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## Environmental Rule Making in Illinois, 27 J. Marshall L. Rev. 121 (1993)

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# ENVIRONMENTAL RULE MAKING IN ILLINOIS

BILL FORCADE\*

## I. STRUCTURE AND PROCESS

In 1970, the State of Illinois enacted the Environmental Protection Act<sup>1</sup> (the Act). This comprehensive pollution control statute created a structure and process for adopting and enforcing environmental regulations in Illinois.<sup>2</sup> Three government agencies would play vital roles under the Act's structure. They were two executive agencies, the Illinois Institute of Environmental Quality (IIEQ) and the Illinois Environmental Protection Agency (Agency), and one independent board, the Illinois Pollution Control Board (Board). Each agency has a distinct function in the rule making process.<sup>3</sup>

The rule making process can have a sharp beginning point, such as the enactment of a statute that requires regulatory action, or it can have a diffuse starting point, as when various policy and planning documents indicate the need for regulatory action. This statutory or planning process leads to a second process, formulation of specific regulatory language and development of technical support documentation. After language formulation and support documentation is the final rule making process—formal promulgation, which includes review by the public and additional government entities. One agency may conduct all three processes or they may all be conducted by different agencies.

The IIEQ, whose name and structure the General Assembly later changed to the Department of Energy and Natural Resources (DENR),<sup>4</sup> is primarily a policy and analysis agency. Its primary

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1. Act effective July 1, 1970, Pub. L. No. 76-2429, ILL. REV. STAT. ch. 111 1/2, para. 1001-1061 (1971).

2. This Article will discuss only traditional rule making activities and will not cover emergency rules, temporary rules, incorporated rules and other unusual regulatory type activity (such as adjusted standards under § 28.1 of the Act). For additional discussion of the Act, see David P. Currie, *Rule making Under the Illinois Pollution Law*, 42 U. CHI. L. REV. 457 (1975).

3. The Act did not assign a specific role in rule making to the Attorney General. However, the Attorney General has previously taken an active role in some rule making activities.

4. The IIEQ was created by § 6 of the Act. See ILL. REV. STAT. ch. 111 1/2, para. 1006 (1971). In 1978, Pub. L. No. 80-1218 created the Illinois Institute of

regulatory activities are applied research and long range planning. DENR has resources of approximately \$87,854,700 and approximately 698 employees.<sup>5</sup> DENR's focus in regulatory promulgation proceedings is evaluation of economic factors. The Act does not place specific procedural requirements on DENR for public and governmental review of its policy and planning activities. The Act does place a few time deadlines for completion of specific state mandated planning activities.<sup>6</sup>

The Act also created a large administrative agency with significant environmental regulatory functions. Section 4(i) of the Act provides that the Agency shall recommend regulatory language to the Board:

- i. The Agency shall have authority to make recommendations to the Board for the adoption of regulations under Title VII of the Act[.]<sup>7</sup>

The Agency is the primary regulatory language formulation entity in Illinois for two reasons. First, sections 4(j) and (l) of the Act designate the Agency as the lead agency for the State regarding various federal environmental protection laws. The second and more important factor is the significant weight of the Agency's resources. The Agency has total resources of approximately \$817,951,700 and 1,200 employees.<sup>8</sup> No other entity in Illinois has that magnitude of resources devoted to the evaluation and control of environmental problems. The Agency is a traditional government environmental agency organized into bureaus and divisions on a medium by medium and programmatic basis. The Agency is under the supervision and direction of a Director appointed by the Governor with the advice and consent of the Senate. The Act places few specific public or governmental review requirements on the Agency for regulatory language development,<sup>9</sup> but does place certain time deadlines on regulatory language development for state mandated actions.<sup>10</sup>

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Natural Resources which assumed these duties. ILL. REV. STAT. ch. 96 1/2, paras. 7401-7414 (1979) (currently codified at 20 ILCS 1105-1105/15 (1992)). In 1981, Pub. L. No. 82-592 renamed the Illinois Institute of Natural Resources to the Department of Energy and Natural Resources (DENR). See 20 ILCS 1105/1 (1992).

5. 2 ILLINOIS STATE BUDGET DETAIL 19, 36 (1992).

6. For examples of time deadlines on state mandated planning activities, see 415 ILCS 5/6.1 (reports on sulfur dioxide); *id.* § 5/6.2 (reports on injection of hazardous wastes underground); *id.* § 5/9.7(b) (reports on CFC's); *id.* § 5/13.1(a) (reports on ground water quality); *id.* § 5/22.9 (reports on hazardous wastes); *id.* § 5/39.2(i) (reports on regional pollution control facilities).

7. 415 ILCS 5/4(i) (1992).

8. 2 ILLINOIS STATE BUDGET DETAIL, *supra* note 5, at 49, 70.

9. See, e.g., 415 ILCS 5/14.4(a) (1992) (requiring the Agency to consult with the Interagency Coordinating Committee on Groundwater and the Groundwater Advisory Council before proposing regulations which will effect groundwater).

10. See, e.g., 415 ILCS 5/9.2 (concerning sulfur dioxide emissions standards); *id.* § 5/14.4 (regulations for the protection of ground water).

