ILLINOIS POLLUTION CONTROL BOARD
December 3, 1992

IN THE MATTER OF:	)	
	)	
CLEAN AIR ACT RULEMAKING PROCEDURES PURSUANT TO SECTION 28.5 OF THE ENVIRONMENTAL PROTECTION ACT, AS ADDED BY P.A. 87-1213	)	RES 92-2 (Resolution)

RESOLUTION AND ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on a motion for reconsideration, filed by the Illinois Environmental Protection Agency (Agency) on November 13, 1992. The Board has not received any response to the Agency's motion. The motion for reconsideration is granted, so that the Board may respond to the issues raised by the Agency's motion.

BACKGROUND

On October 29, 1992, the Board adopted the resolution which is the subject of the Agency's motion. The resolution is in response to new legislation (P.A. 87-1213, effective September 26, 1992), which added a new Section 28.5 to the Environmental Protection Act (Act). Section 28.5 establishes new fast-track rulemaking procedures for rules proposed by the Agency and required by the federal Clean Air Act, as amended by the Clean Air Act Amendments of 1990 (CAAA). These fast-track procedures are very specific, and establish a number of deadlines for action on a CAAA proposal. However, Section 28.5 raises a number of questions of interpretation of those specific provisions. As the Board stated on October 29, the purpose of the resolution is to articulate the Board's position on those issues, and to provide guidance to future participants in Section 28.5 rulemakings. The Board established a 14-day period for the filing of any motions for reconsideration. The Agency's motion for reconsideration was subsequently filed on November 13, 1992.

DISCUSSION

The Agency, in its motion, asks the Board to reconsider a number of provisions of the resolution. Initially, the Agency contends that through this resolution, the Board is "undertaking actions which constitute rulemaking without meeting the formal requirements for rulemaking, including prior notice and comment. Thus, the Agency requests that the Board rescind its [r]esolution." (Motion at 1.)

The Board recognizes that some of the issues discussed in the resolution may be better codified through the rulemaking process. However, as the Board originally stated, the intent of the resolution is to provide guidance to future participants in Section 28.5 rulemakings, and to put all interested parties on notice of the Board's position on ambiguous provisions of Section 28.5. It is clearly within the Board's authority, as a deliberative body, to issue resolutions setting forth its views on unsettled issues. The Board will consider a rulemaking to promulgate procedural rules for Section 28.5 rulemakings. However, the Board notes that it has already received the first Section 28.5 fast-track rulemaking proposal from the Agency (Amendments to the New Source Review Rules, 35 Ill.Adm.Code Part 203, R92-21), and we expect to receive several others before the end of the year. Given the lengthy rulemaking requirements of the Administrative Procedure Act (APA) (Ill.Rev.Stat. 1991, ch. 127, par. 1001-1 et seq.), the Board finds that it is preferable, in the interim, to articulate its views through a resolution, rather than keeping interested parties "in the dark" as to the procedures that will be utilized. Therefore, the Board refuses to rescind its resolution.

In the alternative, the Agency asks that the Board reconsider several proposed procedures articulated in the resolution. The Agency contends that these proposed procedures are contrary to the "letter and intent" of Section 28.5, and therefore "illegal".

First, the Agency objects to the Board's decision to conduct a review of Agency proposals for minimal compliance with the requirements of Section 28.5(e). The Agency contends that the Board will hold regulatory proposals for "3 to 5 days", in violation of Section 28.5. The Agency maintains that Section 28.5 does not provide for any review period, and that any review before the proposal is date-stamped "violates the letter and intent of Section 28.5 and constitutes an illegal act". (Motion at 2.) The Agency argues that the deadlines in Section 28.5 begin with the Board's receipt of a proposal, and that date-stamping is irrelevant.

After careful consideration, the Board refuses to delete the provision that we will conduct a short review of an Agency proposal for minimal compliance with the requirements of Section 28.5(e). The Board has inherent authority to determine what documents to "accept". For example, the Board does not accept any pleading which does not conform with the "form of document provisions of our procedural rules (35 Ill.Adm.Code 101.103), such as pleadings which are not submitted on the prescribed-size paper. Likewise, the Board does not accept any document for which a filing fee is required without that filing fee. Because Section 28.5 establishes tight deadlines for Board action, beginning with "receipt" of the proposal, the Board must have

some method to determine whether the proposal is sufficient for the Board to take the actions required by the statute.

