

ILLINOIS POLLUTION CONTROL BOARD
March 22, 1990

IN THE MATTER OF:)
)
LIMITS TO VOLATILITY)
OF GASOLINE) R88-30 (A)
) (Rulemaking)
EMERGENCY RULE.)

PROPOSED OPINION AND ORDER (by J. Dumelle):

On February 15, 1990, the Board adopted an Opinion and Order in R88-30(A) establishing a statewide 9.5 pounds per square inch ("psi") Reid Vapor Pressure ("RVP") standard during the months of July and August for this summer and each summer thereafter. Subsequent to that date, the adopted regulations were filed with the Secretary of State's Administrative Code Division for publication in the Illinois Register and for official filing. On March 16, 1990, the United States Environmental Protection Agency ("USEPA") filed a motion to reconsider the Board's February 15, 1990 decision. Although the response period has not yet expired, the Board believes that it must address this motion today or undue delay or material prejudice would result for the reasons discussed below. The Board today adopts an emergency rule which addresses USEPA's concern.

USEPA's Motion for Reconsideration

As a preliminary matter, the Board notes that the adoption of the gasoline volatility rule in R88-30(A) followed ample public notice and comment. The Board received comments from many individuals and incorporated those comments which the Board found to be reasonable. USEPA participated in this rulemaking and at no time communicated any problem with the language. In fact, USEPA specifically noted its support for the proposed amendments. That notwithstanding, however, USEPA states in its motion that two subsections of text adopted by the Board on February 15, 1990, are not consistent with USEPA requirements for approval and that unless the Board corrects these "defective" sections, USEPA "must disapprove the incorporation of this rule into the State's plan." The specific concerns are as follows.

First, Section 215.585(e) allows the measurement of RVP by test method ASTM D323 which has not been approved for use in this fashion by USEPA. The other method of measurement contained in Section 215.585(e), which is the method currently approved by USEPA to measure the RVP of gasoline, is the modification of ASTM D323 known as the "dry method", as set forth in 40 CFR Appendix E. To comply with federal requirements, USEPA states that the subsection should be modified to read:

The Reid vapor pressure of gasoline shall be measured in accordance with a modification of ASTM D323 known as the "dry method" as set forth in 40 CFR, Appendix E, incorporated by reference in Section 215.105.

Unless this subsection is modified, USEPA states that it would have "no alternative but to disapprove the Opinion and Order of the Board in proceeding R88-30(A)."

Second, Section 215.585(g) grants the Illinois Environmental Protection Agency ("Agency") authority to approve alternate sampling, test methods, or procedures without USEPA review and approval. USEPA states that "this broad discretion violated Federal requirements contained on page 2-14 of Issues Relating to VOC Regulation Cutpoints Deficiencies and Deviation, Clarification to Appendix D of the November 24, 1987 Federal Register (52 FR 45044)." In support of this belief, USEPA states:

Based on those requirements, the State was notified on June 17, 1988, that it must revise the existing federally approved plan, removing this exclusive grant of discretion from all volatile organic compound rules; such discretion renders the plan inadequate to attain and maintain the National Ambient Air Quality Standards (NAAQS) for ozone. (See the June 17, 1988, letter to Michael J. Hayes, Manager, Division of Air Pollution Control, IEPA, from David Kee, Director, Air and Radiation Division, USEPA,...)

Furthermore, in that recent case law indicates that such State discretionary approvals would modify the State Implementation Plan without Federal comment or rulemaking, USEPA cannot approve Section 215.585(g) as it is now written. (See for example United States of America v. Allsteel Inc. (No. 87C4638 ND ILLINOIS, August 30, 1989)).

(USEPA Motion, p. 2)

To comply with federal requirements, USEPA states that the following language must be added to subsection (g) to complete the section:

Upon approval of the alternate sampling or test methods or procedures contained in subsections (d), (e), and (f), the Agency will submit the methods or procedures to the United States Environmental Protection Agency (USEPA) as a revision to the State plan. Alternate methods or procedures become effective only upon approval of the incorporation of the alternative method or procedure in the State plan by USEPA.

