

ILLINOIS POLLUTION CONTROL BOARD  
January 25, 1990

IN THE MATTER OF: )  
 )  
AMENDMENTS TO TITLE 35, ) RES 90-1  
SUBTITLE C (TOXICS CONTROL) ) R88-21 (A)

RESOLUTION AND ORDER OF THE BOARD (by R. C. Flemal):

In Docket R88-21A, the Pollution Control Board (Board) proposed amendments to 35 Ill. Adm. Code Parts 301, 302, 305 and 309. The proposed amendments to each of these four Parts were considered by the Joint Committee on Administrative Rules (JCAR) at its January 10, 1990 meeting. JCAR issued an objection to some, but not all, of the rules proposed in this Docket. Specifically, JCAR objected to the rules proposed as 35 Ill. Adm. Code 302.Subpart F, "Procedures for Determining Water Quality Criteria"; these proposed rules are intended to implement the narrative water quality standard contained in Section 302.210. Section 302.210, in summary, prohibits the discharge into Illinois waterways of toxic contaminants in toxic amounts. Where the Board has not listed specific numeric limitations for discharge of specific chemical constituents in Section 302.208, Section 302.210 and 302.Subpart F provide the procedures and directives for Board and Illinois Environmental Protection Agency (Agency) case-by-case analysis of other toxic contaminants which may be present in an individual discharge.

This Resolution and Order constitutes the Board's formal response to JCAR's January 10, 1990 Objection to 35 Ill. Adm. Code 302.Subpart F. Section 7.06(c) of the Administrative Procedure Act (IAPA) requires that an Agency respond within 90 days of an Objection. Section 7.06(c) of the IAPA states that, an Agency may (1) modify the proposed rule or amendment to meet the Joint Committee's Objection, (2) withdraw the proposed rule or amendment in its entirety or (3) refuse to modify or withdraw the proposed rule or amendment. For the reasons set forth below, the Board hereby refuses to modify or withdraw the proposed rules.

The Objection

The JCAR Statement of Objection is a four page document which summarizes the objection as follows:

The Joint Committee objects to Section 302.Subpart F of the Pollution Control Board's rule entitled "Water Quality Standards" (35 Ill. Adm. Code 302) because the Pollution Control Board's proposed rule concerning the

determination of water quality standards violates the provisions of the Environmental Protection Act (Ill. Rev. Stat. 1987, ch. 111½, par. 1001 et seq.) and the Illinois Administrative Procedure Act (Ill. Rev. Stat. 1987, ch. 127, par. 1001 et seq.) by requiring the Environmental Protection Agency to establish water quality criteria which will not be promulgated pursuant to the Illinois Administrative Procedure Act (IAPA). (Objection, pp. 1,4)

JCAR noted that the issue of whether the Board was unlawfully delegating rulemaking authority to the Agency was raised by commentators, including the Illinois Environmental Regulatory Group (IERG), prior to publication of First Notice in the Illinois Register. JCAR further noted that IERG had suggested language to the Board to allow for a narrative standard but to also require Agency rulemaking pursuant to the IAPA "setting forth data requirements and test procedures. JCAR went on to state that:

The Board's response to commentators mirrored its response to the Joint Committee when asked about this issue. The Board has maintained throughout this rulemaking that it is not delegating rulemaking authority to the Agency as the Agency will be developing criteria not standards. The Board has stated that criteria will not have general applicability and, therefore, are not rules as defined by Section 3.09 of the IAPA.

The Board is requiring the Agency to develop "criteria" for toxicity in the waters of Illinois. It would seem logical that at least some of the criteria for toxicity developed by the Agency will have general applicability. If the criteria developed are "policy statements of general applicability", the criteria will be rules as defined by Section 3.09 of the IAPA. If the Agency is developing "rules" then the Board is delegating its rulemaking authority and the criteria should be adopted pursuant to the IAPA. (Objection, p.3).

JCAR cited four examples of Agency rulemakings to which it had objected on the grounds that the Act requires the Board, not the Agency, to adopt such rules. (Objection, p.4).

## Board Response

The Board first observes that the issues raised by this Objection were the subject of considerable discussion by the Board in its Second Notice Opinion of December 6, 1989 (pp. 12-17), which has already been supplied to the Joint Committee, and are also the subject of considerable discussion by the Board in its Final Opinion of January 25, 1990 (pp. 27-35) which will be transmitted along with this Response to Objection.

In the interests of brevity, this Response is supplemental to those contained in the text of the Board's Opinions.

1. Section 28.2 of the Environmental Protection Act requires the Board to adopt rules which "fully meet the applicable federal law", which establishes an adoption date of February 4, 1990.

