

ILLINOIS POLLUTION CONTROL BOARD
July 11, 1986

IN THE MATTER OF:)
)
VOLATILE ORGANIC MATERIAL) R82-14
EMISSIONS FROM STATIONARY)
SOURCES: RACT III)

ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on a series of motions and discovery requests filed June 18, 1986, by the Illinois Environmental Protection Agency ("Agency"). The Agency filed two motions to the hearing officer "to allow the filing" of interrogatories and requests for production of documents and to direct answers to the discovery requests. One motion relates to the site-specific regulatory proposal by Minnesota Mining & Manufacturing ("3M") and the other motion relates to the Allied Tube & Conduit ("ATC") site-specific proposal. Each motion is accompanied by a set of interrogatories and a request for production of documents. Both site-specific proposals are being considered within the context of this general rulemaking proceeding. The Agency also requests an extension of the schedule established in the Board's May 22, 1986, Order for pre-submission of testimony for the August hearings in order to have adequate time to formulate a position regarding the two site-specifics after submission of the requested discovery. The Board construes that this motion is directed to the Board rather than the hearing officer as it involves the modification of a Board established schedule. On July 1 and 2, 1986, ATC and 3M, respectively, responded to the Agency's motions. The Agency filed a supplemental Motion in Support of the Discovery Documents. On July 8, 1986, 3M filed a letter in response to the Agency's motions which addressed technical aspects, rather than legal issues. The hearing officer, pursuant to Section 102.160(g) of the procedural rules, referred the motions relating to discovery to the Board for an initial determination.

The Agency argues in its motions regarding interrogatories and production of documents that it has unsuccessfully attempted, by letters and requests at hearing, to obtain information related to 3M's and ATC's operation in order to make a determination of equivalency between the proposed site-specifics and the proposed solids-based rule. The Agency believes that the information requested is necessary for Board and Agency review of the proposed language. The Agency also argues that the hearing officer has authority to order the filing of answers to interrogatories and production of documents relating to those answers. In its supplemental motion, the Agency argues that the

Board has the authority to require answers and the authority to enforce any order requiring answers with civil penalties. The Agency reiterates the necessity of the information for the Agency's as well as the Board's evaluation and the need to have the information prior to hearing.

3M and ATC respond that the hearing officer has no authority to grant the Agency's request and that the Agency's discovery requests and motions are procedurally unauthorized as 35 Ill. Adm. Code 102.140 specifically limits the right of discovery in non-adjudicatory proceedings to the issuance of subpoenas for attendance of a witness or production of documents really necessary to resolve the matter. 3M and ATC also generally allege that they would be unduly burdened if they were required to respond to the "overly broad and excessive in number" interrogatories. 3M additionally argues that it has provided extensive information to the Agency, the Agency has examined 3M at hearing on the information requested and that the information is unnecessary in light of the relief requested by 3M. 3M believes that since its proposal would result in less actual emissions than the Agency's solids based proposal that extensive economic and cost data are not necessary.

The Environmental Protection Act ("Act") and the Board's procedural rules provide various mechanisms for gathering information in regulatory proceedings. Section 28 of the Act requires that the Board conduct public hearings and that its decisions be made on the record. Section 5(e) provides for subpoena power for both adjudicatory and regulatory proceedings. 35 Ill. Adm. Code 102.140 and 102.160 authorize the issuance of subpoenas, commands to produce documents and the issuance of interrogatories. Notably, these subpoenas, commands to produce and interrogatories are to be made in the name of the Board either through the hearing officer or the Board itself. These mechanisms, among others, are available to the Board in order to develop a complete record for decision. Other information gathering mechanisms include questions at hearing, pre-submission of testimony, written inquiries by the Board or hearing officer, public comments and briefs.

There is a significant distinction between mechanisms for gathering information in a quasi-legislative regulatory proceeding and discovery in a quasi-adjudicatory adversarial proceeding. In a regulatory proceeding, the purpose of discovery is to develop a complete record for the Board, while in a contested case proceeding, discovery is between the parties and can be related to other purposes. The standard and focus of discovery in a regulatory proceeding should be general relevancy to "technical feasibility and economic reasonableness." In a contested case, relevancy or the likelihood that the requested information will lead to relevant information is the standard. Information obtained through discovery in a contested case is not

evidence unless otherwise admissible and actually admitted. Failure to comply with discovery requests in a contested case can lead to sanctions, while in a regulatory context lack of supporting information can result in dismissal or denial for inadequacy. In the contested case context, the forum "referees" the discovery process that is ongoing between the parties, while in a Board regulatory proceeding, the Board itself must ensure a complete record by requesting information.

