

ILLINOIS POLLUTION CONTROL BOARD
October 29, 1992

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

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

On September 26, 1992, the Governor signed and made effective SB 1295, P.A. 87-1213, which contains a number of environmental provisions. One of these provisions is the addition of Section 28.5 to the Environmental Protection Act (Act). (Ill.Rev.Stat.1991, ch. 111½, par. 1001 et seq.) Section 28.5 establishes new fast-track rulemaking procedures for rules proposed by the Illinois Environmental Protection Agency (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. The purpose of this resolution is to articulate the Board's position on those issues, and to provide guidance to future participants in Section 28.5 rulemakings.

ISSUES AND PROCEDURES

This resolution addresses several specific provisions of Section 28.5, and is not intended as an exhaustive review of the fast-track procedures. Readers should refer to the language of Section 28.5, contained in P.A. 87-1213, for the complete provisions of that section.

Section 28.5(e): Content of Agency Proposals

This subsection sets forth requirements for the form of the Agency's fast-track rulemaking proposals.

1. Question: Will the Board conduct any type of review of an Agency proposal for compliance with the requirements of Section 28.5(e) before stamping the proposal as received?

Answer: The Board will conduct a review of the Agency proposal for minimal compliance with the requirements of subsection (e). Because the statute provides for tight deadlines for Board action, the Board could be faced with major problems if no review is done. For example, if the Agency's "camera-ready" copy of the

rules for first notice publication is incorrect (see Section 28.5(e)(1)), the Board will have a difficult time filing the rule for first notice within 14 days, especially since there are other requirements to be met within that same 14 day period. The Board asks the Agency to include, with each proposal, a computer disk containing the text of the rules in WordPerfect 5.1. The proposal will not be date-stamped, and thus not considered received, until this review has been completed. However, the Board emphasizes that no proposal will be delayed because of minor problems.

2. Question: How will this review of the Agency proposal be conducted?

Answer: When a proposal arrives at the Board, it will be reviewed by at least two Board attorneys, including (when possible) the Board attorney who will be acting as hearing officer for that proceeding. These attorneys are authorized to date-stamp the proposal as received, or to delay that stamp until any problems are remedied by the Agency. This review will be completed within two working days after the proposal arrives at the Board's office. So that the downstate offices are able to review these proposals, the Agency is asked to send one copy of the proposal to each of the Board's satellite offices. (Those offices are presently located in DeKalb, Jerseyville, and Urbana.) The Agency may then reduce the number of copies sent to the Chicago office. The Board reiterates that the Chicago office is the only location for official filing of proposals.

Section 28.5(f): Scheduling of Hearings and Public Notice

This subsection 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.

3. Question: Does Section 28.5 require hearings to be held in one part of the state (where a proposal is statewide or applies to more than one area) rather than two areas of the state?

Answer: Hearings need be held in only one affected area of the state. Section 28.5(c) specifically requires that all fast-track rules be adopted under the procedures set forth in Section 28.5, and Section 28.5(g) establishes very specific provisions for hearings. Nowhere does Section 28.5 require that the Board hold hearings in more than one area of the state. As a practical matter, because the statute requires us to not only schedule all three required hearings within 14 days, but also continue each hearing from day to day until completed, it would prove very difficult, and in some cases impossible, to quickly obtain hearing rooms which are available for an indeterminate period of time. Of course, for rules which will affect just one area, the hearings will be held in that area.

4. Question: How does the Board interpret the requirement that the Board "file the rule for first notice" and "cause public notice to be given" within 14 days?

Answer: 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 Clerk's office must mail notice to the appropriate papers within 14 days, and hearing officers must mail the first notice package and hearing notices in that time period. It is impossible to have first notice and hearing notices actually published within 14 days. Of course, the Board will continue to ensure that actual publication occurs by the federally required date (30 days prior to hearing).

5. Question: How will the notice list for an individual proposal be developed by the Board?

Answer: The Board will publish a notice in the Environmental Register, informing the public of the new procedures of Section 28.5 (and of this resolution), and soliciting those who may be interested in CAAA rulemakings to submit their names and addresses to the Board for a draft CAAA rulemaking notice list. This "draft" notice list, along with the names provided by the Agency from their "outreach" list, will serve as the initial notice list for the first notice opinion and order and the hearing notice for each new proposal. The first mailing will also include a "coupon" requiring those who want to be included on the notice list for that individual proposal to return the coupon to the Board within a specified time period. The Board has used this coupon method successfully in the past. This procedure will serve two purposes: widespread, early notification to the public so that we can start developing notice lists, and subsequent narrowing of the list to those who are specifically interested in a given proceeding. Please note that any person who wishes to be a "participant of record", as that term is used in Section 28.5, must take affirmative action to be placed on the service list (as opposed to the notice list) for that proceeding (see below).

6. Question: How will hearing dates be chosen?

Answer: Hearing dates will be chosen by the assigned Board member and the hearing officer, without consultation with the participants. Because of the very tight timeframe for the scheduling of hearings, established by Section 28.5, it would be impossible to check with every interested person and actually come up with three acceptable dates. The Agency is asked, when filing a proposal, to provide a list of dates, if any, for which it is not available. The Board will attempt to work within those dates where possible. The Board will also coordinate hearing dates, internally, in an attempt to avoid overlapping hearings on

other pending rulemaking proposals.

Section 28.5(g): Conduct of Hearings

This subsection sets forth the hearing requirements for fast-track rulemakings.

