BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
RACT DEFICIENCIES -	)	R89-16 (A)
AMENDMENTS TO 35 ILL. ADM.	)	
CODE PARTS 211 and 215	)	

NOTICE OF FILING

TO:

Ms. Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601
(FEDERAL EXPRESS)

Mr. Dan L. Siegfried, Hearing Officer
Illinois Pollution Control Board
State of Illinois Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601
(FEDERAL EXPRESS)

PERSONS ON ATTACHED LIST
(FIRST CLASS MAIL)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board an original and ten copies of a RESPONSE AND OBJECTION OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP TO AGENCY MOTION TO RECONSIDER, on behalf of the Illinois Environmental Regulatory Group, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL REGULATORY GROUP

By: Katherine D. Hodge

Dated: March 23, 1990

Katherine D. Hodge
General Counsel
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, Illinois 62701
217/522-5512

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached RESPONSE AND OBJECTION OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP TO AGENCY MOTION TO RECONSIDER in R89-16 (A), upon the following persons:

Ms. Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601
(FEDERAL EXPRESS)

Mr. Dan L. Seigfried, Hearing Officer
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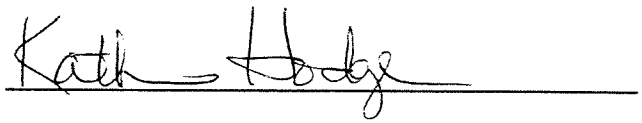
PERSONS ON ATTACHED LIST
(FIRST CLASS MAIL)



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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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RACT DEFICIENCIES -	)	R89-16(A)
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RESPONSE AND OBJECTION OF
THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP
TO THE AGENCY MOTION TO RECONSIDER

NOW COMES the Illinois Environmental Regulatory Group (IERG), by its attorney, Katherine D. Hodge, and files this response and opposition to the Illinois Environmental Protection Agency's (IEPA) Motion to Reconsider dated March 14, 1990, in this docket.

IEPA, in their motion to reconsider, takes the position that the Illinois Pollution Control Board (Board) does not have the authority to review or dismiss a certification by IEPA, and that any rule the Agency so designates as a required rule automatically becomes a "required rule" within the meaning of Section 28.2 of the Illinois Environmental Protection Act. (Ill. Rev. Stat. 1987, Ch. 111 1/2, Par. 1028.2 (ACT)). Should this contention prevail, taken to its logical extension, IEPA could certify any proposed rule as a required rule and the Board would have to so treat the rule, regardless of whether the IEPA's certification is with or without merit. This position is not consistent with the law and is an interpretation which is not only strained, but without any legitimate basis.

IEPA submits that the authority of the Board to conduct hearings under the Act, which is contained in Section 5(d) of the

Act, does not give the Board the authority to rule on IEPA certifications made pursuant to Section 28.2. IERG submits that Section 5(d) gives the Board that power, and further the Board has, under Section 5(b) of the Act, general powers to make and implement rules. Section 5(b) states:

> "b. The Board shall determine, define and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of this Act." Ill. Rev. Stat. 1987, Ch. 111 1/2, Par. 1005.(b).

Clearly, the Board has been granted broad rulemaking authority under Section 5 of the Act, as well as in Section 27 of the Act. To say that these broad grants of authority do not give the Board the authority to review an IEPA certification that a rule is a required rule simply makes no sense. Indeed, as previously noted, the IEPA could certify a rule which is clearly not a "required rule" and it would be the IEPA's position that the Board would have to treat that rule as if it were required because of the certification. In referencing this possibility, in its motion to reconsider, the IEPA states:

> "... After the final decision, any participant with a legitimate interest in the outcome of the proceeding may appeal. Such an appeal could raise the issue of whether the proceeding is a required rule proceeding pursuant to Section 28.2 of the Act." IEPA Motion to Reconsider, p. 6.

As the IEPA is certainly aware, in an appeal from the adoption of an administrative regulation, the one who attacks the regulation bears the burden of establishing its invalidity. Further, a reviewing court may set aside an administrative regulation only if it is clearly arbitrary, capricious, or unreasonable. Midwest Petroleum Marketers Association v. City of Chicago 82 Ill. App. 3d 494, 402 N.E. 2d 709 (Ill. App. 1980).

Issues which are not objected to in the original administrative proceedings are waived and cannot be raised on appeal. Waste Management v. Pollution Control Board 530 N.E. 2d 682, 695, 125, Ill. Dec. 524, 537 (Ill. App. 2d 1988). Thus, if the Board is not permitted to decide the issue of whether a rule is a required rule pursuant to Section 28.2 of the Act at the administrative level, the Appellate Court cannot and will not decide that issue on appeal. If IEPA knows that that is the law, they would likely assert the issue of waiver on appeal where the Board had not addressed the propriety of certification of the rule.

IERG submits that the Board has the power to review IEPA certifications of rules as required rules and that in this case, clearly, the Board properly determined that the IEPA certification of the Generic Rule and SOCMI Leaks Rule were not required rules.