Procedural Aspects

The Board notes that motions to reconsider rulemaking decisions pose significant procedural problems under the Illinois Administrative Procedure Act ("APA"). Once the Board files adopted amendments with the Secretary of State, the Board cannot simply amend those amendments without adherence to one of the rulemaking processes set forth in the APA, i.e., General Rulemaking or Emergency Rulemaking. In fact, once the Board proceeds to second notice in a rulemaking proceeding, the substance of the proposed amendment is established and cannot be amended except as in response to a question or suggestion of the Joint Committee on Administrative Rules. See Ill. Rev. Stat., ch. 127, par. 1005.1(b). Thus, the changes suggested by USEPA's motion, whether

substantively valid or not, present the following challenge--how does the Board adopt the changes in time for the gasoline volatility rule to be effective and enforceable come July 1, 1990?

The reasons that this rule must be enforceable by July 1, 1990, are fully discussed in the Board's Opinion of February 15, 1990. Generally, the reduction of volatile organic material ("VOM") emissions estimated to result from the operation of the gasoline volatility rule is approximately 200 tons per day in the Chicago metropolitan area alone. In other words, if this rule is enforceable, it can reduce the emission of ozone forming materials by about 200 tons per day in the Chicago area. As the Board stated in the R88-30 proceeding:

Ozone pollution is one of the nation's most serious and complex air pollution problems. Ozone is a photochemical oxidant and the major component of smog. Unlike other pollutants, ozone is not emitted directly into the atmosphere but is formed through chemical reactions among precursor emissions (volatile organic compounds or VOCs, nitrogen oxides, carbon monoxide and other compounds) in the presence of sunlight. The rate of ozone production is increased when atmospheric temperatures are warmer.

The hot summers of 1987 and 1988 resulted in high levels of ozone in the Chicago and Metro East non-attainment areas. Readings as high as 0.22 ppm by volume were recorded, which is some 83% above the federal and Illinois air quality standard of 0.12 ppm by volume. However, the ozone problem is not specific to Illinois. The United States Environmental Protection Agency (USEPA) estimates that there are more than 80 urban areas where the ozone air quality standard is being exceeded.

New and emerging scientific data is shedding more light on the effect high levels of ozone have on the general public. Ozone severely affects individuals with chronic heart, lung, and circulatory system diseases. Otherwise healthy individuals who exercise while ozone levels are high can experience reduced functioning of the lungs, leading to chest pains, coughing, wheezing, and pulmonary congestion. In addition to the health effects, ozone has been estimated to cause two to three billion dollars worth of crop damage nationally each year. Also, because the Chicago area has exceeded the ozone standard repeatedly, USEPA has imposed a construction ban on the Chicago non-attainment area which prohibits the construction or modification of major air pollution sources and thus restricts the economic development of the Chicagoland area. (Emphasis added.)

Thus, the Board is quite concerned about effectuating an enforceable rule by July 1, 1990. However, the Board also noted in the R88-30 proceeding that enforcement of the rule is contingent upon approval of the rule by USEPA as a revision to the State Implementation Plan ("SIP"). See American Petroleum Institute v. New York State Department of Environmental Conservation, 29 ERC 1457 (D.N.Y. April 4, 1989). USEPA will also require some time to approve the State rule as a SIP revision.

Obviously, the APA general rulemaking processes (i.e., first notice, second notice, and final adoption) are not appropriate to address USEPA's concerns in time to have an enforceable rule in place by July 1, 1990. However, both the Environmental Protection Act (Act) and the APA contemplate the existence of exceptional situations which can appropriately be handled only by adoption of rules in a shorter-than-usual time period. The Board believes that addressing the noted concerns in this rulemaking is one of those situations which requires such expedited rulemaking.

Pursuant to Section 27(c) of the Act and Section 5.02 of the APA, the Board may adopt a temporary emergency rule effective for 150 days without utilizing the usual rulemaking procedural steps. The 150 days will encompass the regulatory control period of July and August of this year and allow time for consideration of other steps to address USEPA's concerns for next year. The APA terms this type of rulemaking as an "emergency rulemaking", and defines "emergency" as "the existence of any situation which an agency finds reasonably constitutes a threat to the public interest, safety, or welfare." The Board believes that the ozone problem in Illinois reasonably constitutes such a threat¹, that the gasoline volatility rule, if approved by USEPA, would result in a significant reduction of ozone precursors, and that the only means by which the Board can effectuate an enforceable gasoline volatility rule under the circumstances presented herein and in time to realize the benefits therefrom is by emergency rulemaking pursuant to Section 5.02 of the APA.