7. Question: Subsection (g) states that the Board shall require the pre-filing of testimony 10 days before each hearing, and that pre-filed testimony must be served upon all "participants of record" who are on record 15 days prior to hearing. The statute does not define "participants of record". Who is a "participant of record"?

Answer: The Board interprets "participants of record" as meaning all persons placed on the service list for an individual proceeding, as opposed to the notice list for that proceeding. (See 35 Ill. Adm. Code 102.221.) Our notice lists can contain two or three hundred names, and often a large number of those persons simply want to be informed of Board action on a particular proposal. On the other hand, our service lists contain the names of those who signify an interest in active participation in the proceedings. Requiring service of pre-filed testimony on the entire notice list could be very burdensome, especially for smaller participants. The Board finds that using the service list for service of pre-filed testimony will fulfill both the spirit and the letter of the statute.

The hearing officer order accompanying the hearing notice will include a statement that pre-filed testimony will be served only on those "participants of record" on the service list, and that those who wish to receive the pre-filed testimony (as opposed to simply receiving Board opinions and orders) should contact the hearing officer for inclusion on the service list. This will allow any interested person to receive pre-filed testimony, while not requiring service of the pre-filed testimony on those who do not want it. The service list will "close" (for purposes of receiving pre-filed testimony for a specific hearing) as of 4:30 p.m. 16 days before that hearing. Those who will be submitting pre-filed testimony must then contact the Board 15 days before hearing. The service list will then be available through telecopier and at the Board's Chicago office. The Board will also add any person who pre-files testimony for a given hearing to the service list for the next hearing.

8. Question: The pre-filing requirement allows the Board to grant a "waiver" for "good cause". Does this mean a waiver of the pre-filing requirement itself, or a waiver of the deadline? What is "good cause"?

Answer: The Board construes the waiver provision as being

applicable to either the pre-filing requirement or the deadline. "Good cause" will vary from case to case. However, the standard to be used in determining "good cause" is whether the "good cause" arises from uncontrollable circumstances. For example, "the press of business" will not be considered "good cause" which necessitates a waiver.

9. Question: Can those who did not pre-file testimony still testify at hearing?

Answer: Anyone who did not pre-file will be allowed to testify, but only if time remains in that hearing day. 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. Hearings held pursuant to the Act are public hearings, and the Board finds no authority to exclude testimony from the "public", if time remains in that hearing day. The hearing officer order accompanying the notice of hearing will state that the hearing will not be continued to the next day to accommodate those who did not pre-file.

10. Question: Subsection (g)(1) provides that the first hearing shall be confined to testimony by the Agency's witnesses. Can anyone else state a position at that first hearing? For example, if an affected entity generally supports the rule, but objects to a specific section of the proposal, can a representative of that affected entity state its qualified support at the first hearing?

Answer: In such a situation, the representative may state its position for the record, if time permits, but any witnesses to be presented by that representative must be presented at the second hearing. In other words, another participant may state a position at the first hearing, but may not present testimony in support of that position.

11. Question: Subsection (g) also provides that if the Agency and affected entities are in agreement on the rule, or a portion of the rule, and if USEPA has not informed the Board of any unresolved objections, the second and/or third hearings may be cancelled. The statute also provides that "any person" may request, within 7 days after the first hearing, that the second hearing be held. (Subsection (g)(1)(A) and (B).) How do the Agency and affected entities notify us that they are in agreement? When does such notification occur? Does the Board issue any public notification of cancellation?

Answer: Just like information received in any other rulemaking, the Agency and the affected entities must either state on the record at hearing that they are in agreement, or put such notification in writing, to be filed with the Board and served upon the other participants. The Board urges the Agency and affected entities to notify the Board of agreement as early as

possible. The Board will not issue any specific public notification of cancellations. Hearing notices and hearing officer orders will clearly state that the second and third hearings are subject to cancellation, so that participants will be on notice of the possibility of cancellation and can contact the Board for updated information.

12. Question: How does "any person" who wishes to request that the second hearing be held make that request?

Answer: Such a request for the second hearing must be made the same way as a notification of agreement--either on the record at the first hearing, or in writing, filed with the Board and served upon those on the service list.

13. Question: In the absence of a request for hearing, and with no indication of agreement from the Agency and affected entities, will the second and/or third hearing automatically be held?

Answer: The Board interprets the law to require the Board to hold the second and third hearings unless the Board is specifically notified of agreement. In other words, the "7 day request" provision simply allows any person, whether regulated by the proposed rule or not, to compel the second hearing, even if the affected entities are in agreement. (The statute provides for both "affected entities" and "interested parties".)

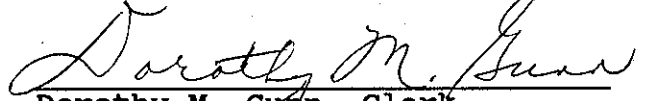
CONCLUSION

The Board will follow the procedures discussed above when handling a rulemaking filed pursuant to Section 28.5 of the Act. We recognize that we may not have anticipated all circumstances which may arise in Section 28.5 rulemakings. Therefore, the Board will revisit the conclusions of this resolution as appropriate, either on its own motion or on the motion of others. The Board notes that motions for reconsideration may be filed within 14 days of the date of this order. Interested persons may also suggest, within the same 14 day period, whether any additional steps should be taken by the Board.

IT IS SO RESOLVED.

R. C. Flemal dissented, and B. Forcade, J. Marlin, and M. Nardulli concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above resolution was adopted on the 29th day of October, 1992, by a vote of 6-1.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board