The Board clearly has the authority to issue interrogatories in a regulatory context, and has used this mechanism in the past (R81-19, Citizens Utilities Site-Specific, Board Order of April 10, 1986; R82-25 Dean Foods Site-Specific, Board Order of July 11, 1985, Hearing Officer Order of September 16, 1985; R82-14 RACT III - Heatset Web Offset Printing, Board Opinion and Order of May 30, 1985, Hearing Officer Order of September 10, 1985). Interrogatories are just one tool the Board may use to gather information. Perhaps the term "interrogatory" is an unfortunate word choice in that it can connote an adversarial process. While Board rulemakings are formal proceedings (hearings are transcribed, cross-examination occurs, decisions are made on the record and comment periods are allowed), it is not appropriate to allow matters to become too procedurally adversarial.

In the instant proceeding, the Board is reluctant to begin full adversarial discovery. The Board has established an extensive hearing schedule which provides for at least two full weeks of hearing with the possibility of a third week if it is necessary. The Board has chosen this method of developing a complete record as the best approach given the practical deadlines imposed by the Clean Air Act ("CAA"). The Board will allow the "filing" of the Agency's interrogatories and document requests as a pleading in this proceeding. The information requests are consequently "on record." The Board will not, at this time, issue the interrogatories in the Board's name as the Agency has requested. By these actions, the Board does not comment on the appropriateness or reasonableness of the information requests made by the Agency. It is anticipated that 3M and ATC will submit additional information at the scheduled hearings that will provide a sufficient record for Board decisionmaking. The Board believes that the scheduled hearings are the best mechanism for completing the record in this proceeding. If, after the August hearings, it is apparent to the Board that necessary information for decision has not been submitted into the record, the Board may request additional information. The Agency may also renew and refine their information requests after the August hearings, if it so desires. However, at this stage, the Board will proceed with the schedule outlined in the May 22, 1986, Order.

The Board will deny the Agency's request to extend the time period to submit pre-prepared testimony. The Board has scheduled

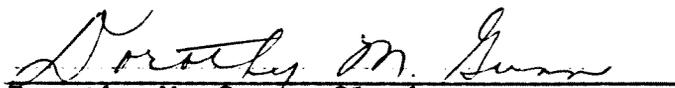
two weeks of hearings that are staggered in time in order to allow development of response and rebuttal testimony. The Board is unwilling to deviate from the schedule established in the May 22, 1986, Order as it could result in claims of prejudice. By so doing, the Board does not believe that it is unfairly treating the Agency or any other participant. The Board has provided an extensive number of hearing days which are spaced to allow adequate time to prepare responsive testimony.

In a separate filing, unrelated to the foregoing motions relating to discovery, Duo Fast filed proposed amendments to 35 Ill. Adm. Code 215: Subpart F and a Motion for Extension of Time to File Testimony. The Duo Fast motion, filed July 1, 1986, incorrectly describes the May 22, 1986, Board Order as a hearing officer order. As previously noted, only the Board can modify the May 22, 1986, schedule.

Duo Fast requests an extension until August 29, 1986, to file any pre-prepared testimony regarding its proposed site-specific regulatory language. Duo Fast cites various scheduling conflicts during July and August, due to travel and vacation plans, involving a potential witness and one of Duo Fast's attorneys. The motion is denied. Duo Fast's request would provide one working day before the second scheduled week of hearings to review the prepared testimony. This is clearly inadequate in light of the complexity of the issues involved. Duo Fast has failed to provide a compelling reason why its testimony cannot be provided in a timely fashion. Additionally, Duo Fast apparently wishes to present its testimony at the September hearings which is reserved for rebuttal testimony and cross-examination. The Board's intent in this matter is to provide an orderly two-stage process that will allow all participants an equal opportunity to present regulatory proposals and testimony and then respond or rebut at later hearings. This schedule is necessary in light of the complexity of the subject matter and CAA deadline for attainment of the National Ambient Air Quality Standard for ozone.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 17th day of July, 1986, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board