While the Agency is primarily responsible for formulating regulatory language, section 5 of the Act delegates primary promulgation authority to the Board:

- (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 . . . .<sup>11</sup>

The Governor, with the advice and consent of the Senate, appoints seven Board members for staggered three year terms. The Governor designates one Board member to be Chairman. The Board is not organized by programs or media. Instead, the Board acts as a panel on every matter, with four votes required for any final determination. The Board has resources of approximately \$1,650,900 and approximately thirty-three employees.<sup>12</sup> The Act places a substantial number of requirements on the process and timing of regulatory promulgation by the Board.<sup>13</sup>

This structure of a large line agency proposing regulatory language to a smaller board or commission for promulgation is not unique to Illinois. Of the nearby industrial states (Minnesota,<sup>14</sup> Wisconsin,<sup>15</sup> Indiana,<sup>16</sup> Michigan,<sup>17</sup> and Ohio<sup>18</sup>), all but Ohio have

11. 415 ILCS 5/5(b),(c) (1992).

12. 2 ILLINOIS STATE BUDGET DETAIL, *supra* note 5, at 71, 73.

13. See 415 ILCS 5/7.2 (adoption of USEPA regulations); *id.* § 5/7.3 (publication of regulations in the *Illinois Register*); *id.* § 5/9.3 (rules concerning alternative control strategies); *id.* § 5/9.4 (municipal waste incineration standards); *id.* § 5/9.5 (toxic air contaminants); *id.* § 5/10 (regulations to carry out the Act's purposes); *id.* § 5/13 (implementation of the Federal Water Pollution Control Act); *id.* § 5/14.2 (setback zones and source/route for community water supplies); *id.* § 5/14.4 (ground water protection); *id.* § 5/17.4 (ground water recharge area); *id.* § 5/17.5 (adoption of USEPA regulations issued under the Safe Water Drinking Act); *id.* § 5/17.6 (concentrations of barium, fluoride and radium in water supply); *id.* § 5/21.1 (waste disposal operations); *id.* § 5/22.4 (underground hazardous waste storage tanks); *id.* § 5/22.5 (certification of personnel operating refuse disposal areas); *id.* § 5/22.7 (state regulations corresponding to federal regulations); *id.* § 5/22.9 (classification, regulation and study of hazardous wastes); *id.* § 5/25 (regulation of noise emissions); *id.* § 5/27 (adoption of substantive regulations, charges, and hearings by the Board); *id.* § 5/28 (hearings and notice required for Board action); *id.* § 5/28.1 (adjusted standards); *id.* § 5/28.2 (required rules); *id.* § 5/41 (review under administrative procedure law); *id.* § 5/55.2 (regulations for waste tires); *id.* § 5/56.2 (regulation of potentially infectious waste).

14. The Minnesota Pollution Control Commission consists of nine members appointed by the Governor with the advice and consent of the Senate, each for a four year term. The Minnesota Pollution Control Agency (MPCA) has a Director appointed by the Governor. The Director and staff of MPCA propose all regulatory language to the Commission which has the power to adopt regulations. MINN. STAT. ANN. §§ 116.02-.07 (West 1987).

15. The Wisconsin Department of Natural Resources (WDNR) is under the direction of the Natural Resources Board composed of seven members ap-

a similar structure.

## II. IN THE BEGINNING

Section 28 at Title VII of the Act describes the relatively simple regulatory promulgation process originally envisioned in 1970.<sup>19</sup> Any person could present written proposals for the adoption, amendment, or repeal of the Board's regulations. Also, the Board could make such proposals on its own motion. The Act required the Board to schedule a public hearing for consideration of a proposal if it met certain minimal criteria or if the Agency or DENR made the proposal. The Board could not adopt, amend, or repeal a substantive proposal until after a public hearing within the area of the State affected. In the case of state-wide regulations, hearings had to be held in at least two areas. The Act required the Board to give notice of the hearing in a newspaper of general circulation in the area of the state affected. The Board had to hold regulatory hearings before a qualified hearing officer and at least one member of the Board, designated by the Chairman. Regulatory hearings had to be open to the public and provide reasonable opportunity to be heard with respect to the subject of the hearing. The Act required the Board to record all testimony stenographically. The Board could then revise the proposed regulations before adoption in re-

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pointed by the Governor for staggered six year terms. WIS. STAT. ANN. § 15.34 (West 1989). The Secretary of the WDNR and staff propose regulations to the Board for adoption. WIS. STAT. ANN. §§ 144.31, .025, .431 (West 1989).

16. The Indiana Department of Environmental Management (IDEM) administers environmental laws. The various divisions of IDEM (air, water, solid and hazardous waste) manage the permit program for each media. The divisions propose regulatory language to their respective pollution control board which adopts environmental standards and pollution control rules. The Air Pollution Control Board, Water Pollution Control Board and Solid Waste Management Board, each with nine members appointed by the Governor for four year terms, promulgate rules in their respective areas. IND. CODE ANN. §§ 13-1-1-3, -3-2, -12-6 (Burns 1990). See Thomas R. Newby et al., *Indiana Environmental Law: An Examination of the 1989 Legislation*, 23 IND. L. REV. 329 (1990) (discussing Indiana's environmental rule making scheme).

