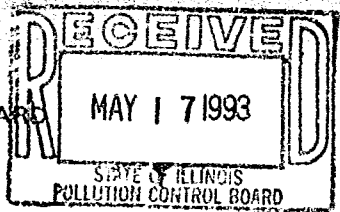


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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

THE MATTER OF:)
)
EMERGENCY RULE AMENDING THE)
STAGE II GASOLINE VAPOR RECOVERY)
RULE IN THE METRO-EAST AREA,)
)
ILL ADM. CODE 219.586(d))

R93-12
(Rulemaking)

NOTICE

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601

Matthew J. Dunn, Chief
Environmental Control Division
Office of the Attorney General
100 W. Randolph St., 12th Floor
Chicago, IL 60601

Bill Derham
Research & Planning
Energy & Natural Resources
325 W. Adams
Springfield, IL 62704

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Response to Board Order of May 5, 1993 of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ENVIRONMENTAL PROTECTION AGENCY
THE STATE OF ILLINOIS

Rachel L. Doctors
Assistant Counsel
Division of Legal Counsel

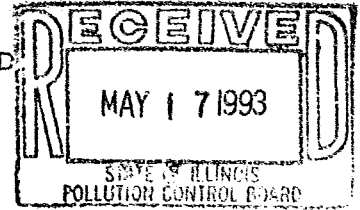
FILED: May 14, 1993

Box 19276
Springfield, Illinois 62794-9276
618/524-3333

THIS FILING IS SUBMITTED
ON RECYCLED PAPER

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD



IN THE MATTER OF:)
)
EMERGENCY RULE AMENDING THE) R93-12
STAGE II GASOLINE VAPOR RECOVERY) (Rulemaking)
RULE IN THE METRO-EAST AREA,)
35 ILL ADM. CODE 219.586(d))

RESPONSE TO BOARD ORDER OF MAY 5, 1993

NOW COMES the Illinois Environmental Protection Agency by its attorney, Rachel L. Doctors, and moves that the Board grant its Motion of April 30, 1993 to file an emergency rule delaying the compliance date of 35 Ill. Adm. Code 219.586(d). In support of the Motion, the Agency states as follows:

1. The Board found on May 5, 1993, that it needed additional information before it can rule on the merits of the Agency's request for emergency rules to delay the compliance date of 35 Ill. Adm. Code 219.586(d)(1), specifically why an emergency exists.

2. The authority to promulgate emergency rules for Stage II rests with the Board. Section 27(c) of the Environmental Protection Act provides:

When the Board finds that a situation exists which reasonably constitutes a threat to the public interest, safety or welfare, the Board may adopt regulations pursuant to and in accordance with Section 5.02 [now Section 5-45] of the Illinois Administrative Procedure Act. [415 ILCS 5/27(c).]

3. The Administrative Procedure Act leaves the determination of what constitutes an emergency with the substantive expertise of the agency that promulgates the rule. The Administrative Procedure Act provides guidance in its definition of "emergency" that there be a threat to public interest. Section 5-45 of the Administrative

Procedure Act provides in pertinent part:

"Emergency" means the existence of any situation that any agency finds reasonably constitutes a threat to the public interest, safety, or welfare. If any agency finds that an emergency exists that requires adoption of a rule upon fewer days than is required by Section 5-40 and states in writing its reasons for that finding, the agency may adopt an emergency rule without prior notice or hearing upon filing a notice of emergency rulemaking with the Secretary of State under Section 5-70. [5 ILCS 100/5-45.]

4. The Agency emphasizes that control of vapors from gasoline fueling in Metro-East is necessary, either in the form of Stage II controls or onboard controls. Such control is required by the Clean Air Act (42 U.S.C. § 7511a(b)(3) and (c)). The question now, in light of the Court's decision in NRDC v. Reilly, 983 F2d 259 (D.C. Cir., 1993)¹, is whether imposition of Stage II controls at this time is necessary. If stage II controls at this time are not necessary, then compliance with the Stage II requirements constitutes an arbitrary and unreasonable hardship to small businesses located in an economically depressed area of the state.

5. As discussed in the Agency's April 30, 1993, Motion, once the USEPA promulgates the rules for Onboard Recovery Systems, there is no longer a federal requirement for Stage II vapor recovery controls. There are three different compliance dates, depending on the size and age of the facility, at 35 Ill. Adm. Code 219.586(d). The May 1, 1993, deadline applies to facilities modified or built after November 1, 1990. Therefore, if USEPA promulgates Onboard rules prior to November 1, 1993, Illinois will be in a position where a rule that was intended to apply to a whole group of sources will apply to only a portion based on when USEPA promulgates Onboard Recovery rules. Gasoline stations that do have to install Stage II will be at a competitive disadvantage to

¹USEPA has informed the Agency that it has not appealed the D.C. Circuit Court's ruling in this case and that it does not intend to.

those that do not. Further, the Agency will have an obligation to enforce this rule only against a segment of the group to which it was intended to apply. Like sources of pollution will not be treated the same.

