

ILLINOIS POLLUTION CONTROL BOARD  
June 25, 1987

IN THE MATTER OF: )  
 )  
NEW SOURCE PERFORMANCE ) R87-3  
STANDARDS ) R87-4

RESOLUTION IN RESPONSE TO JCAR OBJECTION

RESOLUTION AND ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board upon a June 3, 1987, Joint Committee on Administrative Rules (JCAR) Objection to rulemaking. The Pollution Control Board, by this resolution and order, respectfully declines to modify the New Source Performance Standards, 35 Ill. Adm. Code 230.440 and 230.Appendix A in response to the objection of JCAR. This response is made in accordance with Section 7.07 of the Illinois Administrative Procedure Act ("APA"). A notice of refusal to modify will be timely filed with the Secretary of State for publication in the Illinois Register.

The JCAR objection of June 3, 1987, reads in pertinent part, as follows:

The Joint Committee objects to Sections 230.440 and 230 Appendix A of the Pollution Control Board's peremptory rulemaking entitled "New Source Performance Standards" (35 Ill. Adm. Code 230) because, contrary to Section 5.03 of the Illinois Administrative Procedure Act, the Board did not file the notice of peremptory rulemaking within 30 days after a change in rules was required.

The rationale for the objection is summarized as follows:

1. Section 5.03 of the APA states that peremptory rulemaking may be adopted by an agency when rulemaking is required "as a result of federal law, federal rules and regulations, or an order of a court";
2. Section 5.03 of the APA states that, "[t]he agency shall file the notice of peremptory rulemaking [with the Secretary of State] within 30 days after a change in rules is required;"

3. The New Source Performance Standards, 35 Ill Adm. Code 230.440 and 230.Appendix A appeared in the Federal Register on February 17, 1987 (Vol. 52, No. 31, p. 4773) and February 19, 1987 (Vol. 52 No. 33, p. 5105) respectively;
4. These two peremptory amendments were filed with the Secretary of State on April 15, 1987, i.e. after 30 days after publication in the Federal Register;
5. Therefore, these rulemakings do not constitute a valid use of peremptory rulemaking authority.

First, the Board questions the accuracy of JCAR's interpretation of the applicable statutes that a peremptory amendment must be filed with the Secretary of State within 30 days after publication of the rule in the Federal Register. The Board recognizes the APA's statement that notice shall be filed "within 30 days after a change in rules is required." However, the APA does not state with clarity when such change is required. For guidance as to when the change is required, the Board notes that Section 9.1(c) of the Illinois Environmental Protection Act sets forth the authority and procedures for adopting peremptory amendments to Sections 111 and 112 of the Clean Air Act. The schedule the Board is to follow in adopting and filing these peremptory amendments is expressly set forth. Section 9.1(c) mandates that, at the "next scheduled Board meeting following promulgation of the corresponding federal regulations," the Board adopt by resolution the peremptory amendment and then file the amendment with the Secretary of State "in accordance with the [IAPA] within 60 days thereafter." The Board believes, therefore, that the change in rules is required 60 days after the next scheduled Board meeting following promulgation of the rule in the Federal Register.

The Board understands the basis for JCAR's position, but points out the seeming inconsistency in the statutory provisions relating to the filing of these peremptory amendments. The Board believes that Section 9.1(c) of the Act provides the more reasonable schedule in which to promulgate these amendments. While the Board endeavors to hold bi-weekly meetings when practicable, Section 5(c) of the Act requires the Board to hold at least one meeting a month. It is conceivable that the 30 day period, as advocated by JCAR, could fall entirely between Board Meetings such that it would be impossible for the Board to adopt the required rule. The ability of meeting a 30-day deadline is further diminished by the fact that the Board does not receive the Federal Register until days after its publication date, depending on the mails. Section 9.1(c) recognizes the time constraints involved in this process and authorizes a reasonable time for the Board to prepare, adopt, and file these amendments. Furthermore,

the Board believes that the specifically prescribed schedule of Section 9.1(c) controls over the generally applicable Section 5.03. It is a fundamental principle of statutory construction that where two rules may both apply, the more specific rule prevails. Section 5.03 of the APA is a rule of general applicability -- it applies to all administrative agencies of the State. Section 9.1(c) of the Act, however, applies only to the Board in a specifically prescribed manner. Therefore, Section 9.1(c) controls.

Second, the Board declines to modify these amendments because the only remedy would be to follow regular rulemaking procedures which, for this type of proceeding, would be unreasonably costly to the public, unnecessarily time consuming for the Board and apparently against the expressed intent of the General Assembly. Section 9.1(a) of the Act states:

The General Assembly finds that the federal Clean Air Act, as amended, and regulations adopted pursuant thereto establish complex and detailed provisions for State-federal cooperation in the field of air pollution control, provide for a Prevention of Significant Deterioration program to regulate the issuance of preconstruction permits to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources, and also provide for plan requirements for nonattainment areas to regulate the construction, modification and operation of sources of air pollution to insure that economic growth will occur in a manner consistent with the goal of achieving the national ambient air quality standards, and that the General Assembly cannot conveniently or advantageously set forth in this Act all the requirements of such federal Act or all regulations which may be established thereunder.

It is the purpose of this Section to avoid the existence of duplicative, overlapping or conflicting State and federal regulatory systems.

To avoid duplicative, overlapping or conflicting State and federal regulatory systems, the General Assembly authorized the adoption of regulations "in substance identical" to the federal regulations. The General Assembly's intent seems clear: it wanted a regulatory system for New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAPS) consistent with the federal system, but it did not want the Board to incur the expense, in time and money,

associated with general rulemaking proceedings. The General Assembly realized that it would be inefficient to go through the motions of regular rulemaking, with First Notice comment period and Second Notice JCAR review, where the final outcome was statutorily preordained. In short, the General Assembly authorized the peremptory amendment process for NSPS and NESHAPS amendments, in the first instance, to avoid regular rulemaking proceedings.

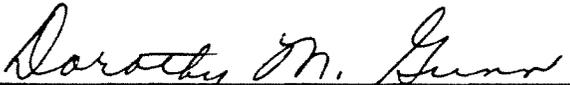
These same considerations apply where strict adherence to the formalities of adopting peremptory amendments has not been achieved. The Board has demonstrated time and again a good faith approach to adopting and filing these amendments. On occasion, strict compliance with the schedule is not attainable. In these instances, however, the Board believes that it acts within the spirit of the law. Surely the General Assembly did not intend to require regular rulemaking formalities as a remedy where its original objective was to avoid those formalities altogether. So long as rules identical in substance to the federal regulations are adopted in an efficient manner, the intent of the General Assembly is accomplished.

It therefore appears contrary to the General Assembly's intent to recommend the adoption of these NSPS amendments via regular rulemaking proceedings. It would accomplish nothing more than has already been accomplished. The goal is to incorporate the federal NSPS and NESHAPS rules into Board rules as efficiently as possible, and that has been done. The Board is certainly dedicated to an effective, efficient system of regulation, and to that end will endeavor to adopt and file these peremptory amendments as swiftly as possible. But the Board concludes that it would be inappropriate to adopt these statutorily required amendments via regular rulemaking, as JCAR recommends. The Board therefore, respectfully declines to modify the amendments in response to JCAR's Objection.

IT IS SO ORDERED.

Board Member J. Theodore Meyer dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Resolution and Order was adopted on the 25<sup>th</sup> day of June, 1987 by a vote of 5-1.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board