On the substance of the IEPA's argument regarding whether the Generic Rule and SOCMI Leaks Rule are required rules, the IEPA first asserts that the Board decided the issue before IEPA had an opportunity to respond. The IEPA notes that it requested an extension of time to respond to the Motion made by Stepan Company and that the Board granted IEPA an extension of time until February 9, 1990 to respond to that Motion. However, IEPA never requested an extension of time to respond to the Business Group's Motion to Dismiss or sever the proposed changes to the Generic Rule and the SOCMI Leaks Rule. The Board waited for the allowable time for responses to pass before acting on this rule. The Board acted expeditiously after that time. IEPA appears to be claiming that the Board acted too expeditiously in ruling on

the Motion, even though the Board had no way of knowing that the IEPA ever intended to respond to that Motion. Indeed, the IEPA does not state that it ever intended to respond to the Motion of the Business Group which was decided by the Board.

Despite these complaints, the IEPA now appears to be filing what would have been its response to the Business Group's Motion. IERG submits that there is nothing contained in IEPA's filing with the Board that provides any support for the IEPA's position that the Generic and SOCMI Leaks Rules are required rules. Indeed, the bulk of the IEPA's discussion of the allegedly required nature of these rules is simply a lengthy quotation from the IEPA's certification of those rules. That certification was clearly reviewed by the Board and was properly found to be inadequate support for the position that these rules are required.

IEPA then states that Section 110(a)(1) of the Clean Air Act makes these required rules. The IEPA should be aware that the Clean Air Act does not require any particular rule content to be adopted by the states, but rather leaves it to each state to determine the proper mix of controls to achieve and attain the National Ambient Air Quality Standards (NAAQS). Thus, IERG submits that none of the Clean Air Act rules are required rules pursuant to Section 28.2 simply because the rule will satisfy the requirement of a part of the State Implementation Plan (SIP). IERG submits that the only way a particular rule under the Clean Air Act becomes a required rule, for purposes of Section 28.2 of the Act, is where the rule adopted by the Board is submitted as a SIP revision to USEPA and USEPA disapproves the particular rule

for a particular deficiency.

The IEPA position in this rulemaking can be summarized as follows: (1) all rules that IEPA certifies as required rules pursuant to Section 28.2 are required rules simply because the IEPA certifies the rule as such; (2) the Board has no authority to disagree with any IEPA certification that a rule is a required rule; and (3) the Board must adopt any rule certified by the IEPA pursuant to Section 28.2 of the Act without considering the technical feasibility or economic reasonableness of such rule. Thus, it is the IEPA's position that rules proposed by the IEPA which will be submitted as SIP revisions to satisfy Clean Air Act requirements are the functional equivalent of "pass through" rules and that anything that IEPA proposes which IEPA states is a required rule, must be adopted on an expedited basis and without considering technical feasibility or economic reasonableness of that rule to Illinois industry. IERG submits that that is a totally improper and incorrect interpretation of Section 28.2

IEPA next spends considerable time criticizing both the Business Group motion and the Board comment that that Motion thoroughly analyzed the certification issue. IEPA appears to have completely missed the point being made by the Business Group in this regard. The issue was not whether a letter was "solicited" or who drafted the letter. The issue was whether the IEPA submitted any support for the position that either the Generic Rule or the SOCMI Leaks Rule were required rules. In coming to the conclusion that the rules were not required, the Business Group analyzed each document which had been submitted by the IEPA to support the required nature of these rules, and it

was in the context of discussing those documents that the issue arose. True, it does not matter whether the letter was solicited from USEPA but it is the content of the letter that matters. The content does not support the required rule allegation. All the letter states is that the proposed rules will satisfy the SIP requirements. The letter does not state and could not state that the proposed rules are the only possible rules which would satisfy the USEPA. Indeed, at hearing, USEPA stated that other rules could satisfy the SIP requirements in this regard. Similarly, the issue of who drafted the letter centers around the fact that an internal memo does not and cannot bind USEPA, and thus that type of finding that the rule was inadequate is not sufficient to make the rule a required rule pursuant to Section 28.2.

Additionally, IEPA claims on page 15 of their Motion, that the major focus in the development of Section 28.2 was to develop a rulemaking process which would allow Illinois to comply with the requirement of the Clean Air Act. The IEPA cites no support in its assertions that Section 28.2 was adopted with a focus on Clean Air Act rules. Indeed, the record is devoid of any support for that position. The testimony of Sidney M. Marder in this docket did discuss the adoption of Section 28.2, and the reasons for its passage. While Section 28.2's utility in expediting the adoption of rules therefore needed to comply with the Clean Air Act, it was not passed by the General Assembly in major focus to facilitate adoption of Clean Air Act rules as asserted.

WHEREFORE, IERG respectfully requests that the Board deny the IEPA's Motion to Reconsider because the Board properly decided

that the Generic Rule and the SOCMI Leaks Rule were not properly certified by the IEPA as required rules and properly severed those rules from this Docket.

Respectfully submitted,

Illinois Environmental
Regulatory Group

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Its Attorney

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