

ILLINOIS POLLUTION CONTROL BOARD
March 11, 1993

IN THE MATTER OF:)
AMENDMENTS TO 35 ILL. ADM.) R92-8
CODE SUBTITLE C (WATER TOXICS) (Rulemaking)
AND BIOACCUMULATION))

ORDER OF THE BOARD (by J. C. Marlin):

On February 3, 1993, the Board received a motion to stay the proceedings in this matter. This motion was filed on behalf of the Illinois Steel Group (ISG), Acme Steel Company, Commonwealth Edison, LTV Steel Company, and UNO-VEN Company (joint movants). On February 16, 1993, the proponents--Sierra Club, Lake Michigan Federation, McHenry County Defenders, and Citizens for a Better Environment (joint proponents)--filed a response in opposition to the motion to stay. On February 22, 1993, the Illinois Environmental Regulatory Group (IERG) filed a motion to be added as a signatory to the motion to stay the proceedings. Additionally, IERG's motion contains new statements in support of the motion to stay the proceedings.

On February 23, 1993, the joint proponents filed a response in opposition to IERG's motion to stay the proceedings. On February 24, 1993, the Illinois Environmental Protection Agency filed a response in opposition to the joint movants' motion to stay the proceeding.

Also on February 24, 1993, the Chemical Industry Council of Illinois filed a separate motion to stay proceedings with "agreed with and subscribed to" joint movants' original February 3 motion. Finally, on February 24 the joint movants filed a reply to the proponents' response to the joint movants' motion to stay the proceedings and a request from GE Chemicals Inc. to join the motion to stay.

The Board had originally planned to address the motion to stay at its February 25 meeting, as hearings had long been scheduled to continue on March 4, 1993. However, given its receipt of three filings late in the afternoon of February 24, and the unusual number of hotly contested complex matters in which decision was required to be reached on February 25, the Board did not reach the merits of that motion on that day. Instead, the Board's February 25 order reserved ruling on all motions, but ordered hearing to proceed on March 4-5.

As the hearings were not delayed, and no prejudice to the participants or to the Board's deliberations have occurred as a result of the February 24 filings, the Board denies the proponent's February 23 motion to strike IERG's February 22 motion to stay. IERG's February 22 motion and GE Chemical's

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February 24 motion to join in the previously filed motion to stay are granted. However, for the reasons stated below, all motions for stay are denied. This docket will proceed.

All movants for stay request that hearings be held in abeyance pending completion of two actions 1) the decision of the Illinois Supreme Court in Granite City Division of National Steel Co., et al v. IPCB, Docket 72850, and 2) and adoption by USEPA of guidance implementing the Great Lakes Water Quality Initiative (GLI).

The Granite City Appeal

The Granite City appeal challenges the water toxics rules adopted by the Board in R88-21(a) and (B). The matter was fully briefed to the Illinois Supreme Court in July, 1992, and argued in September, 1992. The case is still under advisement.

The appeal concerns, among other things, the validity of narrative water quality standards and provisions for mixing zones. The proposal in this docket seeks to amend those rules. Consequently, the movants believe it would be an "unwise use of the Board's time and resources" to proceed with this proposal, noting that the Board would be required to open yet another regulatory docket in the event the rules are remanded. (ISG Motion February 3, 1993, p. 5).

As the proponents point out, however, the validity of the R88-21(A) & (B) rules has been sustained by the Illinois Appellate Court in Granite City v. IEPA, 221 Ill.App.3d 68 (1991). The Board continues to believe that the rules were properly adopted.

Moreover, as the Agency points out in opposing the stay on this ground, "the fact that said appeal could possibly effect (sic) certain existing regulations with some relationship to proponents present regulatory proposal is not a sufficient justification for stay" given that "the proponents regulatory proposal should stand on its own regardless of whether any other regulatory proposal dealing with or affecting the same sections is filed with the Board during the course of this proceeding". (Agency Response, #. 4, 5).

The issues involved in the Granite City appeal are a mere fraction of the issues raised in the instant regulatory proposal. The Board notes that, even following the March 4-5 hearings, the proponents have not finished answering the over 300 questions prefiled by all proponents in this proceeding concerning the full scope and intent of the proposal. The Board sees no reason to postpone further elucidation of the proposal as a whole. In the event that any portion of the R88-21 rulemaking is remanded to the Board for action, the Board will then determine whether

consolidation or severance of dockets is the most practical method of consideration of any related issues.

GLI Guidance

The second asserted justification for stay is the USEPA's still-continuing development of guidance to supplement the Great Lakes Water Quality Initiative.

As IERG points out:

In further support of the Motion to Stay Proceedings, IERG states that in 1990, the U.S. Congress passed the Great Lakes Critical Programs Act, 33 U.S.C. §1267 et seq. (1990). The Act directs the USEPA to publish proposed GLI Water Quality Guidance for water quality standards and implementation procedures by June 30, 1991, and to issue final guidance to the state by June 30, 1992. The states are directed to adopt standards and procedures consistent with the guidance within two years after publication of the final guidance. See Exhibit "A".

The deadlines of the Great Lakes Critical Programs Act (June 30, 1991 and June 30, 1992) have both passed without USEPA promulgating final guidance. In September, 1992, the USEPA completed an initial review of the draft guidance and forwarded it to the Office of Management and Budget for pre-publication review. As indicated in the joint-movants' Motion to Stay Proceedings, Federal Register publication could occur in April, 1993. IERG is unaware of a final publication date for guidance to the states.