17. The Michigan Department of Natural Resources (MDNR) is under the control of the Commission of Natural Resources. The Commission consists of seven members appointed by the Governor to serve four year terms. The Director of the MDNR is appointed by the Commission and serves at its pleasure. The MDNR staff craft regulatory language, but regulatory adoption is by the Commission. MICH. COMP. LAWS ANN. § 16.350 (West 1992). See MICH. COMP. LAWS ANN. § 691.1201 (West 1992) (establishing a thirteen member Governor's Council on Environmental Quality to advise and assist the executive branch on environmental matters).

18. The Ohio Environmental Protection Agency (OEPA) is under the control of a Director. OHIO REV. CODE ANN. §§ 3745.01, 121.02, 121.03 (Baldwin 1991). OEPA promulgates pollution control regulations. The Director is required in many circumstances to consult with outside interests in regulatory actions. OHIO REV. CODE ANN. § 3704.033 (Baldwin 1991).

19. Act effective July 1, 1970, Pub. L. No. 76-2429, ILL. REV. STAT. ch. 111 1/2, para. 1001-1061 (1971).

sponse to suggestions made at the hearings. Finally, the regulations became effective when the Board filed them with the Secretary of State. In summary, the Board would receive proposals, publish the text of the proposals in the Board newsletter, hold hearings, then adopt final language and file it with the Secretary of State.

### III. CHANGES FROM 1970 TO 1989

The simple regulatory process enacted in 1970 soon began to change. In 1975, P.A. 79-790 added new provisions to sections 6 and 27 of the Act. Those provisions required the DENR to prepare an economic impact study (EcIS) for most new and existing regulations. Section 6(b) of the amended Act listed fourteen specific factors that must be evaluated in the EcIS, provided minimum time deadlines for public review of the EcIS before submission to the Board, and required the Board to hold an EcIS hearing before final rule adoption.<sup>20</sup> The DENR was expected to rely on information produced during the Board hearings to prepare the EcIS. Therefore, EcIS preparation had to await completion of the Board merit hearings. The amendment, thus, added to the existing regulatory time frame the time required to prepare the EcIS, circulate it for 30 day public comment, submit it to the Board, and hold Board EcIS hearings.

In 1975, the General Assembly enacted The Illinois Administrative Procedure Act (APA) which created a legislative oversight committee, the Joint Committee on Administrative Rules (JCAR).<sup>21</sup> The purpose of the APA and JCAR was to secure uniformity in state agency action, particularly rule making activities. As applied to the Board's regular rule making activities, the APA created new and substantial procedural requirements. First, the APA expanded the number of government agencies required to evaluate or approve the form and content of a developing Board regulation. The APA assigned formal review roles to the Administrative Code Division of the Office of the Secretary of State,<sup>22</sup> the Small Business Office of

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20. The DENR could make a determination not to prepare an EcIS when the regulation would have no economic impact or where the EcIS would not generate useful information. ILL. REV STAT. ch. 96 1/2, para. 7404(d) (1983) (repealed 1992).

21. Act effective Sept. 22, 1975, Pub. L. No. 79-1083, ILL. REV STAT. ch. 127, paras. 1001-1021 (1977) (currently codified at 5 ILCS 100/1 to 100/15-5 (1992)). The APA creates JCAR at 100/5-90 and authorized JCAR to adopt rules to implement the APA at 100/5-95. The rules about rule making are found in the Illinois Administrative Code. ILL. ADMIN. CODE tit. 1, §§ 100, 220 (1985).

22. This office publishes the *Illinois Register* in which all proposed regulatory language must be published. The division must approve the language before the proposed rule can be published.

the Department of Commerce and Community Affairs,<sup>23</sup> and provided a substantial role to JCAR. The APA also extended the regulatory time line by adding two new comment periods before final adoption, the first notice period and the second notice period. Thus, the regulatory adoption process became more complicated and time consuming.

The Board continued to receive regulatory proposals, publish them in the Board's newsletter, and conduct merit hearings much as it had before. At the conclusion of the merit hearings, the Board embarked on the new EcIS period by awaiting the preparation and submission of the EcIS. When DENR submitted the EcIS, the Board held EcIS hearings and received final comments. At the conclusion of the EcIS period, the Board proceeded to the newly created APA processes of first and second notice.<sup>24</sup>

The Board made a substantive decision based upon both the merits and economics of the proposal by adopting regulatory language for first notice. First notice publication was followed by additional public input during the forty-five day comment period and by additional hearings, if requested.<sup>25</sup> At the conclusion of the first notice period, the Board adopted a second version of the regulatory language called second notice. This was the last opportunity for the Board to change the regulatory language except in response to comments or objections from JCAR. Once JCAR accepted the second notice package as complete, it started an additional forty-five day comment period exclusively for JCAR. If JCAR posed no objection, the Board adopted final regulatory language. When the Board filed the language with the Secretary of State it became effective. The newly created EcIS process and APA process significantly extended the time required for regulatory action.

