

ILLINOIS POLLUTION CONTROL BOARD
December 6, 1991

IN THE MATTER OF:)
)
GROUNDWATER PROTECTION: REGULATIONS FOR) RES 91-1
EXISTING AND NEW ACTIVITIES WITHIN SET-) R89-5
BACK ZONES AND REGULATED RECHARGE AREAS) (Rulemaking)
(35 ILL. ADM. CODE 601, 615, 616 and 617))
("TECHNICAL STANDARDS"))

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

In Docket R89-5, the Pollution Control Board ("Board") proposed new rules in 35 Ill. Adm. Code Parts 615, 616, and 617, and amendments at 35 Ill. Adm. Code 601. The proposal was considered by the Joint Committee on Administrative Rules ("JCAR") at its November 19, 1991 meeting. JCAR issued an objection to each of the proposed rules and amendments in this docket.

This resolution and order constitutes the Board's formal response to JCAR's November 19, 1991 objection to 35 Ill. Adm. Code 615, 616, 617, and 601. Section 7.06(c) of the Administrative Procedure Act ("IAPA") requires that an agency respond within 90 days of an objection. Section 7.06(c) of the IAPA states that an agency may, (1) modify the proposed rule or amendment to meet JCAR's objection, (2) withdraw the proposed rule or amendment in its entirety, or (3) refuse to modify or withdraw the proposed rule or amendment. For the reasons set forth below, the Board hereby refuses to modify or withdraw the proposed rules.

The Objection

The JCAR statement of objection is as follows:

The Committee objects to the rules of the PCB [cite to the specific proposed rule or amendment] because the rules are part of a groundwater protection program that creates undo (sic) burden for certain small businesses. Additionally, according to information submitted by the Board at 2nd Notice, the Board failed to consider any regulatory alternatives designed to minimize the economic impact on small businesses, as required by Section 7.06(a) of the IAPA.

The text of the objection is the same for parts 601, 615, 616, and 617.

Board Response

The Board does not take a JCAR Objection lightly.

The Board first observes that the issues raised by the objection really only pertain to the proposed new rules contained in parts 615 and 616. The amendments to part 601 only contain a change in the definition of the term "groundwater" by adding the statutory definition of the term. Proposed new part 617 was created as a "shell" for the placement of regulated recharge area determinations when these are promulgated. To date, no petitions for regulated recharge area determinations have been submitted to the Board. Therefore, the part 601 and 617 actions are merely procedural rather than substantive actions, and consequently do not involve economic issues. However, since JCAR objected generally to all four parts, the Board's response includes all four parts.

Undue Burden

The JCAR objection contains two issues. The first concerns the proposed rules as part of a groundwater protection program, that, as JCAR believes, creates an undue burden for certain small businesses¹

The Board regulations follow the directives in the Environmental Protection Act, Ill. Rev. Stat. 111 1/2, par. 1001 et seq. ("Act"), specifically section 14.4. The legislature specifically mandated that the Board regulate new and existing activities within regulated recharge areas and setback zones as part of the groundwater protection regulations². Some small businesses which store or handle pesticides and fertilizers may be affected by these rules. Pesticide and fertilizer facilities are among the activities explicitly identified by the legislature to be subject to these groundwater protection regulations. The list of activities is found at Section 14.4(a)(3) of the Act, where the Agency is to propose regulations:

prescribing standards and requirements for the following activities; . . . storage and related handling of pesticides and fertilizers at a facility for the purpose of commercial application . . .

In Section 14.4(b), the Board is to include in these regulations for existing activities:

¹ The "certain small businesses" alluded to by JCAR are, evidently, limited to agricultural facilities.

² This is an important point. The Board regulations only cover those activities within setback zones and regulated recharge areas, not the entire State.

1. appropriate programs for water quality monitoring;
2. reporting, recordkeeping and remedial response measures;
3. appropriate technology-based measures for pollution control; and
4. requirements for closure or discontinuance of operations;

and for new activities, pursuant to Section 14.4(d):

1. appropriate programs for water quality monitoring, including, where appropriate, notification limitations to trigger preventive response activities;
2. design practices and technology-based measures appropriate for minimizing the potential for groundwater contamination;
3. reporting, recordkeeping and remedial response measures; and
4. requirements for closure or discontinuance of operations.

This is not a general mandate; it includes specific directives with which the Board is attempting to comply. Therefore, the Board believes that any burden which may be placed on any businesses as a result of these rules is directly related to the groundwater protection program embodied in the specific statutory mandate, and was considered by the legislature when adopting the Groundwater Protection Act.

The Board, in attempting to comply with the mandate, does not believe that its rules create a burden due to duplication of regulation. The Board addressed this issue as it pertained to the Department of Agriculture's Part 255 rules. On page 15 of the June 20, 1991 Board Opinion and Order, the Board found that the Part 255 rules did not cover all matters addressed in the statutory mandate to the Board, and, based on the extensive record before the Board, concluded that there is a need for groundwater monitoring, closure and post-closure care, reporting and recordkeeping, and remedial response measures.

Prior to submission of Second Notice, the Board again visited this issue, addressing additional comment. In an effort to deal with and eliminate any regulatory overlap between these

rules and the Part 255 rules in response to comments, the Board added subsection (b) to Section 615.304 and Section 616.304 that require a survey plat. Subsection (b) would allow that information requirements under any other state or Federal program, which contain the same information required by the Board regulations, may be used to satisfy the Board requirement. The Board is desirous of avoiding duplication of regulatory requirements in all instances.