The USEPA has also received a draft scientific analysis of four technical guidance documents used to develop water quality criteria in the Great Lakes Basin, entitled, "An SAB Report: Evaluation of the Guidance for the Great Lakes Water Quality Subcommittee of the Ecological Processes and Effects Committee and the Drinking Water Committee of the Science Advisory Board ("SAB Report"). See Exhibit "B". The SAB Report is the result of an "extensive charge" from EPA Region V asking for a review of "aquatic life, wildlife, and human health criteria guidance and a new approach for assessing

bioaccumulation".

The SAB Report is, inter alia, a critique of the science supporting the current draft of the guidance documents; IERG submits that it would conserve the resources of the Board and all those with an interest in the outcome of this instant rulemaking to delay R92-8 until such time as questions concerning the science of the GLI highlighted in the SAB Report are resolved via the public notice and comment period and USEPA's final publication of guidance to the states. (IERG Motion, par. 5-9)

The joint movants generally believe that the Board should conserve its own resources, and those of all participants, and wait until USEPA adopts the final version of its guidance before amending the existing Illinois rules. They believe that:

Waiting will give the public the chance to fully debate the new concepts and issues raised by the Great Lakes guidance. Since it is clear that they will be subject to debate in the wider forum of the entire Great Lakes area, it would be precipitous to decide them as a matter of Illinois law after receiving input only from Illinois sources. (ISG Motion, par. 6)

Joint movants also question application of regulations derived from the GLI guidance to areas in Illinois outside of the Great Lake Basin.

In its response, the Agency states:

The Agency believes that any person has the right to file a regulatory proposal under the provisions of the Illinois Environmental Protection Act and the Board's rules and regulations. The Agency also believes that, if the proceeding were to continue, the proponents should be required to provide independent justification for the use of the concepts and criteria contained in the early draft of the GLI that has not been subjected to peer review or public notice. Furthermore, the Agency believes that the proponents should be required to provide specific justification for the use of those concepts and criteria for the waters of the State outside the Great Lake Basin. Finally,

the Agency believes that any proponent must be able to provide the proper justification for all other aspects of a proposal. (Agency Motion, par. 3)

The rule's proponents assert that R92-8 looks to the GLI for only a limited purpose, and that the GLI process includes many matters not necessarily germane to this proceeding. They note that:

Although some of the methodologies proposed by the joint proponents are also proposed by GLI. The methods were derived from U.S. EPA 1986 guidance, "Quality Criteria for Water 1986 (EPA 440/5-86-001)," and are already substantially in effect in several Great Lakes states, including Wisconsin.

Contrary to the joint movants' position, the GLI methodology is not radically new or different. The methodology for setting bioaccumulation factors in R92-8 is based upon long-standing and established methods from the Gold Book and are substantially similar to the methods used in Wisconsin, Indiana and Michigan that have been debated, reviewed negotiated and finally incorporated into the GLI.

The methodology proposed by the joint proponents for developing formulas to determine bioaccumulation factors was developed by state and federal water standards experts, in cooperation with non-governmental participants for the Great Lakes Water Quality Initiative in recognition that current water quality standards fail to deal adequately with the long-term chronic effects of persistent toxic chemicals. Whether or not the formula is ultimately adopted as federal guidance through the GLI is irrelevant, because under the GLI, state regulations that produce similar or better results than federal guidance would be allowed to stand in any case. (Proponents' Response to ISG, par. 5-7)

As to IERG's additional argument that the SAB report justifies a delay in this proceeding, the proponents argue that:

the SAB report notes that the ". . .BAF (Bioaccumulation factor) procedure is more

advanced and scientifically credible than existing BCF procedures". The SAB report endorses the concept of BAF. Any issues or questions about the BAF methodologies in the R92-8 proposal that are raised by this report would appear to be proper subjects of discussion in these proceedings. Only by going forward with these proceedings can the Board give full consideration to all of the scientific evidence. A stay of these proceedings would certainly not accomplish this goal. The Board should deny IERG's motion to stay. (Proponents' Response to IERG, par. 4)

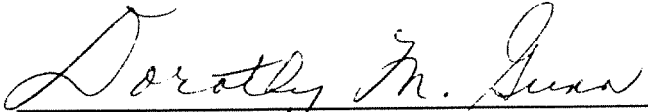
The Board notes that this record contains no indication as to when final USEPA action--already overdue--could occur. While the Board appreciates joint movants' desire to avoid duplication of effort at the state and federal levels, it is also the Board's long experience that federal action may often be delayed for reasons which do not relate to Illinois concerns, and that to find that the Board is effectively "preempted" from considering regulation in an area which is also under scrutiny may unacceptably delay resolution of Illinois issues.¹ The Board concurs with the belief of the Agency and proponents that the proponents should be afforded the opportunity to make a record concerning any need and justification for regulatory change. While the Board appreciates the participants' concerns about the possibility of multiple dockets on different time tracks, the Board again notes that we will carefully assess case management needs if and when the situation arises.

Again, the motions to stay are denied. Hearings will proceed in this docket.

IT IS SO ORDERED.

¹ One example is regulation of non-hazardous waste landfills. See R88-7, In the Matter of: Development Operating and Reporting Requirements for Non-Hazardous Waste Landfills, Opinion p. 43-52 (February 25, 1988) and Opinion p. 26-28 (March 1, 1990).

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 11th day of March, 1993, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board