#### IV. THE 1989 STATUTORY CHANGES

The 1975 changes sowed seeds of discontent about the regulatory process in Illinois. The problems surfaced primarily in the air pollution control program with claims that delayed promulgation resulted in delayed air quality improvement. Informal criticism of

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23. This office reviews proposed rules for their impact on small businesses and reports its conclusions to JCAR.

24. The APA procedures had to follow the completion of merit hearings and the EcIS process. The APA prohibits final adoption of any rule more than one year after first notice publication. 5 ILCS 100/5-40(e) (1992). The EcIS process alone would have frequently exceeded one year. The merit hearings, EcIS process and APA mandated second notice would exceed one year with virtually every proposed rule. Therefore, only by completing the merit hearings and EcIS process before first notice could the Board ensure the one year deadline would be met.

25. The statute mandated a public hearing for certain requests. ILL. REV. STAT. ch. 127, para. 1005.01(a)(5) (1991).

the process surfaced in the early 1980's. An initial document to voice concern over delays in regulating came from USEPA in 1986 and stated that "[t]he State of Illinois continues to have one of the most lengthy and cumbersome regulatory development processes in the nation. . . . The lengthy rule making process makes it difficult for the State to comply with changing federal requirements."<sup>26</sup> This initial complaint soon expanded to include a series of related government actions concerning Illinois' ability to respond in a timely manner to regulatory demands. From 1983 to 1987, USEPA took several actions to disapprove Illinois air pollution rules.<sup>27</sup> In 1987, the State of Wisconsin filed a civil action against the Administrator of USEPA for failing to ensure adequate air pollution rules in Illinois and other states.<sup>28</sup> On May 12, 1987, the Chicago Regional Office of USEPA released a report critical of Illinois rule making delays.<sup>29</sup> On December 9, 1987, a report on the pollution control regulatory system sponsored by the Governor of Illinois was released.<sup>30</sup> On October 17, 1988, USEPA issued final disapproval of portions of the Illinois air rules.<sup>31</sup> As a result of the Wisconsin lawsuit, USEPA proposed and adopted air pollution control rules for Illinois.<sup>32</sup>

The General Assembly responded to criticism of the environmental regulatory system by enacting Public Law 85-1048, effective January 1, 1989. This law profoundly modified the process of promulgating rules to implement various federal programs. Public

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26. U.S. ENVTL. PROTECTION AGENCY, NAT'L AIR AUDIT SYS. REP. FOR FISCAL YEAR 1986 iv-v (cited in U.S. ENVTL. PROTECTION AGENCY, REGION V, ISSUES CONCERNING THE STATE OF ILLINOIS' ADMINISTRATION OF FEDERALLY MANDATED ENVIRONMENTAL PROGRAMS (1986)) [hereinafter WHITE PAPER].

27. See 48 Fed. Reg. 5110 (1983) (to be codified at 40 C.F.R. § 52) (providing notice of deficiencies in the Illinois Strategic Implementation Plan (SIP) to comply with the Clean Air Act); 50 Fed. Reg. 28,244 (1985) (to be codified at 40 C.F.R. § 52) (indicating USEPA's intent to disapprove portions of Illinois' SIP); 52 Fed. Reg. 26,424 (1987) (to be codified at 40 C.F.R. § 52) (stating USEPA's intent to implement a construction ban on sources of volatile organic compounds in the Chicago and St. Louis nonattainment areas as a result of Illinois' SIP deficiencies).

28. *Wisconsin v. Reilly*, No. 87-C-0396, (E.D. Wis. Nov. 6, 1989) (filing of settlement agreement by parties prompted court to vacate court order issued against USEPA to promulgate standards for Illinois).

29. See WHITE PAPER, *supra* note 26.

30. See MICHAEL SCHNEIDERMAN, REPORT TO THE GOVERNOR OF ILLINOIS ON PROCEDURES OF THE ILLINOIS POLLUTION CONTROL REGULATORY SYSTEM (1987) [hereinafter SCHNEIDERMAN REPORT].

31. 40 C.F.R. § 52.726(c) (1988) (promulgating final rule disapproving Illinois' ozone plan for Cook, Lake, DuPage, and Kane Counties and issuing construction moratorium on sources of volatile organic compounds).

32. See 54 Fed. Reg. 40,415 (1988) (to be codified at 40 C.F.R. 52) (revising the Reasonably Available Control Technology limitations for volatile organic compounds in the Illinois SIP for ozone); 55 Fed. Reg. 26,814 (1990) (to be codified at 40 C.F.R. 52).

These rules were appealed in *Illinois Env'tl. Regulatory Group v. USEPA*, No. 90-2778 (7th Cir. 1990).



Law 85-1048 divided the existing single regulatory process into three types: (1) "identical in substance" rules,<sup>33</sup> (2) "required rules" that are generally called "federally required" or "federally mandated" rules,<sup>34</sup> and (3) all other regulatory proceedings.<sup>35</sup>

These conceptual divisions relate closely to conceptual divisions among the federal environmental programs intended for state implementation. In some federal programs, USEPA adopted formal substantive regulations that were complete, detailed, and easily implemented. Those USEPA regulations described specific control actions each category of pollution source had to take. If a state wished to secure delegation of this federal program, it could adopt essentially identical state regulations. In other federal programs, the actual USEPA regulatory language spoke more to the goal and process of state regulation development; USEPA did not adopt regulations specifying individual facility pollution control requirements. When a state implemented these federal programs, it had to make the critical policy and scientific decisions regarding specific facility pollution control requirements within the body of its own regulatory language. Public Law 85-1048 attempted to sweep the former category of rule making activities into the identical in substance process and the latter category into the federally required process.