The Board stresses that its decision to undertake a technical review of the proposal for compliance with the statutorily-required elements is intended to promote, not hinder, efficiency. The rulemaking will proceed much more quickly and efficiently if the required elements are provided "up front", rather than during the course of the proceeding. As stated in our October 29 resolution, the Board will review the proposal only for minimal compliance, and will not delay a proposal because of minor problems. Additionally, although the Board stated in the resolution that the review will be completed within two business days (not the three to five days suggested by the Agency), in most cases it will take far less time. For example, the Board completed its review of the Agency proposal in Amendments to the New Source Review Rules, 35 Ill.Adm.Code Part 203, R92-21, and the proposal was date-stamped as received, on the same day that the proposal arrived at the Board's office. Additionally, the Board date-stamped the proposal without asking for any changes, even though the Board identified at least seven errors which we had to correct before the proposed rules were filed with the Secretary of State for first notice publication.

Next, the Agency challenges the Board's interpretation of Section 28.5(f), which requires the Board to, within 14 days of receipt of the rule, file a proposed rule for first notice, schedule all hearings, and cause public notice to be given. The resolution stated that the Board interprets this requirement to mean that the appropriate documents must be sent within 14 days, not that first notice and public notice of hearings be published. The Agency states that it interprets the language of subsection (f) "to mean that first notice must be published in the Board's usual fashion, that is through a Board [o]rder, and that public notice be given through the Illinois Register and the other usual methods of public notice within the 14 days." (Motion at 2.) The Agency contends that the Board has attempted to grant itself discretion where none is provided, and states that it "anticipates that, if the Board misses these publication deadlines, it should miss the deadline by only a few days rather than by the two weeks the Board is giving itself in its [r]esolution." (Motion at 2-3.)

The Board is not completely clear on the Agency's position on this issue.[1] Initially, the Board notes that Section 28.5(f)

[1] The October 29 resolution did not specifically state that the Board will issue, within the 14-day time period, a Board first notice order. The Board will issue its first notice order within 14 days of the receipt of a Section 28.5 proposal, and in

never uses the word "publish", but requires the Board to "file" and "cause public notice to be given" within the 14-day period. If the Agency is contending that first notice must actually be published in the Illinois Register within 14 days, and that actual newspaper publication must occur within that 14 day period, the Board points out that to interpret Section 28.5(f) in such a way would lead to an impossible result. The rules of the Administrative Code Division provide that all documents received by the Administrative Code Division by 4:30 p.m. on Tuesday shall be published in the Illinois Register on the following Friday, ten days later. (1 Ill.Adm.Code 100.200.) Therefore, any proposal received by the Board on any day other than Friday or Monday would always be published outside the 14-day period. Even those proposals received on a Friday or Monday would be publishable within 14 days only where the Agency proposal is received in perfect form for publication (a determination made by the Administrative Code Division, in the final instance). Additionally, in order to comply with the requirements of the Clean Air Act, the Board must publish notice of hearing in eleven newspapers around the state. Several of those papers are only published weekly, so that it would be impossible to ensure, in every case, that all newspaper notices would be published within 14 days of receipt of the proposal. In construing a statute, it is presumed that the legislature did not intend absurdity, inconvenience, or injustice. (See, e.g., Harris v. Manor Healthcare Corp. (1986), 111 Ill.2d 350, 489 N.E.2d 1374; City of Rolling Meadows v. Kyle (1st Dist. 1986), 145 Ill.App.3d 168, 494 N.E.2d 766.) Therefore, the Board finds that Section 28.5 does not require actual publication within 14 days, but only that the Board take the actions required to file first notice with the Administrative Code Division, schedule all hearings, and cause public notice to be given.

