

ILLINOIS POLLUTION CONTROL BOARD
January 21, 1993

IN THE MATTER OF:)
)
AMENDMENTS TO THE NEW) R92-21
SOURCE REVIEW RULES) (Rulemaking)
35 ILL. ADM. CODE 203)

CONCURRING OPINION (by J. Theodore Meyer):

I concur with the majority's conclusion that the Agency should be available to answer questions at the second hearing. However, I would have strictly limited the questions to which the Agency must respond, to questions related solely to modifications to the proposal made by the Agency at the first hearing.

I believe that Section 28.5(g)(2), read strictly, may not require the Agency to answer questions at the second hearing. The responses to the Agency's objection place a great deal of emphasis on the statute's use of the word "confined" when discussing the first hearing, as opposed to the use of the word "devoted" when referring to the subject matter of the second hearing. After considering the definitions of those two words, I cannot see a substantive difference between their meanings. "confine" is defined as "to keep within bounds; restrict", while "devote" is defined as "to give or apply (one's time, attention, or self) entirely to a particular activity, pursuit, cause, or person; to set apart for a specific purpose or use". (American Heritage Dictionary 308, 390 (2d ed. 1985).) Given the plain meaning of these two words, I cannot find that the legislature intended different results in the interpretation of subsection (g)(1) as opposed to subsection (g)(2).

However, I do believe that the legislature intended that all persons have the opportunity to question the Agency regarding the proposed rules. Thus, although the statute does not directly address what is to occur in the event of a modification to those proposed rules, I find that it is reasonable, and comports with the legislative intent of Section 28.5, to find that the Agency should answer questions, posed at the second hearing, which relate only to modifications proposed by the Agency at (or after) the first hearing.¹ If there was provision in the statute for any person to request the third hearing, I would find that the Agency should not answer questions at the second hearing.

¹ Of course, in this proceeding only, I support the hearing officer's determination that the Agency should answer all questions from those in the Mount Vernon area who allege that they were prejudiced by the 29-day notice.

0138-0853

However, Section 28.5(g)(3) clearly states that if the Agency indicates that it does not intend to introduce any additional material, the Board shall cancel the third hearing. Since there is no way for a person to request a third hearing, so that they could question the Agency about modifications to the proposal, I believe that such questions should be allowed at the second hearing. I do not agree, however, with the suggestion that nuances of the Agency's proposal which emerge at the first hearing should be subject to questioning at the second hearing. The first hearing is clearly intended for all persons to question the Agency about the proposal. In other words, persons wishing to ask questions get one shot, and one shot only.

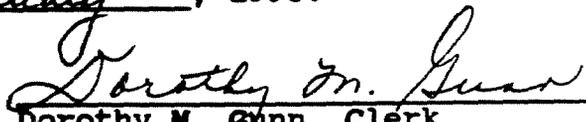
I must also voice my disagreement with the majority's comment that "taking the Agency's espoused position, one could argue that if the Agency is neither an 'affected entity' nor an 'interested party', then the Agency would not be able to participate in any fashion at the second hearing." (Majority op. at 3.) I assume that this comment arises from the fact that subsection (g)(2) does not specifically allow for questions, unlike subsection (g)(1). If the fact that questions are not specifically provided for leads to the conclusion that the Agency could not participate at the second hearing, I see no reason to find that anyone could ask questions at the second (or third) hearings. Subsection (g)(2) only allows for testimony, documents, and comments by affected entities and all other interested parties. Nowhere does it address the questioning of those giving testimony. I do not believe that the legislature intended such a result.

In sum, I concur with the majority's finding that the Agency should answer questions at the second hearing. However, I believe that any questions directed to the Agency at the second hearing should be strictly limited to questions on modifications to the proposal which could not have been asked at the first hearing.

For these reasons, I concur.


 J. Theodore Meyer
 Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above concurring opinion was filed on the 22nd day of January, 1993.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board

0138-0854