Thus, the Board will proceed pursuant to the emergency rulemaking procedures to address USEPA's concerns². As a preliminary matter, the Board notes that the changes USEPA requests are of a substantive nature. Unfortunately, USEPA did not raise these concerns during the R88-30(A) proceeding, although it was kept apprised of the Board's progress during that rulemaking and although it participated actively. As USEPA's concerns were not aired previously, the Board does not have much of a record upon which it can determine what effect these changes will have. Further, the Board is not today proposing a general rulemaking to address USEPA's concerns on a permanent basis. Rather, as subdocket (B) has already been proposed, and is awaiting the preparation of an Economic Impact Study, the merits of USEPA's

¹The Board notes that under Section 27(c), paragraph 1, of the Act, the Board may promulgate a permanent regulation that "shall take effect without delay and the Board shall proceed with hearings and studies required by this Section while the regulation continues in effect." This procedure may be used "when the Board finds that a severe public health emergency exists." The Board does not believe that the present situation regarding ozone constitutes a "severe public health emergency".

²The Board notes two recent situations in which the emergency rulemaking authority was invoked: R86-9, Hazardous Waste Prohibition, October 23, 1986, and R88-12, Managing Tire Accumulations to Limit the Spread of the Asian Tiger Mosquito, April 21, 1988. R86-9 was the subject of appeal in Citizens For A Better Environment v. Illinois Pollution Control Board 504 N.E.2d 166 (Ill. App. 1 Dist. 1987). The Board's action today is consistent with the appellate decision and with the action taken in R88-12.

comments can be addressed in subdocket (B) for implementation during the regulatory control period in 1991.

The Board notes that, with respect to the test method, the "dry method" was added to subsection (e) in response to comments received from industry. As USEPA wants this method specified as the only method, the Board does not anticipate that this change will have an unreasonable impact.

With respect to the subsection (g) alternate test method language requiring test method submission to USEPA and approval as a SIP revision, the Board does not know what effect this may have on the regulated community. However, the Board notes that there is a federal regulation governing the gasoline volatility, which apparently specifies which test method is applicable. Thus, the regulated community is already subject to a USEPA approved test method. Given this particular situation, the Board does not believe that requiring USEPA approval of alternate test methods is unreasonable. However, the Board notes that this determination is made solely on the peculiar facts of this proceeding and is not intended to be precedential in nature. The Board has serious questions about the authority of USEPA to require these changes; however, the Board believes it in the best interest of the environment and the State to add the requirement here and adopt an unquestionably approvable rule so as to obtain the benefits resulting therefrom.

Finally, the Board notes that after the filing of R88-30(A) with the Secretary of State, the Board discovered that two subsections were incorrect; subsections (e) and (h) contained the first notice language without the changes made in response to comments received during the first notice period. As the Secretary of State's Administrative Code Division's regulations do not allow the Board to file corrections in this situation, the Board must correct the language of those subsections by other means. As those subsections were adopted pursuant to proper notice and comment, the Board is adding the correct language to this Order, where not amended by USEPA's changes, so as to have the correct language on the Secretary of State's files during the regulatory control period. These changes are necessary to obtain an approvable rule and therefore meet the emergency standard. Permanent corrections to those subsections are currently pending.

Finally, the Board notes that as time is short it has not scheduled a hearing or requested comment before adopting these emergency rules. That notwithstanding, the Board is aware that some interested member of the public may wish to file written comments on some aspect of today's action. So as to afford an opportunity for comments, the Board will withhold filing the emergency rule with the Secretary of State's Office for approximately 10 days--until April 3, 1990. Interested persons may file comments on this Order until that date. If the Board is persuaded to take additional action or to reconsider this Order, it can take appropriate action after that date. If the Board believes it appropriate to continue on the course contemplated by this Order, no further Orders will be issued.

ORDER

Having found that the existing situation reasonably constitutes a threat to the public interest, safety or welfare, the Board hereby adopts the following amendments pursuant to and in accordance with Section 5.02 of the Illinois Administrative Procedure Act.