Section 28.2 of the Environmental Protection Act establishes procedures for the adoption of a "required rule", defined in part as one "needed to meet the requirements of the federal Clean Water Act (CWA)". Section 28.2 goes on to provide that "[w]henver a required rule is needed, the Board shall adopt a rule which fully meets the applicable federal law".

Pursuant to Section 28.2, the Agency has certified that water toxic rules are "required rules"; the United States Environmental Protection Agency (USEPA) has also presented testimony and comment that the adoption of rules is required on or before February 4, 1990 pursuant to Section 303(c)(2)(B) of the CWA.

Section 303(c)(2)(B) of the Water Quality Act of 1987 provides in part that all states "shall adopt criteria for all toxic pollutants listed pursuant to Section 307(a)(1) ... as necessary to support such designated uses. ... Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available ... such states shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to Section (a)(8)." (33 U.S.C. §303(c)(2)(B)).

2. Where "specific numerical criteria" are not available, federal law requires the adoption of specific procedures for their development. The rules contained in 302.Subpart F establish such procedures.

The term "criteria", as used by USEPA, has not previously been used in Illinois environmental regulations. The term used for rules of general applicability is "standards". In the context of this rulemaking, some "specific numeric criteria" are "not available" for timely adoption by the Board as rules of general applicability; the Board has proceeded with this rulemaking on the basis of the Agency proposal, and includes within Section 302.208 the numeric standards which have been demonstrated by the Agency to the Board as appropriate for application on a state-wide basis.

Where specific numeric standards have not been adopted, USEPA guidance documents provide that a state may satisfy the CWA mandate by adopting narrative water quality criteria procedures. The 302.Subpart F rules are intended to establish such procedures.

3. Based on Illinois case law, concerning delegation of rulemaking authority, the Board believes that the 302.Subpart F rules are permissible "directives" to the Agency consistent with the Environmental Protection Act and IAPA. The Board further believes that to allow the Agency to adopt IAPA "data requirements and test procedures" is impermissible, and is the type of Agency rulemaking to which the Joint Committee itself has objected.

The commentators in this proceeding have each discussed the three principal Illinois court cases which have examined Board rules to determine whether the Board has improperly delegated rulemaking authority. While the commentators disagree over whether these Section 302 rules constitute an improper delegation, they do agree as to the analysis used by the court. As the Illinois Steel Group has stated, "[t]hese cases draw a distinction between a delegation of authority and a directive. These cases suggest that a directive from the Board to IEPA to perform a particular act consistent with the Illinois [Environmental Protection] Act is not unlawful whereas a delegation from the Board to IEPA of the authority to set standards is unlawful."

In two cases the court found that the Board had issued permissible directives. In Commonwealth Edison Co. v. Pollution Control Board, 62 Ill. 2d 494, 343 N.E. 2d (1976), the Illinois Supreme Court validated a rule (now 35 Ill. Adm. Code 243.104) which provided that if the existing air quality in an area was better than that set by the Board in a general air quality standard, that the better existing air quality should be maintained unless a lowering of the standard was proven to the Agency to be "necessary [to] economic and social development and

will not interfere with or become injurious to human health and welfare". Such proof was designed to be made to the Agency in the course of the permit process, and the numbers derived by the Agency were to be used as air permit limitations. In affirming the rule, the Supreme Court overruled a finding by the First District Appellate Court that the rule was invalid. In U.S. Steel Corp. v. Pollution Control Board, 52 Ill. App. 3d1, 367 N.E. 2d 327 (2d Dist. 1977), the Appellate Court addressed a rule (now 35 Ill. Adm. Code 309.141(f)) which allows the Agency to establish numerical effluent limitations as conditions in NPDES permits necessary to accomplish the purposes of the CWA, even prior to promulgation of effluent standards by USEPA. The court found this to be a proper directive from the Board to the Agency, rather than an improper delegation. The court noted that it found no conflict between this rule and Section 39(b) of the Environmental Protection Act, which gives the Agency explicit statutory authority to issue permits containing "those terms and conditions...which may be required to accomplish the purposes and provisions of the Act."

On the other hand, in reviewing the very same rule as did the U.S. Steel court, the Fifth District Appellate court found the rule to be an unlawful delegation of Board rulemaking authority in Peabody Coal Co. v. Pollution Control Board, 36 Ill. App. 3d5, 344 N.E. 2d 279 (5th Dist. 1976). In so holding, the Court specifically acknowledged the prior Supreme Court and appellate court holdings in the Commonwealth Edison cases, and adopted the appellate court's opinion as more "appropriate and persuasive" than that of the Supreme Court.

