ILLINOIS POLLUTION CONTROL BOARD
August 7, 1980

IN THE MATTER OF:	)	
	)	
PROPOSED RULES UNDER	)	R71-9, R80-1
SECTION 25a OF THE	)	Consolidated
ENVIRONMENTAL PROTECTION ACT	)	

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

In 1971, a proposal was filed and docketed as R71-9 pursuant to Section 25(a) of the Illinois Environmental Protection Act to develop radiation standards for nuclear plants in Illinois. Subsequently, Section 25(a) was held unconstitutional, based largely upon the United States Supreme Court affirmance of Northern States Power Company v. Minnesota which found federal preemption in the area of regulation of radioactive emissions from nuclear power plants. 405 U.S. 1035, 92 S.Ct. 1307, 31 L.Ed.2d 576 (1972), aff'd 447 F.2d 1143 (1971).

Until recently, no further action has been taken on R71-9. In 1980, however, the Illinois Attorney General moved to reopen R71-9 following the passage of the Clean Air Act Amendments of 1977 which authorized limited state participation in the regulation of airborne radioactive emissions. Therefore, the Board scheduled hearings in docket R80-1 to inquire into its authority to regulate radiation emissions and has consolidated that proceeding with R71-9. Commonwealth Edison Company moved to dismiss the consolidated proceedings, and the Board set a briefing schedule to address two issues: (1) the Board's authority to regulate radioactive emissions pursuant to the federal Clean Air Act Amendments and (2) the Board's authority under the newly organized Illinois Department of Nuclear Safety. Briefs were received on behalf of the Illinois Attorney General, Commonwealth Edison Company, Mid-America Legal Foundation, Illinois Power Company and Citizens for a Better Environment. The first and last of these opposed dismissal; the others supported it.

There have been significant changes in the area of nuclear power generation since the R71-9 proposal was filed. Nine years of research and development in an area as new as nuclear energy has greatly added to our understanding of it. Further, the events at Three Mile Island have clearly underscored the need to look more deeply into regulations concerning the construction and operation of nuclear power plants, and recent amendments to the Clean Air Act have significantly changed the regulatory relationship between the states and the federal government.

It is in the light of these changes that the Board has been asked to revive R71-9 and has instituted the now consolidated R80-1. The briefs submitted concerning the motion to dismiss have greatly aided the Board in determining the scope of its jurisdiction in this area, and the Board has reached several conclusions.

First, and most importantly, the Board has determined that it does in fact have jurisdiction to regulate radioactive emissions pursuant to Section 25(a) of the Illinois Environmental Protection Act (Illinois Act) Ill. Rev. Stat., ch. 111-½, par.1001 et seq., and the Federal Clean Air Amendments of 1977 (Clean Air Amendments) 42 U.S.C. 7401 et seq.

The Clean Air Amendments have radically changed the powers of the states to regulate radioactive emissions. Congress has now expressed an intent not to preempt all state authority to regulate radiation from nuclear power plants and fuel reprocessing facilities. Therefore, the Board's holding in the Application of Commonwealth Edison Company and the Application of General Electric Company, 4PCB 445 (May 3,1972), no longer has any vitality. That decision was based on Northern States Power Co. v. Minnesota, supra, which held that the Atomic Energy Act preempts the states from regulating radioactive discharges. Without the authority to regulate radiation, the Board reasoned that it lacked authority over any non-radiation matters, such as the requirement of an environmental feasibility report, because the entire statutory scheme of Section 25(a) of the Illinois Act which granted such authority hinged on control of radioactive emissions.

The most relevant sections of the Clean Air Act which have caused this change are §302(g) and §116. A reading of these sections and of their legislative history makes it clear that limitations have been set on the extent of federal preemption. Under §302(g) "air pollutant" has now been defined to include "radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air." §116 then provides that:

> nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

Since no applicable standards or limitations yet exist under sections 111 or 112, the states now have the authority to freely regulate emissions of radioactive matter entering the ambient air pursuant to sections 302(g) and 116. Further, that authority may continue after a federal standard or limitation is in effect so long as the state regulation is no less stringent than the federal.

The legislative history clearly supports this reading. The intent of Congress is explicitly set out in House Conference Report No. 95-564 (August 3, 1977) at 143, 2 U.S.C. Congress and Administration News 1523-1524:

> Under this provision [section 122 of the Conference Bill], radioactive pollutants, including source material, special nuclear material, and by-product material are covered by section 116 of the Clean Air Act. Thus, any state, or political sub-division thereof, may establish standards more stringent than Federal, or where a Federal Standard has not been established, may establish any standards they deem appropriate. Thus the provision would not preempt States and localities from setting and enforcing stricter air pollution standards for radiation than the Federal Standards, and would not follow the holding of Northern States Power Co. v. State of Minnesota [citation omitted] in the context of radioactive air pollution.

Floor debates on the Clean Air Amendments confirm this regulatory delegation to the states (at Congressional Record H8665, H8671, H8672 and S13710, all August 4, 1977).

In summary, the Board finds that the holdings of the Application of Commonwealth Edison Company and the Application of General Electric Co., supra, and of Northern States Power Co. v. Minnesota, supra, are no longer valid precedents, that Section 25(a) of the Illinois Act is no longer preempted, and that the Board now has regulatory power over radiation emissions, as well as the other applicable provisions under that section.