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE B: AIR POLLUTION
CHAPTER I: POLLUTION CONTROL BOARD
SUBCHAPTER c: EMISSIONS STANDARDS AND LIMITATIONS FOR
STATIONARY SOURCES

PART 215
ORGANIC MATERIAL EMISSION STANDARDS AND LIMITATIONS

SUBPART Y: GASOLINE DISTRIBUTION

Section

- 215.581 Bulk Gasoline Plants
- 215.582 Bulk Gasoline Terminals
- 215.583 Gasoline Dispensing Facilities
- 215.584 Gasoline Delivery Vessels
- 215.585 Gasoline Volatility Standards
- 215.586 Emissions Testing

Section 215.585 Gasoline Volatility Standards

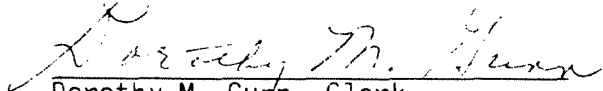
- a) No person shall sell, offer for sale, dispense, supply, offer for supply, or transport for use in Illinois gasoline whose Reid vapor pressure exceeds the applicable limitations set forth in subsections (b) and (c) during the regulatory control periods, which shall be July 1 to August 31 for retail outlets, wholesale purchaser-consumer facilities, and all other facilities.
- b) The Reid vapor pressure of gasoline, a measure of its volatility, shall not exceed 9.5 psi (65.5 kPa) during the regulatory control period in 1990 and each year thereafter.
- c) The Reid vapor pressure of ethanol blend gasolines shall not exceed the limitations for gasoline set forth in subsection (b) by more than 1.0 psi (6.9 kPa). Notwithstanding this limitation, blenders of ethanol blend gasolines whose Reid vapor pressure is less than 1.0 psi above the base stock gasoline immediately after blending with ethanol are prohibited from adding butane or any product that will increase the Reid vapor pressure of the blended gasoline.
- d) All sampling of gasoline required pursuant to the provisions of this Section shall be conducted by one or more of the following approved methods or procedures which are incorporated by reference in Section 215.105.
 - 1) For manual sampling, ASTM D4057;

- 2) For automatic sampling, ASTM D4177;
 - 3) Sampling Procedures for Fuel Volatility, 40 CFR 80 Appendix D.
- e) The Reid vapor pressure of gasoline shall be measured in accordance with either test method ASTM D323 or in the case of gasoline-oxygenate blends which contains water-extractable oxygenates, a modification of ASTM D323 known as the "dry method" as set forth in 40 CFR 80, Appendix E, incorporated by reference in Section 215.105. For gasoline - oxygenate blends which contain water-extractable oxygenates, the Reid vapor pressure shall be measured using the dry method test.
 - f) The ethanol content of ethanol blend gasolines shall be determined by use of one of the approved testing methodologies specified in 40 CFR 80, Appendix F, incorporated by reference in Section 215.105.
 - g) Any alternate to the sampling or testing methods or procedures contained in subsections (d), (e), and (f) must be approved by the Agency, which shall consider data comparing the performance of the proposed alternative to the performance of one or more approved test methods or procedures. Such data shall accompany any request for Agency approval of an alternate test procedure. If the Agency determines that such data demonstrates that the proposed alternative will achieve results equivalent to the approved test methods or procedures, the Agency shall approve the proposed alternative. Upon approval of the alternate sampling or test methods or procedures contained in subsections (d), (e), and (f), the Agency will submit the methods or procedures to the United States Environmental Protection Agency (USEPA) as a revision to the State plan. Alternate methods or procedures become effective only upon approval of the incorporation of the alternate method or procedure in the State plan by USEPA.
 - h) Each refiner or supplier that distributes gasoline or ethanol blends shall:
 - 1) During the regulatory control period, document and clearly designate state that the Reid vapor pressure of all gasoline or ethanol blends leaving the refinery or distribution facility for use in Illinois complies with the Reid vapor pressure limitations set forth in Section 215.585(b) and (c). Any facility receiving this gasoline shall be provided with a copy of the accompanying document specifying the Reid vapor pressure an invoice, bill of lading, or other documentation used in normal business practice stating that the Reid vapor pressure of the gasoline complies with the State Reid vapor pressure standard.
 - 2) Maintain records for a period of two one years on the Reid vapor pressure, quantity shipped and date of delivery of any gasoline or ethanol blends leaving the refinery or distribution facility

for use in Illinois. The Agency shall be provided with copies of such records if requested.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 23rd day of March, 1990 by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board