

ILLINOIS POLLUTION CONTROL BOARD
October 27, 1989

IN THE MATTER OF:)
)
RACT DEFICIENCIES - AMENDMENTS)
TO 35 ILL. ADM. CODE 201, 211) R89-16
AND 215.) (Rulemaking)

Order of the Board (by J.D. Dumelle):

On October 5, 1989, the Board adopted an Opinion and Order sending the Illinois Environmental Protection Agency's (Agency) proposed amendments to 35 Ill. Adm. Code 201, 211, and 215 for First Notice. In that Opinion, the Board noted that these proposed amendments were filed in response to a settlement agreement submitted in the lawsuit of Wisconsin v. Reilly. The Board noted that in order to achieve the goal of state adoption of the amendments by May 25, 1990, the Board would proceed under a tentative schedule set forth on the October 5 Order, which included a date for a special Board meeting to determine whether an economic impact study should be prepared. Proper notice having been given for today's special meeting, the Board hereby determines that an economic impact study should not be prepared.

As a preliminary matter, the Board notes that in its proposal, the Agency certified that the proposed amendments met the "required rule" definition contained in Section 28.2 of the Environmental Protection Act (Act). Section 28.2(c) states in pertinent part:

Within 21 days of the date that the Board accepts for hearing a proposal for a required rule, any person may request the Board to determine that an economic impact study should be prepared or that an economic impact study should not be prepared. Such request shall be made to the Board in writing and shall detail the reasons for the request. *** Within 60 days of the date that the Board accepts for hearing a proposal for a required rule, the Board shall determine whether an economic impact study should be conducted. The Board shall reach its decision based on its assessment of the potential economic impact of the rule, the potential for consideration of the economic impact absent such a study, the extent, if any, to which the Board is free under the statute authorizing the rule to modify the substance of the rule based upon the consideration the Board deems appropriate. The Board may identify specific issues to be addressed in the study.

Two public comments were filed within 21 days of the date that the Board accepted the proposal. On October 19, 1989, the Agency filed a motion regarding an economic impact study. In its motion, the Agency moves the Board not to conduct an economic impact study (EcIS) in this proceeding. Regarding the assessment of potential economic impact, the Agency states that this a unique situation. The Agency argues that:

[t]he proposed rules may be promulgated by the Board or the United States Environmental Protection Agency (USEPA) as part of the Federal Implementation Plan, or both. One thing is relatively certain, these rules will be codified in either the state or federal regulatory systems, if not both, and emission sources will be required to come into compliance. The economic impact will result whether or not the Board acts on this proposal. The question remains, however, as to the timing of promulgation and the economic impact of an earlier adoption by the Board.

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Several scenarios regarding timing can be envisioned. If the Settlement Agreement is not accepted by the District Court, these corrections will be promulgated by USEPA by March 18, 1990. Shortly after that time, they may be promulgated by the Board as well. If the Settlement Agreement is accepted by the District Court, the Board has until May 25, 1990 to promulgate these rules so as to avoid the need for federal rulemaking. In the event of the Board's failure to meet the schedule in Exhibit C of the Settlement Agreement, USEPA will promulgate them by March 18, 1990, or six months after any failure, but in no event later than December 31, 1990. Therefore, under all circumstances, the Board's promulgation will only be a maximum of seven months before the final date of USEPA promulgation (December 31, 1990).

* * *

The Agency points out that the potential economic impact of an earlier adoption of the rule (a maximum of seven months) is slight. Variance proceedings are available to emission sources with extreme economic or technical hardships. The most compelling argument, however, is the very limited degree to which the Board can modify the substance of the proposed rules. Any change, however slight, to the content of the proposed rules could

render them unapprovable by USEPA. In sum, the guidance presented in Section 28.2(c) of the Act does not compel the Board to conduct an EcIS.

