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	)	

ORDER OF THE BOARD (by G. T. Girard):

On January 13, 1993, the Board received a filing from the Illinois Environmental Protection Agency (Agency) entitled "Agency's Objection to Hearing Officer's Ruling, Language Added to Section 203.112 Pursuant to Hearing Officer Order, and USEPA'S September 3, 1992, transition memo" (objection). On January 15, 1993, the Board received a second filing from the Agency entitled "Motion for Expedited Decision on Agency's Objection to Hearing Officer's Ruling" (motion). On January 20, 1993, the Board received responses to the objection filed by the Illinois Environmental Regulatory Group (IERG), Illinois Steel Group (Steel) and Stepan Company (Stepan).

At the January 6, 1993 hearing in this matter, the Board's hearing officer entered an order based on arguments made at the hearing. The order would allow anyone who argues that they may be prejudiced by the notice in the Mt. Vernon newspaper to question Mr. Romaine of the Agency on his testimony given at the January 6, 1993 hearing. In addition, the hearing officer stated that: "my reading of 28.5 is that the Agency should be available, and therefore shall be available to answer additional questions at the second hearing . . .". (Tr. at 124.) The hearing officer limited the scope of questioning to unresolved issues pursuant to Section 28.5(g)(1)(B). (Tr. at 127.)

The objection takes issue with two provisions enunciated by the hearing officer. The first provision that the Agency takes issue with was stated as:

> The Agency disputes the Board's assertion that proper notice was not served. However, in the interest of assuring that the SIP is not jeopardized and in the interests of being cooperative, the Agency hereby merely registers its objection to the order but will be available for any cross-examination on its prefiled testimony brought to the second hearing under the circumstances described by the Hearing Officer . . .. (Obj. at 3.)

The second provision which the Agency takes issue with was the direction by the hearing officer that the Agency would

respond to questions raised at the second hearing on issues left unresolved from the first hearing. (Obj. at 3.) The Agency states that Section 28.5(g)(2) limits the scope of the second hearing to "affected entities and all other interested parties". The Agency states that "[n]either of these categories includes the Agency". (Obj. at 3.) The Agency specifically states that the Agency declines to answer any questions or be subject to cross-examination. (Obj. at 5.)

The Board first notes that it was not clear from the Agency's filing of the objection what action the Agency was seeking, if any. The objection cites to 35 Ill. Adm. Code 102.360 and 101.246 of the Board's rules. Both of those sections of the Board's rules deal with reconsideration of a Board's final order. As the objection is to a hearing officer ruling, it was unclear what action was anticipated by the filing. The motion filed by the Agency asks that the Board render a decision at the January 21, 1993 meeting. However, the motion still did not specify what decision the Agency was seeking from the Board. The Board assumes that the Agency is seeking a reversal or clarification by the Board of the hearing officer's order.

The Board also notes that the Agency has misstated the Board's position regarding notice of hearing in this case. A review of the transcript indicates that the hearing officer very carefully stated that the notice published in the Mt. Vernon paper could possibly create a notice problem. The federal regulations for air rules involving a state implementation plan at 40 CFR 51.102 require at least 30 days notice of hearing. The Board has long interpreted that provisions of 40 CFR 51.102 to require notice in all eleven regions for at least 30 days. The Board believes that a 29 day notice in one region may be sufficient. However, a cure for this potential deficiency was readily available by convening a second hearing. Therefore, the Board's hearing officer correctly stated the Board's position on this matter and properly effected a cure. The Board further notes that several of the participants requested that a second hearing be held so that they could provide testimony. (Tr. at 114, 128, 129.) Therefore, under Section 28.5, a second hearing is required.

The hearing officer stated that the ruling was "not a precedent which may be necessarily followed in further 28.5 rules". (Tr at 127.) However, all participants who responded to the Agency's objection as well as the Agency, expressed concern over the precedential value of the hearing officer's ruling. (IERG at 4; Steel at 2; Stepan at 2; Obj. at 5.)

The Steel group responded to the Agency's objection in support of the hearing officer's ruling. The Steel Group cited to several minor procedural errors by both the Board and the Agency in attempting to meet with the requirements of Section

28.5 of the Act. (Steel at 3.) "A strict reading of the statute would not enable the Agency, or the Board, to easily cure these problems." (Steel at 3.) The Steel group argues that a reading of the statute which recognizes the Board's implied authority to recall Agency witnesses "would better comport with the intent of the statute." (Steel at 4.)

In support of its position Steel argues that:

> By use of two different words to define the limitations on testimony in the section ("confined" versus "devoted") it appears that there was not intended to be parallel construction of the two sections. The second hearing need not be "confined" to the testimony of the affected entities and all other interested parties, although that is to be its focus. (Steel at 4.)