Second, the Board has determined that the hearings scheduled under R80-1 have now been rendered needless, and that that part of the consolidated proceedings should be dismissed. The Board finds that the Motion to Dismiss and the attendant briefing have provided the necessary information upon which to determine jurisdiction and that any inquiry hearings at this point would be in the nature of superfluous oral argument.

Third, the Board has determined that given the nine years that have passed since the proposal was filed in R71-9, and given the great number of changes that have taken place in nuclear development, the proposals in R71-9 may well be out-dated. Further, federal regulations concerning radionuclides are,

apparently, in the process of being developed, and the promulgation of such regulations will change the context of the state/federal regulatory scheme.

Pursuant to Section 122(a) of the Clean Air Act, the Administrator of the U.S. Environmental Protection Agency has added radionuclides to the list of hazardous air pollutants in accordance with Section 112(b)(1)(A) of that act (44 Fed. Reg. 76738 (December 27, 1979)) and under Section 112(b)(1)(B) has 180 days to publish a proposed emission standard or not to promulgate a standard if he finds the pollutant is clearly not hazardous. That last step has not as yet taken place, and, therefore, there are presently no limitations on the state authority to regulate radionuclides.[1]

However, once federal standards are set, §112(d)(1) of the Clean Air Act provides:

> Each State may develop and submit to the Administrator a procedure for implementing and enforcing emission standards for hazardous air pollutants for stationary sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards.

This section in conjunction with Section 9.1 of the Illinois Act which provides that the "Board shall adopt rules which are in substance identical with federal regulations promulgated... to implement Sections...112," may limit the power of the Board to regulate radioactive emissions once federal standards are set. However, the Board is not at this time finding that §112(d)(1) of the Clean Air Act and §9.1 of the Illinois Act will foreclose the possibility of independent State regulation. As of now neither section has been triggered by the setting of federal standards.

Therefore, the Board finds that R71-9 should not be dismissed but that further proceedings are not presently appropriate. Time is needed for the Department of Nuclear Safety or any other interested proponent to develop and propose a regulatory scheme reflecting the present state of knowledge

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[1] Those briefs favoring dismissal of these proceedings have indicated that, under section 112(d)(1) of the Clean Air Act, the state's participation in regulation of radioactive discharges is limited to developing enforcement procedures only after a federal emission standard has been established for a hazardous air pollutant under Section 112(b)(1)(B). However, having found that the states now have the authority to set independent standards under Section 116, the Board finds that it could not have been the intent of Congress to set up a gap in the regulatory scheme whereby standards which are promulgated by the states pursuant to Section 116 are suspended pursuant to Section 112 when the USEPA lists a hazardous air pollutant, but before any federal standards are promulgated, only to later have USEPA standards control.

concerning radioactive emissions from nuclear power plants. To allow for this the Board finds that proceedings in R71-9 should be stayed for a period of six months.

Fourth, the Board has determined that the Department of Nuclear Safety (DNS) will have no effect on the Board's power to adopt standards under §25(a) of the Illinois Act, and that the act of proposing the DNS demonstrates that the intent of both the executive and legislative branches of the Illinois government is to have the Board exercise its powers pursuant to Section 25(a) of the Illinois Act.

In Executive Order #3 (1980) Governor James Thompson, pursuant to Article V, Section 11 of the 1970 Illinois Constitution, proposed the creation of the DNS, which would take over various powers and duties of the Department of Public Health, the office of the State Fire Marshal and the Environmental Protection Agency (EPA) and would have the powers of the EPA "to the extent that such powers relate to standards of the Pollution Control Board adopted pursuant to Section 25(a) of the Act" (Section II c(1) of Executive Order Number 3). The same Order (page 1, para.2) states that the purpose of creating DNS is to "consolidate... licensing programs and insure the safer operation of nuclear facilities."

Further, House Bill 3614, legislatively creating the Department of Nuclear Safety passed the legislature and is on the Governor's desk. The Bill amends §25(a) to add the following:

> The Department of Nuclear Safety shall enforce the provisions of this section and standards, rules and regulations adopted by the Board pursuant thereto. The Department of Nuclear Safety shall have the same authority, powers, obligations and duties as the Agency has pursuant to this Act. (Lines 956-960).

Thus, like the Governor, both houses of the General Assembly have now explicitly recognized that the Board has power under §25(a) to regulate nuclear facilities and have indicated that it should proceed to exercise that power.

The Board, therefore, finds that the proposed DNS does not alter the Board's power to regulate radioactive emissions from nuclear power plants, and that it is, in fact, the intent of the Executive and Legislative Branches of the Illinois Government that such powers should be exercised.

In conclusion, the Board has found that it presently has jurisdiction to regulate radioactive emissions. The State of Illinois, which has more nuclear reactors than any other state, should begin to examine methods of regulation which can protect the health and safety of its citizens, based upon the growing knowledge of health risks and control technology with respect to the nuclear power industry.

This opinion constitutes the Board's finding of facts and conclusions of law in this matter.

ORDER

1. Hearings set under R80-1 are hereby vacated, and that part of the consolidated proceedings of R71-9 and R80-1 is dismissed.

2. Proceedings in R71-9 are hereby stayed for a period of 6 months from the date of this order, that being February 9, 1981.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 7th day of August, 1980 by a vote of 5-0.

Christa L Moffett

Christan L. Moffett, Clerk
Illinois Pollution control Board