#### A. *The Identical in Substance Process*

The identical in substance process provided both that "the Board shall adopt the verbatim text of such USEPA regulations as

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33. For examples of Act sections affected by "identical in substance" rules, see 415 ILCS 5/7.2 (adoption of USEPA regulations by the Board); *id.* § 5/13(c) (underground injection control regulations); *id.* § 5/13.3 (regulations to implement the Federal Water Pollution Control Act); *id.* § 5/17.5 (Board adoption of USEPA regulations issued under the Safe Drinking Water Act); *id.* § 5/22.4(a) (Board adoption of USEPA regulations issued under the Resource Conservation and Recovery Act); *id.* § 5/22.4(d) (Board adoption of USEPA regulations issued under the Hazardous and Solid Waste Amendments).

34. Procedures for Federally Mandated Rules are codified at 415 ILCS 5/28.2 (1992).

35. 415 ILCS 5/27-28 (1992). The General Assembly has carried over the concept of reduced procedural requirements and decision deadlines from mandates implementing federal programs into a substantial number of specific mandates to adopt regulations which do not implement federal programs.

Where the General Assembly specifically requires regulations not mandated by federal programs, they are referred to as "state mandated" rules. These rules frequently are subject to reduced procedural requirements or specific completion deadlines. Rules which arise solely upon the initiative of the IEPA, private interests, or the Board (rather than by statutory mandate) and are processed pursuant to the Board's general rule making authority under §§ 27 and 28 of the Act are called "general rules." These rules are subject to the full spectrum of procedural requirements and they have no completion deadlines.

are necessary and appropriate for authorization of the program,”<sup>36</sup> and that “[i]f a USEPA rule prescribes the contents of a State regulation without setting forth the regulation itself . . . the Board shall adopt the regulation as prescribed.”<sup>37</sup> Section 7.2 of the Act required the Board to complete identical in substance rule making within one year of the date of promulgation of the corresponding federal rule.

Identical in substance proceedings were essentially notice and comment rule making proceedings, sometimes called “desktop” rule making. No government agency proposed language to the Board. Instead, the Board formulated proposed regulatory language and published it in the *Illinois Register* for a forty-five day written public comment period. After the close of the comment period, the Board reviewed the comments and adopted final rules. The Board typically delayed filing of the rules for up to thirty days to allow the Agency, the Attorney General, and USEPA to review them in order to discover any technical errors.

The Board adopted a significant number of Illinois regulations under the identical in substance rule making process. This process involved substantially more than just retyping the rules. Because of differences between the state and federal system, the Board frequently had to resolve significant structural and policy issues as it created proposed regulatory language.

### *B. The Required Rules Process*

Section 28.2 of the Act defined “required rules,” generally called federally required rules, as those needed to meet the requirements of the federal Clean Water Act, Safe Drinking Water Act, Clean Air Act, or Resource Conservation and Recovery Act, other than the identical in substance rules. The Agency had to certify on submission that a proposed regulation was a federally required rule.

The hearing requirements of the Act and the APA process still applied to federally required rules, but the EcIS procedures were modified. The Board was required to make an initial determination whether an EcIS should be prepared within sixty days, as in general rule making. DENR was given a six-month deadline in which to complete EcIS. If DENR failed to complete the EcIS, the Board could adopt final rules meeting federal requirements without an EcIS.

Public Law 85-1048 made no significant changes to the state mandated or general rule making processes of the Act. It did amend section 27 to require the filing of detailed information with

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36. 415 ILCS 5/7.2(a) (1992).

37. *Id.* § 5/7.2(a)(3).

proposals for regulations, to assist the Board in making EcIS determinations. Public Law 85-1048 also allowed prehearing conferences in certain rule making proceedings to maximize participant understanding and limit issues of disagreement.

With these statutory changes in place, the Board could and did modify the rule making process. The Board could immediately publish a proposal for first notice without making a substantive decision on the content. The Board would then make the EcIS decision. After the first notice public comment period and the required hearings, the Board would make its only substantive decision in the proceeding at the second notice determination phase. After second notice, the process was the same as before. In short, the merit rule making process, EcIS process, and APA process would occur simultaneously rather than sequentially.<sup>38</sup>

The improvements enacted in Public Law 85-1048 greatly decreased the time frame needed for regulatory promulgation by the Board. Measuring the time of a regulatory proceeding traditionally starts when the Board regulatory docket is opened and stops when a final decision is made on that docket. The final decision may be to adopt a rule or not to adopt a rule. Generally, time frames are counted in months. Before the P.A. 85-1048 improvements, typical time lines for rule making that implemented federal programs were as follows: for a relatively simple rule with no EcIS — 10.1 months; for a simple rule with an EcIS — 20.1 months; for a complicated rule with an EcIS — 28.0 months.<sup>39</sup> Other states' typical time frames (in months) were as follows: Minnesota (12), Wisconsin (9), Indiana (7), Michigan (6), and Ohio (6).<sup>40</sup>