On October 23, 1989, the Illinois Department of Energy and Natural Resources (DENR) submitted its comments on the appropriateness of an EcIS. DENR also believes that a formal EcIS is not appropriate for this proceeding. Noting that the Board, the Agency, and DENR are all equally constrained by the settlement agreement schedule, DENR states that it wishes to underline the extraordinary nature of the agreement and this docket. Further, DENR points out that the Act permits 6 months for DENR to perform an EcIS ordered by the Board. It is DENR's considered judgment, consistent with legislative intent, that 6 months is the absolute minimum necessary to provide the Board with any credible EcIS. DENR argues that the Board cannot and will not be well served by ordering a two month EcIS, which would be needed to meet the settlement agreement schedule, on such a crucial matter. DENR contends that the Board can and will be better served by looking to the numerous scheduled merit hearings to provide any relevant economic information which may be lacking in the Board's voluminous RACT proceedings' files. Finally, DENR encourages all participants to make every effort to provide all information necessary for their economic case.

Pursuant to Section 28.2(c) of the Act, the Board determines that an EcIS should not be conducted. First, while it is the Board's assessment, at this point, that the proposed amendments may result in an economic impact on some portion of the regulated community, the Board firmly believes that there is ample potential for consideration of the economic impact absent such a study. The Board notes that hearings have been scheduled and noticed for December 7, 8, 14, and 15, 1989. The Board believes that four days of hearing are more than enough to permit submission of information, which includes economic information. However, if four days is not enough, the Board has directed its hearing officer to continue the hearing on a day to day basis as needed. Further, the Board agrees with the commenters that much of the subject matter involved in these proposed amendments has been the subject of prior Board rulemakings in which economic impact studies were prepared. Portions of those existing studies may be relevant to this rulemaking. Participants are encouraged to submit information, with specific reference to supporting materials in the existing studies, of the economic effect the proposed amendments may or will have.

Also, the Board notes that there is some merit in the Agency's argument that the economic impact in issue is that caused by the Board's adoption of the amendments before USEPA adopts them. The Board agrees that when faced with certain adoption of the same or similar rules by the USEPA, the economic impact of a Board adopted

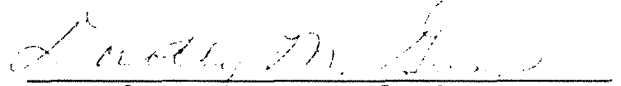
regulation appears to be minimized. However, the Board notes that USEPA also has certain procedural requirements which it must follow in its rulemaking processes and that it is one thing for USEPA to say what it may require by regulation and another thing for USEPA to complete the rulemaking process with a regulation at final adoption that is the same as that proposed. In other words, the Board, as any rulemaking agency, is aware that any up-front assertion as to what may be required by a future regulation may well be adjusted after going through the rigors of the rulemaking process. Thus, the Board must note that the Agency's argument, although attractive, is somewhat speculative as well.

Finally, the Board takes under advisement the Agency's position that there is a very limited degree to which the Board can modify the substance of the rule based upon the conclusions of such a study, if one were to be done. The Board notes that while USEPA has stated in its comments that if the Board adopts the proposed amendments as written it intends to approve the regulations as a SIP revision, USEPA has not stated that any other version, determined to be appropriate by the Board, would be unapprovable. Also, the Board notes that this is one of the first rulemaking proceedings in which the Board is acting under Section 28.2 of the Act. As such, the Board notes that it is one of the first times that the interrelationship, if any, between Sections 28.2 and 27 of the Act is raised. The Board notes that the Section 27 requirement that the Board consider the "technical feasibility and economic reasonableness" in adopting regulations may or may not apply in the context of a Section 28.2 "required rule" rulemaking. If it does apply and if the "required rule" as proposed is determined to result in unreasonable economic impact, must the Board either modify the substance of the rule to become economically reasonable or decline to proceed with the rulemaking? The Board specifically requests comment on this issue during this proceeding.

For all of the foregoing reasons, the Board determines that DENR should not prepare an EcIS in this proceeding. However, in light of the relationship of this proposal to the Wisconsin lawsuit and the short time frame involved, the Board specifically requests DENR to remain an active participant and to submit any economic information that it may have available or that it can acquire during the hearing process, such information to include economic impact studies, or relevant portions thereof, prepared in previous rulemaking proceedings.

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 27th day of October, 1989, by a vote of 6-5.



Dorothy M. Gunn, Clerk,
Illinois Pollution Control Board