

ILLINOIS POLLUTION CONTROL BOARD
January 5, 1989

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO) R88-21
TITLE 35, SUBTITLE C)
(TOXICS CONTROL))

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

The first matter comes before the Board on a December 22, 1988 motion by the Illinois Environmental Protection Agency ("Agency") requesting the Board to direct the Agency to draft a consolidated rule proposal incorporating the proposed Narrative Toxics Control (Part 377) into 35 Ill. Adm. Code Sec. 203 (the Board's Water Quality Standards). As requested the Board hereby grants this motion and directs the Agency to draft a consolidated rule proposal incorporating the Narrative Toxics Control (Part 377) into 35 Ill. Adm. Code Sec. 203.

The second matter comes before the Board upon questions raised in the December 6-7, 1988 hearings concerning the status of proposed Part 379, the "Illinois Mixing Zone Policy", to which the Agency indicated it would take Board direction. After consideration, the Board directs the Agency to propose pertinent parts of Part 379 as Board rules.

The third matter comes before the Board on a December 22, 1988 motion by the Agency requesting the Board to "consider and adopt" the Proposed Amendments to the Illinois Toxic Control Strategy and the Proposed Amendments to Title 35: Subtitle C. The Board hereby accepts, but does not adopt, the Proposed Amendments to the Illinois Toxic Control Strategy and the Proposed Amendments to Title 35: Subtitle C.

The fourth matter comes before the Board on an oral motion made at hearing by the Illinois Environmental Regulatory Group ("IERG"). The motion requests that hearings be suspended until February to allow IERG opportunity to minimize their areas of disagreement with the Agency, and to consider further amendment to the proposal. Regardless of the outcome of any negotiations between the Agency and IERG and any other group, the Board finds merit in suspending further hearings until February to allow the Agency time to prepare amendments to its proposal consistent with its Order; no hearings shall be held in January, 1989.

The fifth and final matter arises due to certain amendments to the Act enacted in SB 1834, P.A. 85-1048, effective January 1, 1989. Among other amendments, SB 1834 adds a new Section 28.2 to the Act. New Section 28.2 provides:

Section 28.2

- (a) For the purposes of this Section, "required rule" means a rule that is needed to meet the requirements of the federal Clean Water Act,

Safe Drinking Water Act, Clean Air Act (including required submission of a State Implementation Plan), or Resource Conservation and Recovery Act, other than a rule required to be adopted under subsection (c) of Section 13, Section 13.3, Section 17.5, subsection (a) or (d) of Section 22.4, or subsection (a) of Section 22.7.

- (b) Whenever a required rule is needed, the Board shall adopt a rule which fully meets the applicable federal law, and which is not inconsistent with any substantive environmental standard or prohibition which is specifically and completely contained and fully set forth within any Illinois statute, except as authorized by this Act. In determining whether the rule fully meets the applicable federal law, the Board shall consider all relevant evidence in the record.
- (c) 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. To aid the Board in determining whether an economic impact study is needed, the person filing a request that an economic study be prepared or requesting that an economic study not be prepared shall describe to the extent reasonably practicable the universe of affected sources and facilities and the economic impact of the proposed required rule.

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 conclusions of such a study, and any other considerations the Board deems appropriate. The Board may identify specific issues to be addressed in the study.

- (d) If the Board determines that an economic impact study is necessary, the Department shall prepare an economic impact study in accordance with "An Act in relation to natural resources, research, data collection and environmental studies", approved July 14, 1978, as amended. The economic impact study shall be prepared within 6 months of the date of the Board's decision that an economic impact study should be conducted. If the economic impact study is not submitted to the Board within that 6 month period, the Board may proceed to adopt a required rule without an economic impact study. If the Board notifies the Department that it will proceed to adopt a required rule without an economic impact study, the Department need not complete the economic impact study. To the extent possible consistent with subsection (b), the Board shall conduct a hearing on the economic impact of the proposed required rule.

- (e) When the Agency proposes a rule which it believes to be a required rule, the Agency shall so certify in its proposal, identifying the federal law to which the proposed rule will respond. The Board shall reference such certification in the first notice of the proposal published in the Illinois Register pursuant to the Illinois Administrative Procedure Act. First notice of the proposal shall be submitted for publication in the Illinois Register as expeditiously as is practicable, but in no event later than 6 months from the date the Board determines whether an economic impact study should be conducted.

(Source: Amended in SB 1834, P.A. 85 1048, effective 1/1/89)

It is well settled Illinois law that:

As a general rule...statutes will not be construed retroactively unless it clearly appears such is the legislative intention. But this general rule is not ordinarily applied to statutes which relate merely to remedies and forms of procedure and which do not affect substantive right. Hogan v. Bleeker, 29 Ill.2d 181, 184, 193 N.E.2d 844 (1963).

Moreover, the Illinois Supreme Court has consistently directed that "in all cases involving statutes which merely change the procedure, such statutes should be complied with as far as is practicable in all pending and undetermined causes." McQueen v. Conner, 385, Ill. 455, 459 53 N.E.2d 435, 437 (1943). See also Nelson v. Miller, 11 Ill.2d 378, 143 N.E.2d 673 (1957) and cases cited therein.

In this case, there is ample hearing testimony by representatives of both the Agency and USEPA that the proposed regulations are required to meet requirements of the Clean Water Act, and that regulations must be in place before February, 1990. The proposal currently before the Board does not, however, appear to meet the certification requirements of Section 28.2(e) of the Act.*

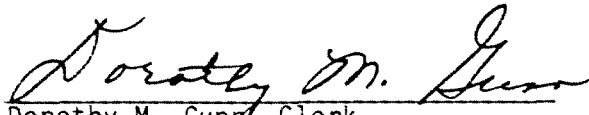
As to the issue of an EcIS in this proceeding, by letter filed December 21, 1988, DENR advised the Board of its conclusion that an EcIS should be performed, thereby preempting a Board decision in this matter pursuant to Section 28.2(c). This leaves for resolution, however, the question of when the six-month period for preparation of the EcIS specified in Section 28.2(d) begins to run. While such period arguably would begin to run January 1, 1989, the Board believes that the more prudent course is to construe the period as commencing upon the Board's receipt of a formal written certification pursuant to Section 28.2(e). The Board hereby directs the Agency to prepare and file such a certification as expeditiously as practicable.

* The Board notes, however, that the Agency was directed, in response to a motion made at hearing, to prepare a statement essentially equivalent to such a certification. (R. 599-603).

This Order does not establish deadlines for the filing of a revised Agency proposal and Agency certification, and does not set a schedule for future hearings, as the Board believes that such dates are better set by the Hearing Officer in consultation, to the extent reasonably practicable, with the Agency and other participants. The Board notes, however, that the time frames for activity in this docket are very tight, and would require Board adoption of a second notice Opinion and Order in December, 1989 if the testified-to federal deadline is to be met. The Board will accordingly monitor the progress of this docket quite closely, and will act as necessary to avoid any prejudice to the Board's ability to render a timely decision.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Interim Order was adopted on the 5th day of January, 1989, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board