Furthermore, the Board is unaware of any similar groundwater monitoring requirements under federal programs for pesticides and fertilizers pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (7 USCA Sec. 136 et seq.).

In summary, the Board believes that any regulatory burden is due to the direct statutory mandate contained in the Groundwater Protection Act amendments to the Environmental Protection Act.

Consideration of Regulatory Alternatives

For the second part of the objection, JCAR believes that the Board's second notice submittal indicates that the Board failed to consider any regulatory alternatives designed to minimize the economic impact on small businesses, as required by Section 7.06 of the IAPA. Under Section 7.06, JCAR may examine proposed rules and amendments, and, in addition:

[JCAR] may consider . . . whether the rule is designed to minimize the economic impact on small businesses.

At second notice, the Board submitted information required by JCAR rules 35 Ill. Adm. Code 220.600, the State Mandates Questionnaire, and the Analysis of Economic and Budgetary Effects Questionnaire, as well as copies of the Board's first and second notice opinions and orders.

For the information required by JCAR rules, question 7 contains a "final regulatory flexibility analysis", that pertains to issues raised by small businesses during the rulemaking process. Specifically, question 7 reads:

- 7) A final regulatory flexibility analysis, which shall include the following;
 - A) A summary of the issues raised by small businesses during the first notice period; and
 - B) A description of actions taken on any alternatives to the proposed rulemaking suggested by small businesses during the first notice period, including reasons for

rejecting any alternatives not utilized.
(Ill. Rev. Stat. 1985, ch. 127, par.
1005.01(b)).

In response to this question, the Board discussed issues raised by small businesses:

- A) No one who testified or commented specifically identified themselves as a small business representative, although some who commented or testified, such as the Illinois Farm Bureau and Illinois Fertilizer and Chemical Association most likely represent small businesses as well as larger ones.

In its opinions and orders the Board addressed comments made by participants during first notice, as well as those comments and testimony offered during the five days of public hearings held in this docket. The Board reported to JCAR how it addressed the first notice comments by forwarding a copy of the second and first notice opinions, in addition to quoting portions of the second notice opinion in the information submitted pursuant to Section 220.600 (in answer to questions 7 (B) and 9).

The Board addressed the concerns expressed by the small businesses. To the extent that these concerns may be considered "regulatory alternatives designed to minimize the economic impact on small businesses", the Board not only considered some of these "alternatives", but also incorporated some "alternatives" suggested. These changes in response to comments were discussed in answer to question 9 of the Board's second notice submittal at pages 9 and 10, as well as in the second notice opinion at pages 10 and 11. In order to make it as clear as possible that the burden on these small businesses was considered, the Board, in its final opinion and order notes changes it made prior to second notice in certain monitoring and reporting requirements:

In order to strike a balance between lessening the economic burden which may be placed on smaller operators and providing a reasonable degree of assurance that a facility's groundwater protection measures are effective, a semi-annual groundwater monitoring schedule for agrichemical facilities is incorporated at Sections 615.207 and 616.208, instead of the quarterly monitoring schedule required by others, where certain conditions are met. Also, the post-closure monitoring requirement for agrichemical facilities at Sections 615.202 and 616.202 is three-years, instead of the five-years associated with other types of regulated facilities. December 6, 1991 Op. at p. 17-18.

The Board also allowed that certain reporting requirements that may be duplicative of requirements under Department of Agriculture's Part 255 rules be satisfied by the Part 255 requirement. The only requirement is that the Agency have access to the records. (Section 615.304(b) discussed above)

What the Board did not do was agree with the alternative of deleting the requirement of groundwater monitoring and Agency oversight, although that alternative was certainly considered by the Board. The Board continues to believe that the clear statutory mandate and the information contained in the record do not allow for exemption of these facilities from the groundwater monitoring requirements contained in the rules.

It is true that in answer to a question contained in the Analysis of Economic and Budgetary Effects Questionnaire the Board answered that it considered one regulatory "alternative". Since previous questions covered responses to comments, this question was read as asking whether any alternatives to the entire rulemaking package were considered. The answer to that question is one. The Board regrets any confusion which its answer to this question may have caused.

For the reasons outlined above, the Board considered regulatory alternatives designed to minimize the economic impact on small businesses identified, and incorporated those alternatives to the extent possible, consistent with the statutory mandate. In addition, as was stated in the Board's opinion at second notice and in today's final opinion:

The Board does recognize that there may be individual cases where the economic burden is abnormally heavy and reminds such parties of the adjusted standard process before the Board (pursuant to Title VII of the Act) and, in some cases, the certification of minimal hazard through the Agency (pursuant to Section 14.5 of the Act).

Also, any person may file a petition for amendment to Board regulations (Section 28 of the Act).

Conclusion

The Board does not take a JCAR Objection lightly.

Section 7.06 of the IAPA sets forth the universe of possible Board responses. Neither modification nor withdrawal of the rules appears to be an appropriate response to the Objection, given the mandate of Section 14.4 of the Environmental Protection Act and the Board's belief that it has proposed the only environmentally necessary option available to it based upon the record before it. Under these circumstances, the Board believes

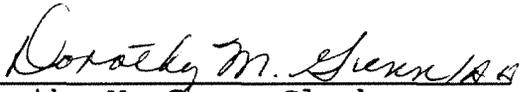
its only recourse is to refuse to modify or withdraw these proposed rules.

Notwithstanding its response to the Objection, the Board wishes to thank JCAR and its staff for their efforts and assistance in this review process.

IT IS SO ORDERED.

Board Member J. Theodore Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Resolution and Order was adopted on the 6th day of December, 1991, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