Board records for all eighty-one regulatory proceedings initiated during the three year period after January 1, 1989, (the effective date of Public Law 85-1048) and before January 1, 1992, show:

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38. In response to the legislation, the Board completely revised its procedural rules governing regulatory matters. ILL. POLLUTION CONTROL BD. R 88-5(B) (May 10, 1990). The Board also revised its general procedural rules. ILL. POLLUTION CONTROL BD. R 88-5(A) (June 8, 1989). The Board adopted resolutions articulating methods and procedures for the speed up of regulatory proceedings. Resolution 88-1 (Jan. 21, 1988) (amended Sept. 22, 1988); Resolution 89-1 (Jan. 5, 1989).

39. SCHNEIDERMAN REPORT, *supra* note 30, at 17-18.

40. *Id.* at 21.

<u>Type of Rule</u>	<u>Number of Dockets Completed</u>	<u>Months-Average Time</u>	<u>Months-Maximum Time</u>	<u>Number not yet Completed</u>
Identical in Substance	36	4.72	12.73	3
Federally Required	8	5.42	8.52	2
State Mandated	7	13.17	22.11	4
General Rule	17	11.82	29.64	4

This regulatory adoption schedule was not adequate to still the criticism. In 1991 and 1992 the General Assembly adopted legislation substantially affecting the regulatory processes at the Board.

#### V. THE 1991-1992 LEGISLATION

In 1991, the General Assembly enacted the Environmental Legal Resources Act.<sup>41</sup> This legislation created the Attorney General's Task Force on Environmental Legal Resources (Task Force) consisting of nine members appointed by the Governor, each legislative leader and the Attorney General, to study the fragmentation of legal resources and assess the delivery of environmental legal services in Illinois. The Task Force held meetings in March of 1992 and released a report on May 7, 1992 (AG's Report).<sup>42</sup> Various people, including USEPA and some public interest environmental groups, provided testimony and comments to the Task Force that were critical of the existing rule making process.<sup>43</sup> Business groups and the private bar provided testimony and comments that overwhelmingly supported maintaining the Board with existing powers.<sup>44</sup> The AG's Report made rule making recommendations to

41. Act effective Sept. 23, 1991, Pub. L. No. 87-727, ILL. REV. STAT. ch. 14, paras. 251-253 (1991) (currently codified at 15 ILCS 220/1-3 (1992)).

42. ROLAND BURRIS, ILLINOIS ATTORNEY GENERAL, REPORT OF THE ATTORNEY GENERAL'S TASK FORCE ON ENVIRONMENTAL LEGAL RESOURCES (1992) [hereinafter AG'S REPORT].

43. The Illinois Environmental Council (IEC) submitted a copy of *The IEC Green Papers: An Agenda for the Nineties*. Section III of this report criticizes slow rule making and recommends transfer of rule making authority from the Board to the Agency. AG'S REPORT, *supra* note 42, at Annex G. The IEC recommended abolition or improvement of the Board. *Id.* at Annex B.

USEPA reiterated their long-standing concerns about the excessively lengthy, quasi-judicial rule making process for environmental programs, especially in light of upcoming Clean Air Act deadlines. The 1989 legislative reforms were described as a useful first step. Letter from Gail Ginsberg, USEPA Regional Counsel, to Diane L. Rosenfeld of the Task Force (Mar. 20, 1992), reprinted in AG'S REPORT, *supra* note 42, at Annex C.

44. See AG'S REPORT, *supra* note 42, at 25 (discussing support for the Pollution Control Board by the private bar and business who argued that quasi-judicial and enforcement rules should not be reserved in the same agency); Annex B

eliminate the EcIS requirement and streamline the rule making process before the Board.<sup>45</sup>

The AG's Report did not contain the detail and specificity found in the earlier evaluations of Board rule making activities. The AG's Report did not discuss or evaluate the 1989-1992 time frames for Board regulatory action, although the Board provided such statistics to the Task Force.<sup>46</sup> In addition, the AG's Report did not recommend any goal or acceptable time frame for regulatory action. It also did not discuss how much time would be expected to be saved by elimination of the EcIS or by streamlining the rule making process. Despite criticism of the regulatory process, the AG's Report did not specify any changes that should be made to streamline the process, or how they might be accomplished.

In 1992, the General Assembly adopted two pieces of legislation having a dramatic effect on the rule making process. The first was Public Law 87-860. This law effectively eliminated the EcIS for rule making activity, striking substantial language from section 27 of the Act. For all intents and purposes the EcIS debate appeared to be resolved.

The second piece of legislation was the Illinois Pollution Prevention Act (IPPA).<sup>47</sup> This lengthy amendment changed the Act to address many areas, including used oil recycling, source reduction, recycling of toxic chemicals, and toxic packaging reduction. However, the bulk of the legislation focused on regulatory mandates and permit processes to implement the Clean Air Act Amendments of 1990 in Illinois.

