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REFLECTIONS OF A REGULATOR: BASES FOR DECISION MAKING

*Jacob D. Dumelle**

Much has been written about the content of judicial or regulatory decisions, but few articles deal with how regulatory decisions are made. Shortly after my appointment to the Illinois Pollution Control Board, I asked another member with many years of legal experience how he had come to a certain decision. "I considered the totality of the record," he responded. Understandably, such an answer was not very helpful. This Essay is an attempt to shed some light on the regulatory decision-making process in general, and in particular on the workings of the Board.

The Illinois Environmental Protection Act,[1] and the Board it spawned, were largely the innovative creation of University of Chicago Law Professor David P. Currie.[2] The Act, I have been told, was to have been introduced in 1971, but the first Earth Day furor, April 22, 1970, led Governor Richard B. Ogilvie to move up that timetable by a year. Both houses of the Illinois legislature unanimously adopted the Act.[3] "It would have been like voting against apple pie and motherhood," one agricultural area state senator told me.

The Act gave the Board complete environmental rule-making power over air, water, land, solid-waste disposal, and noise,[4] and a permitting role in nuclear power.[5] In addition to rule making, the Board could grant variances from rules or from the Act, could decide appeals from permit conditions and permit denials, could decide environmental enforcement cases, including those brought by citizens, and eventually ob-

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* Mr. Dumelle, a registered professional engineer, served for more than 21 years on the Illinois Pollution Control Board. For 15 of those years, he acted as Chairperson.

1. ILL. ANN. STAT. ch. 415, act 5, §§ 1-56.6 (Smith-Hurd 1993) (original version at ch. 111 1/2, paras. 1001-1056.6 (1970)).

2. Currie served as the Board's first chairperson. *See* David P. Currie, *Rulemaking Under the Illinois Pollution Law*, 42 U. CHI. L. REV. 457, 458 (1975). The Act also created the Illinois Environmental Protection Agency and the Institute for Environmental Quality. *Id.* at 457.

3. There were some abstentions, but not one dissenting vote.

4. *See* Currie, *supra* note 2, at 457-59.

5. This permitting role was later negated in Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). The court held that "the federal government has exclusive authority under the doctrine of pre-emption to regulate the construction and operation of nuclear power plants . . . ." *Id.* at 1154.

tained the authority to rule on appeals from landfill siting denials or grants issued by municipalities or counties.[6]

Board decisions were made directly reviewable in the Illinois appellate courts.[7] Thus, in effect, the then five-person Board served as a trial court for pollution matters. On contested matters the Board acted in a quasi-judicial manner; and, when performing rule making, the Board acted in a quasi-legislative mode as a delegatee of the legislature. A full written record was created in each type of proceeding. Testimony was given under oath and recorded by a court reporter. Exhibits were offered and numbered. Hearings were required in rule makings, in permit appeals, in enforcement cases and, upon request, in variance cases.

I considered the following questions during each proceeding, and in close cases used them for guidance:

- Has the burden (where one exists) been met?
- Has due process (read "fairness") been afforded?
- From my background as a professional engineer, does the proposed result follow?
- Do the precedents (both legal and Board) apply in this case?
- Is justice being done?
- It is the "Illinois *Pollution Control* Board." Does the result "control pollution"?
- Am I the swing vote on this? Will it go a certain way no matter what I do?
- Will the proceeding be appealed? Should I draft a supplementary or concurring or dissenting opinion to aid that particular view?
- Do I have to put a price on a human life?
- Does this involve carcinogens for which there are no thresholds? If so, what are the risks?
- And, inevitably, will this decision adversely affect my reappointment to another three-year term?

Clearly, these concerns overlap and the answers for some are at best uncertain. In the more than 300 talks I have given to specialized groups—for example, electroplaters—I would almost always preface it with something like this:

> You know more about your industry and its problems than I do. I am an engineer, but a Pollution Control Board member should also have the knowledge of a physician, chem-

6. *See* Currie, *supra* note 2, at 457-59.
7. ILL. ANN. STAT. ch. 415, act 5, § 41 (West Supp. 1993).

> ist, biologist, hydrologist, toxicologist, microbiologist, geologist, botanist, nuclear physicist, limnologist, meteorologist, virologist, statistician, economist, agronomist, lawyer, metallurgist, and so on.
>
> Obviously, no one can have all of these skills and training. All I can tell you is that I do read the record. It is up to you to make it as full and as understandable and accurate as you can. Know what the Board is doing and participate in its proceedings.

For some reason lawyers newly appointed to the Board seemed to take only six months or less to feel comfortable with making Board decisions. But nonlawyers—such as agronomists, geologists, and engineers—would not "settle down" until about a year had passed. Perhaps lawyers adapted faster to this "science court" because of their experience in deposing or interrogating experts in other fields such as medicine, real estate, and finance. They have to be a quick study of other specialties and disciplines. There are physical laws, however, that lawyers may not know exist, such as the law of the conservation of matter, the nuclear decay sequence, or the basic combustion equations. Thus, in rule making it may be crucial to ask technical questions.