The Board is puzzled by the Agency's assertion that it anticipates that if the Board misses these deadlines, they should be missed by only a few days rather than by the two weeks that the Board is "giving itself". As stated above, and in the October 29 resolution, the Board intends to comply with the requirements of subsection (f) by mailing the appropriate documents within 14 days. The Board believes that this interpretation of subsection (f) is proper. The Board does not "anticipate" missing the 14-day deadline at all, and is confused by the Agency's reference to a two week delay. It is ironic that the Agency should seem to insist that publication must occur within the time period (an interpretation that renders the statute absurd), yet imply that missing a deadline by a few days is acceptable.

fact did so in Amendments to the New Source Review Rules, 35 Ill.Adm.Code Part 203 (November 19, 1992), R92-21.

Third, the Agency moves that the Board add to its resolution a requirement that the hearing officer telephone the Agency attorney assigned to a proposal to notify him or her of the hearing dates, rather than waiting for publication in the Illinois Register. The Board points out that all persons on the notice list, which includes the Agency attorney, receive copies of the hearing notice and hearing officer order. That hearing notice and hearing officer order will be mailed within 14 days of receipt of the proposal. The Board will leave the question of individual phone calls up to the hearing officer.

The Agency next objects to the Board's findings on the pre-filing provisions of Section 28.5(g). The Agency contends that only those who have pre-filed their testimony, and served that testimony upon all "participants of record", can testify at hearing. The Agency maintains that "[f]or the Board to do other than what is required by Section 28.5(g) regarding the prefiling of testimony would constitute an illegal act on the part of the Board." (Motion at 3.) The Agency argues that subsection (g) is clear in stating that the Board shall require the written submission of all testimony, and that this language precludes testimony from those who fail to pre-file or who pre-file later without good cause.

As the Board recognized in its October 29 resolution, Section 28.5(g) states that the Board shall require the pre-filing of testimony, but does not exclude testimony from those who do not do so. The Board does not believe that this is an artificial distinction. Hearings held pursuant to the Act are public hearings, and the Agency has failed to point to any authority to exclude testimony from the "public" where time remains in that hearing day. Additionally, the Board questions whether hearings pursuant to Section 28.5(g) would satisfy the public hearing requirements of the Clean Air Act if a person was precluded from testifying solely because he or she did not pre-file. The Board agrees with the Agency that we are bound by the requirements of Section 28.5, and the Board intends to comply with all provisions of the Act. However, the Board is not persuaded by the Agency's interpretation of the pre-filing requirement of subsection (g).

Fifth, the Agency moves that the Board reconsider its interpretation of what may be waived "for good cause" pursuant to subsection (g). The Board interpreted that provision to allow a waiver of either the pre-filing requirement itself or the deadline for pre-filing. The Agency contends that the intent of the "drafters" was not that the Board could waive the pre-filing requirement, but only the deadline for pre-filing.

The Board rejects the Agency's contentions. The sentence at issue reads "The Board shall require the written submission of all testimony at least 10 days before a hearing, with

simultaneous service to all participants of record in the proceeding as of 15 days prior to hearing, unless a waiver is granted by the Board for good cause." (Section 28.5(g).) The question is whether the clause allowing the waiver modifies the whole sentence, or whether it modifies only the last provision. If, as the Agency argues, it modifies only the last part of the sentence, then it would allow the Board to grant a waiver of the simultaneous service provision only, and not either the requirement itself or the deadline for pre-filing. The Agency itself argues that the waiver provision was intended to allow a waiver of the deadline. The Board finds the most logical interpretation of the sentence to be that the Board (acting through its hearing officer, where necessary) may waive either the pre-filing requirement or the deadline. As to the Agency's contention that the intent of the drafters was to allow only a waiver of the deadline, the Agency has failed to point to any evidence of legislative intent, such as floor debates. The Board finds that its interpretation of the waiver provision is correct.

Next, the Agency asks the Board to reconsider our finding that a second hearing will be held without a specific request for the second hearing, where there has not been a statement of agreement regarding the proposal. The Agency contends that Section 28.5(g)(1) specifically requires that there be a request for the second hearing within seven days of the first hearing, and that the language in subsections (g)(1)(A) and (B) that the Board "may" cancel the second hearing refers only to a situation where there was a request for the second hearing, but agreement was subsequently reached. The Agency also asserts that the Board has "added" a requirement that there be agreement on a proposal in order for the second hearing to be cancelled; that Section 28.5 does not give the Board the authority to hold a second hearing "just because" the Agency and the participants have not stated on the record that there is agreement to the rule; and that "[w]here there is no statement of agreement and no request for the second hearing, the Board is obligated to cancel the second and third hearings and proceed to second notice based upon the record before it." (Motion at 4.)