Steel also responds to the Agency argument that it is not an "interested party" to the rulemaking by reading the word "other" in the phrase "affected entities and all other interested parties" to refer back to the discussion of the IEPA which occurred two paragraphs earlier. The ISG submits that a more logical reading of the phrase would be that the word "other" refers to "affected entities". In this reading the IEPA would be an "other interested part[y]." (Steel at 4.)[1]

Stepan's response also asks that the Board sustain the hearing officer order. In fact Stepan states: "Stepan Company fully supports the Hearing Officer's ruling as the only reasonable interpretation of both the language of Section 28.5 and the procedures required as a result of events which took place at the January 6, 1992 (sic) hearing." (Stepan at 2.) Stepan points out several problems which could result if further questioning of the Agency is not allowed. Specifically, Stepan is concerned that a clear record might not develop. Stepan states:

> This rigid reading would put an artificial limitation on the record created in the second hearing that could result in issues and questions, which could easily be examined and potentially resolved on the record, being left open and unanswered. This would potentially place the Board in the untenable

[1] The Board notes 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.

> position of having to make a ruling on a record where the Agency and affected parties have in effect talked and argued "past each other" without actually joining the issue. (Stepan at 2.)

Stepan further expressed concern that such a reading of the statue would preclude the Board from asking the Agency questions for clarification purposes. (Stepan at 2.)

Stepan also points out that although parties did have an opportunity to cross-examine the Agency witness at the first hearing "many of the nuances of the Agency interpretation" were first communicated at the hearing. (Stepan at 2.) "Therefore, the participants in that hearing cannot be expected to have been fully prepared tc cross-examine the Agency" on interpretation at that time. (Stepan at 2-3.)

Finally, Stepan states:

> There is no reason to interpret Section 28.5 in the rigid fashion proposed by the Agency. In fact, the language of Section 28.5 makes it clear that while the first hearing "shall be confined to testimony by and questions of the Agency's witnesses" (Section 28.5(g)(1) (emphasis added)), the second hearing shall be devoted to presentation of testimony, documents, and comments by affected entities and all other interested parties" (Section 28.5(g)(2) (emphasis added)). Strict statutory construction makes it clear that the second hearing, while designed to provide an opportunity for presentations from affected parties and interested persons, need not be "confined" to those presentations. There is no indication in the language of Section 28.5 of an intent that the Agency would not answer questions raised in the second hearing. As the proponent of the rule and having placed sworn testimony in the record, the Agency should be fully available to answer questions from the affected public whenever they arise. To allow the Agency to answer questions only as it sees fit, could quite possibly slant and jeopardize the Board's rulemaking record. This is certainly not required by Section 28.5. (Stepan at 4.)

IERG responded in support of the hearing officer's interpretation of Section 28.5. IERG states that section 28.5(g)(2) does not prohibit or preclude the Agency from

answering questions at the second hearing nor is IERG aware of any other statutory provisions which would operate to preclude the Agency from answering questions. (IERG at 2.)

IERG also points out that:

> Section 28.5(k) requires the Board to "take whatever measures are available to it to complete fast-track rulemaking as expeditiously as possible consistent with the need for careful consideration." (Emphasis added.) (IERG at 2-3.)

Finally IERG states:

> IERG appreciates the Agency's concerns with the precedence of the Board's Hearing Officer's ruling, and it is for this very reason that IERG responds here. IERG agrees with the Agency that the "constraints of Section 28.5 are new and unusual," but disagrees that the Hearing Officer's ruling would establish "unsatisfactory precedents." Indeed, IERG believes that a Board Order interpreting Section 28.5(g)(2) to prohibit the Agency from answering questions would establish an unsatisfactory precedent and could hinder the Board in performing its rulemaking responsibilities in Clean Air Act Fast-Track rulemakings. (IERG at 4.)

Finally the Steel Group states:

> The intent of the statute is to allow the Board the necessary authority to cure minor problems which may arise with the notice and drafting processes of fast-track rulemakings. Therefore, the Board has the implied authority to take the least time-wasting action that it can to cure any problems with the notice or the IEPA's proposal, consistent with general intent and scheme of the statute. Rather than declaring a pending rulemaking to be void and forcing all the participants back to ground zero, the Board may, by Hearing Officer or Board Order, change the character of the remaining hearings to comply with the intent to the act. Only by recognizing that it has such flexibility can the Board effectuate the intent of the statute, which was to put the Clean Air Act rules on a "fast-track".

Upon reviewing the transcript and the arguments put forward by participants, the Board is persuaded that the hearing officer has correctly read Section 28.5 of the Act. Allowing questions of the Agency at a second hearing will ensure the development of complete rulemaking record and expediting the process. Such a reading of Section 28.5(g) comports with the legislative goal of fast-paced rulemaking under the Clean Air Act. The Board affirms the hearing officer order.

IT IS SO ORDERED.

Board Member J. Theodore Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 21st day of January, 1993, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board