The IPPA made three significant changes in the regulatory process. First, it modified the general rule making provisions of section 28 of the Act to preclude the Board from initiating any rules to implement provisions of the Clean Air Act Amendments of 1990 (CAAA). The legislation also created two new rule making processes especially for CAAA regulations.

The IPPA added a new section to the Act to deal with a new category of rule, the "CAAA identical in substance" rule.<sup>48</sup> The

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(the public notice listing the issues the task force was interested in receiving comments on); Annex C, pp. 6, 11, 12, 13, 15, 16, 17 (summarizing several groups' comments to the task force, including law firms and the Illinois State Bar Association). The Illinois State Bar Association (ISBA) and the Chicago Bar Association (CBA) supported the existing structure. See *id.* at Annex C, p. 11 (ISBA testimony); Annex F (CBA testimony).

45. *Id.* at 28-29.

46. The AG's Report summarized the detailed statistics filed by the Board. See *id.* at Annex B, C.

47. Act effective Sept. 25, 1992, Pub. L. No. 87-1213, 415 ILCS 115/1-115/65 (Supp. 1993).

48. 415 ILCS 5/28.5 (1992). This section will be repealed on December 31, 1997. *Id.* The section exempts rules promulgated thereunder from the merit hearing requirements of Title VII of the Act as well as from the procedural re-

IPPA defined these as rules that the state must adopt in substantially the same form as final federal regulations.<sup>49</sup> This new category of rule making was essentially the same as the old "identical in substance" rule making, with one important exception. The Board would no longer prepare the initial regulatory language. Instead, the Agency would propose such rules to the Board as soon as practicable after federal rule promulgation.<sup>50</sup>

Section 28.5 of the Act also created the "fast-track" rule.<sup>51</sup> To qualify for fast-track procedures, a regulation must meet three criteria: (1) the rule does not meet the criteria for CAAA identical in substance rule making; (2) the CAAA requires Illinois to adopt the regulation before December 31, 1996, and USEPA is empowered to impose sanctions against Illinois for failure to adopt; and (3) the Agency requests fast-track rule making procedures be applied and submits a proposal in the proper form.<sup>52</sup>

This fast-track language in the Act provides an extremely specific definition for the regulatory process involved. The statute requires fast-track proposals from the Agency to meet eight articulated criteria pertaining to form, legal documentation, supporting technical data, economic data, and background material.<sup>53</sup> Within fourteen days of receipt the Board must publish the proposal for first notice under the APA and schedule and provide notice of three hearings on the proposal.<sup>54</sup> The first hearing has to be held within fifty-five days.<sup>55</sup> If there is agreement on the language and no one objects or asks for additional hearings, the hearing process ends there.<sup>56</sup> If a second hearing is held, the hearing has to start within thirty days of the commencement of the first hearing.<sup>57</sup> Any third hearing must commence within fourteen days of the start of the second hearing.<sup>58</sup>

This fast-track section confines the first hearing to testimony by and questions of Agency witnesses concerning the scope, applicability, and basis of the rule.<sup>59</sup> The second hearing is devoted to presentation of testimony, documents, and comments from affected entities and other interested persons.<sup>60</sup> The second hearing can not

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quirements of the APA, which include the first notice and second notice requirement. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. 415 ILCS 5/28.5 (1992).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. 415 ILCS 5/28.5 (1992).

59. *Id.*

60. *Id.*

revisit regulatory language agreed to by the participants.<sup>61</sup> The third hearing is devoted exclusively to any Agency response to material submitted at the second hearing.<sup>62</sup> Each of these hearings can be continued, but only from day to day excluding weekends and holidays.<sup>63</sup> The Act requires that all testimony be submitted in writing ten days before hearing, with copies served on all participants.<sup>64</sup> The Act requires expedited transcripts, and provides that the comment period has to close fourteen days after the availability of the transcripts.<sup>65</sup>

The Board has to make its second notice decision within 130 days after the proposal is filed if no third hearing is held, and within 150 days after proposal if a third hearing is held.<sup>66</sup> Second notice filing with JCAR has to be made within five days of adoption of the second notice order.<sup>67</sup> The Board can not modify the regulatory language from the Agency proposal, without agreement of the Agency, until after the end of the hearing and comment period.<sup>68</sup> The Board must submit the final adopted rule to the Secretary of State within twenty-one days of a JCAR statement of no objection.<sup>69</sup> In any event, the final rules must be based solely on the record before the Board.<sup>70</sup>

The first regulatory proposal under the new section 28.5 process was filed by the Agency on November 13, 1992.<sup>71</sup> During the proceeding the Board adopted two resolutions and orders regarding the implementation of section 28.5.<sup>72</sup> As of October 1993, a total of four section 28.5 proceedings had been filed with the Board. Two had been completed within the statutory deadlines. The remaining two were on schedule for completion within the statutory deadlines.

One interesting side note concerns the EcIS process. Public Law 87-860 effectively eliminated the EcIS by striking all references to it in sections 27, 28, and 28.2 of the Act. However, the IPPA resurrected it by adding section 28.5(h) which states that the Board can order an economic impact study that will not prevent

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61. *Id.*

62. *Id.*

63. 415 ILCS 5/28.5 (1992).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. 415 ILCS 5/28.5 (1992).