The rules developed by the Board in 302.Subpart F are clearly the type of rules which were found to be permissible "directives" by the Supreme Court in Commonwealth Edison and the appellate court in U.S. Steel. In each of these rules, the Agency has been directed to calculate a number to be included in a permit to be issued by the Agency pursuant to Section 39 of the Environmental Protection Act, and subject to the review of the Board pursuant to Section 40 of the Act. The difference between the 302.Subpart F rules and the older rules considered by the courts is that the 302 rules are more specific rules; the older, pre-IAPA rules do not establish as many directives and "groundrules" for exercise of Agency discretion as do these rules.

The Board notes that the Joint Committee itself has not objected to Board rules which direct the Agency to calculate numbers to be used in permit conditions, provided that the rule articulates factors to be considered by the Agency in making such calculations. (See 35 Ill. Adm. Code 202.401, directing Agency determination of the useful life of a facility for air permits containing alternative control strategies, considered by JCAR February 23, 1984.) The Board believes that were it to fail to

issue the "data requirements and test procedures" to be used in deriving criteria as Board rules, that the rules would be defective pursuant to the IAPA. Moreover, the Board fails to see where the Agency has statutory authority to itself adopt such rules, which are of the type to which the Joint Committee has previously raised objection. (See Objection, p. 4)

4. If the Board were to direct the Agency to adopt "data requirements and test procedures" by way of IAPA rulemaking, the practical effect of such action would be to insulate Agency decisions from timely review.

As the Joint Committee has noted in its objection, it is the Board's position that criteria to be derived by the Agency pursuant to Part 302 are not rules of general applicability, but would instead be applied in permitting and other site-specific situations. The Board has made clear in Section 302.210(f) that the numbers calculated by the Agency enjoy no "presumption of validity" in the specific cases in which they will be applied. The Agency bears the burden of demonstrating that the criterion is validly derived and applied in an action before the Board. The Board's actions are then appealable in the appellate court pursuant to Sections 29 and 40 of the Environmental Protection Act.

In contrast, rules adopted by the Agency pursuant to the IAPA are not reviewable by the Board under the Environmental Protection Act; such rules are reviewable by the circuit courts pursuant to the Illinois Administrative Review Act. Review by the circuit court alone is likely to be a more lengthy process than review by the Board an appellate court, given the relatively more crowded calendars of the state's circuit courts. Until such time as an Agency rule were to be overturned by a circuit court, the Board would arguably be required to deem the Agency rule valid and apply it as written; the Board cannot opine with certainty in this area, as the Environmental Protection Act was designed to prevent such situations. The Board further notes that it would be equally arguable as to whether the Board could grant a discharger relief from an Agency rule, either by way of variance, adjusted standard, or site-specific rule; the Environmental Protection Act is clear that only the Board may grant relief from its own regulations.

The Board's view, then, continues to be that Agency adoption of even "data requirements and test procedures" by IAPA rulemaking would result in the very situation the Joint Committee's objection seeks to avoid: unlawful delegation by the Board to the Agency of the Board's duties to "determine, define,

and implement environmental control standards". The system proposed by the Board allows for site-by-site challenge of criteria as they are developed pursuant to procedures adopted by the Board. At such time as it appears that any criterion should be given statewide applicability, the Agency, the Board, or any other person can initiate a rulemaking to have a criterion elevated to the status of a standard.

Conclusion

The Board does not take a Joint Committee Objection lightly.

Section 7.06 of the IAPA sets forth the universe of possible Board responses. Neither modification nor withdrawal of the rules appears to be an appropriate response to the Objection, given the mandate of Section 28.2 of the Environmental Protection Act that requirements of the CWA be met by February 4, 1990, the Board's belief that it has proposed the only compliance option practically available to it, and its belief that the compliance option does not constitute improper delegation of the Board's rulemaking authority. Under these circumstances, the Board believes its only recourse is to refuse to modify or withdraw these proposed rules.

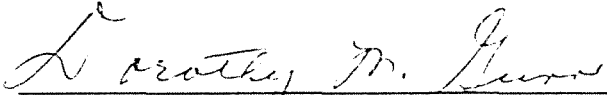
Notwithstanding its Response to Objection, the Board wishes to thank the Joint Committee and its staff for their favorable consideration of the requests made by the Board and its staff for expedited review of various phases of this proceeding. The Board appreciates the sensitivity to its desire to make a timely decision in this matter.

IT IS SO ORDERED

Board Member J. T. Meyer concurs.

Board Members J. D. Dumelle and M. Nardulli dissent.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Resolution and Order was adopted on the 25<sup>th</sup> day of January, 1990, by a vote of 5-2.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