Based upon the language of Section 28.5(g), the Board rejects the Agency's claims. The assertion that the language that the Board "may" cancel the second hearing applies only where agreement is reached after a request for a second hearing ignores the plain meaning of subsection (g). That subsection specifically provides that the Board "shall" set three hearings on each proposal. In other words, the Board has an affirmative duty to schedule all three hearings. Subsection (g)(1) then provides that "any person may request", within seven days of the first hearing, that the second hearing be held. Contrary to the Agency's contention, that provision does not require that a request be made in order for the second hearing to be held. The only mentions of cancellation of the second hearing are in

subsections (g)(1)(A) and (B). The additional hearings may only be cancelled if: 1) the Agency and affected entities are in agreement on the rule; 2) the United States Environmental Protection Agency (USEPA) has not informed the Board of any unresolved objections to the rule; and 3) no other interested party contests the rule or asks for the opportunity to present additional evidence. Even if all of these conditions are satisfied, the decision whether to cancel the additional hearings lies with the Board. The statute clearly states that if the three conditions are met, the Board may cancel the additional hearings.

Contrary to the Agency's contentions, the Board has not "added" a requirement that there be agreement on the proposal in order for the second hearing to be cancelled. Instead, the statute specifically requires that there be agreement before the Board may cancel the second hearing. The Board also points out that once a second hearing has been requested pursuant to subsection (g)(1), even a subsequent agreement as to the rule will not cancel the second hearing, unless the request for hearing is withdrawn. It is possible, for example, that while the Agency, the affected entities, and USEPA may agree on the rule, some other "interested party" may wish to have a second hearing. In such a situation, the second hearing must be held. In sum, the Board reaffirms its earlier statement that, in the absence of an agreement on the proposal, the second hearing must be held, even where there has been no specific request for that second hearing. The Board specifically rejects the Agency's assertions that we are "obligated" to cancel the additional hearings where there is no statement of agreement and no request for the second hearing. The language of Section 28.5(g) simply does not support such an interpretation.

Finally, the Agency moves that the Board accept the Agency's statement on the record that there is agreement on the rule, unless a participant of record states, also on the record, a contrary position. The Agency states that it engages in extensive outreach in the development of rules required by the Clean Air Act, and thus, when the Agency states that it believes that there is agreement to a proposal, it does so in good faith. The Agency recognizes that such a statement must be part of the record, either stated at hearing or in a written document served upon all participants of record. The Agency contends that at this point, "the burden shifts to the participants of record to come forward and state disagreement with the rule and to provide good reasons for their disagreement and to provide some proof or indication that their position is more acceptable to the [USEPA] than is the proposal the Agency has stated is agreed-to." (Motion at 5.)

The Board will preliminarily accept, for purposes of determining whether there is agreement on the rule, the Agency's

statement on the record that it believes that there is agreement to the rule. However, such an Agency statement must either be made on the record at the first hearing, or in writing immediately after the first hearing, so that any person who disagreed would have sufficient opportunity to request a second hearing. If the Agency believes, however, that a person who states disagreement with the proposal must provide "good reasons" in order to indicate disagreement with the proposal (as opposed to this being a general statement that a participant of record must support his position), the Board rejects such an interpretation. For purposes of stating that an affected entity does not agree with the proposed rule, so that the proceeding will continue to further hearings, all that entity must do is merely state its disagreement.

CONCLUSION

As stated above, the Board rejects the Agency's assertion that the October 29, 1992 resolution should be withdrawn. The Board has also considered the specific objections of the Agency to the substance of the resolution, and has resolved those objections as stated above. The Board reaffirms the October 29, 1992 resolution, as further clarified by this resolution and order.

IT IS SO RESOLVED AND ORDERED.

R. Flemal and B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above resolution and order was adopted on the 3rd day of December, 1992, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board