69. *Id.*

70. *Id.*

71. ILL. POLLUTION CONTROL BD. R 92-21, In the Matter of: Amendments to New Source Review Rules, ILL. ADMIN. CODE tit. 35, § 203 (filed Nov. 13, 1992).

72. Resolution 92-2, Clean Air Act Rule making Procedures Pursuant to Section 28.5 of the Environmental Protection Act, as added by Public Law 87-1213 (Oct. 29, 1992, and Dec. 3, 1991).

adoption of the rule within the 130-150 day time frames articulated in that section.

## VI. PRESENT STATUS

In sum, the present set of environmental regulatory processes is particularly complicated. There are six key types:

1. *The CAAA Identical in Substance:*
  - Agency proposes
  - Only where substantially the same as final federal rule
  - One year from federal adoption for final Board action
  - Notice and comment rule making
  - No EcIS
2. *The CAAA Fast-Track:*
  - Agency proposes
  - Only where CAAA requires and USEPA can impose sanctions
  - 130-150 days to second notice
  - Hearings and second notice period
  - May have EcIS
3. *Identical in Substance:*
  - Board proposes
  - May include Clean Air Act and other federal program implementation
  - One year from federal adoption for final Board action
  - Notice and comment rule making
  - No EcIS
4. *Federally Required:*
  - Agency proposes
  - May include CAAA rules not subject to USEPA sanctions or not due by 1996
  - May include other federal programs
  - No deadlines
  - Hearings and first and second notice period
  - No EcIS
5. *State Mandated:*
  - Requirements set in individual statutory language requiring the rule
  - Proponents, timing deadlines, and procedural requirements may vary
6. *General Rule Making:*
  - Arises on initiative of Agency, other interested person or Board
  - May include any subject under Board authority
  - No deadline
  - Full merit hearings, then first and second notice period
  - No EcIS



## CONCLUSION

The General Assembly has expended substantial effort over the last twenty-two years to accomplish two primary goals. First, statutory amendments increase the number of public and government entities who review and evaluate conceptual regulatory ideas before final adoption. Second, the amendments ensure that regulatory promulgation times are not unreasonably long for state implementation of federal programs, especially the CAAA. Over time, the twin goals of increased review and decreased development times have fostered ever more stringent and more specific statutory language. Nearly all the amendments have been ad hoc attempts to resolve a particular type of perceived problem. Unfortunately, these twin goals frequently work at cross purposes. Perhaps the time has come to evaluate a more holistic approach to defining an environmental regulatory process.

As stated at the beginning of this Article, the regulatory process has a beginning, a middle, and an end. An example would be the CAAA, the regulatory area that has received the greatest legislative attention. That process began when Congress adopted the CAAA on November 19, 1990, placing specific regulatory burdens on Illinois. For each specific substantive area of the CAAA, the process will develop as USEPA proposes and adopts regulations and supporting technical documents. The process will continue as the Agency crafts regulatory language to fulfill those CAAA requirements. The process will end when the Board adopts final regulations. Deadline dates for state action extend from 1992 until 1996. In short, the regulatory process will extend from two years to six years. Nearly all present Illinois statutory requirements for public and government review, as well as requirements for speedy regulatory determinations, apply only to the last five months: the Pollution Control Board promulgation process.

The wisdom of placing all timing and participation controls on the tail end of the process seems suspect. The more quickly problems are discovered, the easier they are to correct. Regulatory concepts gain momentum which can prove difficult to divert at the last moment. The only portion of the process where allowance for public participation is mandatory is the tail end. Time limits on that portion alone can be perceived as an attempt to limit meaningful input by members of the regulated public as well as the public at large.

Also, it seems incomplete to establish deadlines for one part of a multi-part process. If the goal really is to shorten the overall process, similar statutory timing deadlines and requirements for review should apply for earlier phases: regulatory planning and language development.

If the General Assembly evaluated statutory requirements which could be made applicable to the earlier stages of regulatory development, several options are possible. Section 7.3 of the Act already contemplates the development of a regulatory agenda to solicit comments concerning any rule that the Board is considering, but for which no notice of rule making activity has been submitted to the Illinois Register. The language development stage could have a similar requirement for agenda publication and receipt of comments.<sup>73</sup> JCAR procedures already exist for preliminary review of regulatory language.<sup>74</sup> The language development phase could be made subject to preliminary language review by JCAR, the Administrative Code Division of the Office of the Secretary of State, and the Small Business Office of the Department of Commerce and Community Affairs.

There are still opportunities to improve environmental rule making in Illinois. Earlier participation in the process and limits on development time can both speed the end result and improve the quality of that result.

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73. The APA provides the description of a regulatory agenda. 5 ILCS 100/5-5 (1992). This section can be used by the Agency in its regulatory language development efforts at the present time, but it is not mandatory.

74. ILL. ADMIN. CODE tit. 1, § 220.200 (1991) establishes preliminary review procedures for language published for first notice. This process could be adapted to review draft regulatory language prior to its submission to the Board.