6. As discussed in the Agency's April 30, 1993 Motion, once an automobile has onboard recovery equipment, Stage II controls would result in no further improvements in air quality. Stage II controls represent duplicative controls.

7. Mr. William Deustch of the Illinois Petroleum Association has called the Agency to describe the hardship that would fall on the affected gasoline station owners and operators. Installing Stage II vapor recovery controls imposes a significant hardship on small businesses. Gasoline stations operate on a very slim profit margin of two to four cents a gallon. It will cost each gas station between \$40,000 and \$100,000 to install Stage II controls. Clearly the cost of the control outweighs the marginal benefit of immediate reduction in emissions. This expense is clearly a hardship on these businesses, and some may have to close or reduce staff. The Metro-East area already has a high rate of unemployment; clearly more is not in the public interest nor is restricting access and increasing the cost of a necessary commodity. Moreover, with the promulgation of the onboard rules, air quality will be improved, as it would be with implementation of Stage II recovery.

8. This proposal for emergency rulemaking is distinguishable from that in Citizens for a Better Environment v. Illinois Pollution Control Board, (1st Dist. 1983) 152 Ill. App. 3d 105, 504 N.E. 2d 166. In that case, the Board adopted emergency rules which were to guide the implementation of Section 39(h) of the Environmental Protection Act. Section 39(h) prohibited the deposit of hazardous waste streams in a permitted hazardous wastesite unless the waste generators and site owners and operators first

obtained specific authorization from the Environmental Protection Agency. The Court found the administrative economy the clarification represented did not justify an emergency. Here, emergency rules are being proposed to alleviate a clear and present threat to the public interest, not merely administrative ease.

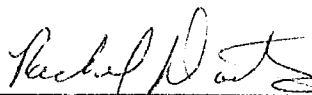
9. The Agency understands that individuals affected by the rule are filing comments with the Board in response to the Board's May 5th order. These comments should demonstrate first-hand the economic hardship that will be suffered by these small businesses. Further, the Agency understands that few if any sources affected by the May 1, 1993, deadline for implementation of Stage II controls are in compliance.

WHEREFORE, for the reasons stated above, the Illinois Environmental Protection Agency moves that the Board grant the Agency's April 30, 1993 Motion to file with the Secretary of State an emergency rule that delays the first compliance date for Stage II gasoline vapor recovery in the Metro East area, found at 35 Ill. Adm. Code 219.586(d)(1), for 150 days as provided by the Administrative Procedure Act at Section 5-45.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

by



Rachel L. Doctors
Assistant Counsel
Bureau of Air

DATED: May 14, 1993

P.O. Box 19276
Springfield, Illinois 62794-9276
217/524-3333

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

AFFIDAVIT

I, RACHEL DOCTORS, having been first duly sworn upon oath, depose and state as follows:

1. I am employed by the Illinois Environmental Protection Agency as Assistant Counsel assigned to the Bureau of Air, Regulatory Development Unit.
2. As part of my duties, I have been assigned responsibility for the proposal that the Board adopt an emergency rule in the Metro-East area regarding Stage II gasoline vap. recovery. That proposal is docketed at R93-12.
3. I have prepared the foregoing Response to Board Order of May 5, 1993.
4. The contents of that Response are true and correct to the best of my knowledge.

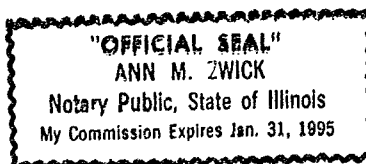
FURTHER AFFIANT SAYETH NOT.

Rachel Doctors

SUBSCRIBED AND SWORN TO BEFORE

ME THIS 14TH DAY OF MAY, 1993.

Ann M. Zwick
NOTARY PUBLIC



STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

PROOF OF SERVICE

I, the undersigned, on oath state that I have served the attached Response to Board Order of May 5, 1993 upon the person to whom it is directed, by placing a copy in an envelope addressed to:

Federal Express:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 W. Randolph, Suite 11-500
Chicago, Illinois 60601

First Class Mail:

Matthew J. Dunn, Chief
Environmental Control Division
Office of the Attorney General
100 W. Randolph St., 12th Floor
Chicago, IL 60601

Bill Denham
Research & Planning
Energy & Natural Resources
325 W. Adams
Springfield, IL 62704

and mailing it from Springfield, Illinois on May 14, 1993 with sufficient postage affixed.

Richelle K. Tucker

SUBSCRIBED AND SWORN TO BEFORE ME

this 14th day of May, 1993

Anne M. Alexander

Notary Public