The late Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, David L. Bazelon, who heard numerous cases resulting from regulatory actions, said the following in a speech to the American Society for Public Administration:

> The multitude of new statutes aimed at controlling technology are of particular concern to me because of my position on the U.S. Court of Appeals here in Washington. At present over two-thirds of our business involves federal administrative action—far more than any other court in our country—and all signs point to a continuing increase. More and more these cases are on the frontiers of science and technology: What are the ecological effects of building a pipeline for badly-needed oil across the Alaskan tundra? Does the public health require removal of lead additives from gasoline? How can society manage radioactive wastes from nuclear reactors which remain toxic for centuries? Shall we ban the Concorde SST or Red Dye #2? . . .
>
> Significant or not, decisions involving scientific or technical expertise present peculiar challenges for reviewing courts. The problem is not so much that judges will impose their own

views on the merits. The question is whether they will even know what's going on.[8]

One method of "knowing what's going on" would be to discuss a case or a rule making. For years the Board discussed, in its regular open meetings, cases and rules that were up for decision two weeks later. However, because parties in cases and participants in rule makings occasionally filed motions or comments after hearing these open deliberations, the content of the discussions changed from meaningful dialogue to evasive vagueness. Discussion of the merits was often replaced by dodging: "I'm still working on it," or "It's a close one, please read it carefully," or "I'm writing a memo that you'll have soon."

It was never clear whether the strictures of the Illinois Open Meetings Act[9] applied in all respects to the Board. Certainly all meetings had to be, and were, properly noticed and fully open to the public. But what of the provision forbidding "a majority of a quorum" from meeting on a pending matter?[10] When the Board had five members, a quorum was three and a majority of a quorum was two. Literally interpreted, it meant that one Board member *could not* talk to another about a difficult or sticky technical or legal point.

After the Board was expanded to seven in 1983, a quorum was four and a majority of a quorum was three. This solved the "one-on-one" dilemma of the five-person Board but still could have been interpreted as a prohibition of joint discussion of three members in chambers. In order to avoid this potential problem, the Illinois Commerce Commission, at least recently, was careful never to have three commissioners in someone's office at the same time. However, since the Open Meetings Act is directed mainly toward legislative bodies, an argument exists that because most of the Board's actions were *quasi-judicial*—that is contested cases—as opposed to quasi-legislative—that is rule making—the Act did not apply. Yet, a deliberate, collegial body, operating from a written record, needs the give and take of informed discussion so that—to use Judge Bazelon's phrase—all might "know what's going on."

One way, perhaps, of rating the importance of an issue was the degree of personal sleeplessness generated. Several times during my two decades-plus on the Board, I could not sleep the night before the vote. For example, in 1972 the Board issued a permit to a Commonwealth Edison nuclear plant. I had followed the controversy about the adequacy of the emergency core cooling system and the failure of small scale tests

8. *Notable & Quotable*, WALL ST. J., Dec. 10, 1976, at 8.
9. ILL. ANN. STAT. ch. 5, act 120, §§ 1-6 (West 1993).
10. *See id.* § 1.02.

of that system. I voted to deny the permit, but lost by a vote of four to one. I then tried, without support, to get the operating temperatures reduced. In 1979 the Three Mile Island nuclear plant melted down due to the failure of the emergency core cooling system, fortunately without loss of life.

Later on I spent a sleepless night before the vote on a rule to allow the Metropolitan Water Reclamation District of Greater Chicago to cease chlorination of sewage plant effluents. The District, which operates three large sewage treatment plants, including the largest in the world, wished to save the chlorination expense. Since the plants discharged to artificial canals—the North Shore Channel, the Cal-Sag Channel, and the Sanitary and Ship Canal—where no swimming was permitted, the District felt that human safety was not at issue. My own feeling, bolstered by expert testimony from a Ph.D. microbiologist-engineer, was that the bacteria would not die off fast enough to protect people swimming around their sailboats on the various downriver "lakes" created by the locks in the Illinois Waterway along the Illinois River, about forty miles from the plants. I lost the vote and was the only dissenter. The Attorney General of Illinois, who had intervened late in the rule making, appealed. The matter was reversed on the merits—a rare judicial outcome in an Illinois environmental rule making—and remanded to the Board for further proceedings.[11]

The moral is, if you have a sleepless night before the vote, just vote your feelings and you will be proven right eventually.

I was told by the second Governor to appoint me that to be a regulator means that one must avoid impropriety or the appearance of impropriety. There are no exact definitions of "impropriety." As Chair, I was expected to attend an annual environmental meeting of the Illinois State Chamber of Commerce. I wondered if the succulent shrimp and other appetizers would be thought of as "improprieties." Certainly the citizen environmental groups could never afford them. However, impropriety is a double-edged sword. A nationally prominent environmentalist, now deceased, was proud of his Scottish ancestry. He invited my wife and me to the annual Feast of the Haggis—a festive and ancient ceremony. I accepted, but a few days later I realized that I would not have accepted such an invitation from an industrialist. I called him and declined with genuine regret.

A regulator's life is not an easy one. One wants to be a public official who is helpful; yet ex parte contacts on contested matters have to be

11. People v. Illinois Pollution Control Bd., 456 N.E.2d 909 (Ill. App. Ct. 1983).

avoided. The full-time professionals in the environmental field—the lawyers, scientists, and engineers—understand that. But the citizen in his or her first pollution fight may not understand that stricture. An aggressive person may try to lobby a Board member for a particular outcome. All one can do is to be alert and try to cut short such a move.

The quasi-judicial and quasi-legislative matters before the Illinois Pollution Control Board were always challenging. It was an arena where law and technology met. One could not know enough about these subjects and new issues arose constantly. When choosing a candidate for appointment to an environmental board or commission, a governor should consider not only the candidate's technical knowledge but also the candidate's ability to deal with the ethical and moral questions she or he will face. Balancing economics and environmental protection is often a difficult personal decision.