

ILLINOIS POLLUTION CONTROL BOARD  
June 26, 1975

IN THE MATTER OF: )  
 )  
The Proposed Amendments to Air ) R74-12  
Pollution Regulations to Regulate )  
Smoking in Public Places )

OPINION AND ORDER OF THE BOARD (by Mr. Henss):

A group called The Environmental Lawyers Clinic filed a petition with the Illinois Pollution Control Board requesting that the smoking of tobacco in public places be restricted. Petitioner proposed that:

"No person shall smoke any tobacco product in any public elevator, indoor theater, library, art museum, concert hall, store, shop, restaurant, or in any means of mass transportation which is used by or open to the public, or in any public portions of any room, ward, or area of any hospital, medical or dental clinic, or in any portion of any room, chamber, place of meeting or public assembly in which the public business is transacted; except that, the owner, manager or officer in charge of any such location may designate, by prominently displayed public sign or notice, certain portions of such locations as "smoking" and "non-smoking" areas, and may permit smoking only in those areas designated "smoking" areas notwithstanding the provisions hereof, provided, however, that such "smoking" areas are located or designed so as to protect the health and safety of persons outside of such areas."

Petitioner also found it necessary to propose that the current definitions of "ambient air" and "emission source" be amended. We are asked to define "ambient air" as the "internal or external atmosphere surrounding emission sources." At the present time, ambient air is defined in our Regulation as the atmosphere external to buildings. The proposal would have us redefine "emission source" to include "any article" capable of emitting specified air contaminants "in such amounts

as to endanger the health and safety of the public". At the present time an "emission source" is any equipment or facility of a type capable of emitting specified air contaminants "to the atmosphere". Under the proposal, it would no longer be a requirement that the emission be "to the atmosphere".

The Pollution Control Board requested Petitioner and a number of other organizations to file briefs regarding the Board's jurisdiction to adopt the proposed regulation. Legal briefs were filed by The Environmental Lawyers Clinic, the Chicago Heart Association and the Illinois Association of Tobacco and Candy Distributors. A number of other organizations submitted statements which did not address the jurisdictional issue.

Section 28 of the Environmental Protection Act provides:

"Any person may present written proposals for the adoption, amendment or repeal of the Board's regulations, and the Board may make such proposals on its own motion. If the Board finds that any such proposal is supported by an adequate statement of reasons, is accompanied by a petition signed by at least 200 persons, is not plainly devoid of merit and does not deal with a subject on which a hearing has been held within the preceding six months, the Board shall schedule a public hearing for consideration of the proposal... The Board may also in its discretion schedule a public hearing upon any proposal without regard to the above conditions".

In *Gromes Supermarket vs. Pollution Control Board*, 6 Ill. App. 3rd 1036 (1972) it was held that parties who are interested in challenging the Board's jurisdiction are not entitled to judicial relief until after the hearings have been conducted. As a practical matter this means that we can schedule hearings on a proposed regulation even if we do not have the jurisdiction to ultimately adopt that regulation. We do not accept the view, however, that no more is required, to get a hearing before the Illinois Pollution Control Board, than an idea (one not plainly devoid of merit) and 200 signatures. Such a philosophy would place our time, our efforts and our environmental program at the mercy of any number of well-intentioned individuals who have ideas, of one kind or another, and the ability to collect 200 signatures. We do not believe that we are mandated to hold hearings on regulations which we have no jurisdiction to adopt. We do not choose to hold hearings in this matter unless we have jurisdiction to actually adopt the proposal.

After careful consideration of the rather sparse material available to us we find that we do not have jurisdiction to adopt the proposal. Therefore, we will not schedule hearings. The petition will be dismissed. If the reviewing Court finds that we do have jurisdiction to adopt the proposed regulation then we wish to make it known that we will schedule hearings upon receipt of the mandate of the Court.

As an administrative agency created by statute we exercise only those powers conferred upon us by the enabling statute. We do not believe that the Illinois Legislature has granted us authority to regulate the quality of the indoor air. Section 10 of the Environmental Protection Act gives this Board the authority to adopt "ambient air quality standards". The Legislature did not specify what definition should be given to the term "ambient air". However, the commonly accepted definition is that it means the outside air. The term is defined by the U. S. Environmental Protection Agency:

"Ambient air means that portion of the atmosphere, external to buildings, to which the general public has access". [40 CFR Section 50.1(e)]

The United States Supreme Court in a very recent decision stated:

"The Clean Air Act Amendments directed the Environmental Protection Agency to publish regulations describing national quality standards for the 'ambient air', which is the Statute's term for the outdoor air used by the general public." (Emphasis supplied) Train vs. Natural Resources Defense Council, 43 USLW 4467 (U. S. No. 73-1742, April 15, 1975)

The definition of ambient air is sufficiently well settled that we should not attempt to redefine it without some expression from the Legislature accepting a new definition and thereby broadening our authority.

The Legislature has specifically given this Board the authority to prescribe emission standards specifying maximum concentrations of various contaminants that may be discharged "into the atmosphere". (Environmental Protection Act, Section 10) The word "atmosphere" is used in several places in the Illinois Statute. Section 8 states that it is the purpose of the Act to assure that no air contaminants are discharged "into the atmosphere" without the treatment or control necessary to prevent pollution. Section 9(a) is a prohibition against the emission of contaminants so as to cause "air pollution". "Air pollution" is defined as the presence "in the atmosphere" of contaminants

of such quantity, characteristics and duration as to be injurious to health, etc. [Environmental Protection Act, Section 3(b)]

The word "atmosphere" is not defined in the Statute. Webster defines it as:

- "1. A gaseous mass enveloping a heavenly body (as a planet).
2. The whole mass of air surrounding the earth.
3. The air of a locality.
4. A surrounding influence or environment.
5. A unit of pressure equal to the pressure of the air at sea level or approximately 14.7 lbs. to the square inch."

The Board in the past has not established standards for indoor air. Even in the adoption of the asbestos regulation the Board noted that the indoor impact of the regulation was "merely incidental" to the attempt to regulate asbestos in the outside air. The Board's Opinion by Mr. Lawton states:

"The regulation we adopt today does not control the level of asbestos inside of a plant, largely an occupational hazard beyond our jurisdiction. (Emphasis supplied) Insofar as this Board's regulation affects what transpires inside a plant or on a construction site, the impact is merely incidental to the relationship between certain 'in-plant' activity and a significant hazard of air pollution beyond the site of such activity." (R71-16, January 6, 1972)

The Board was constrained to make this statement even though the Legislature had recognized asbestos as a serious health hazard receiving special attention in Section 9(e) of the Environmental Protection Act. That Section gave the Board especially broad powers to regulate with regard to asbestos.

We find from a reading of the entire Statute that it was designed for the regulation of the outside air. We draw this inference from the absence of certain things from the Statute as well as from the words which are actually there. For instance, in Section 2 of the Act there is no finding by the Legislature that unhealthy conditions exist in work, commercial and recreational indoor environments. There are no definitions in Section 3 for such terms as designated smoking areas, tobacco products, smoking, health hazard area. Section 5 fails to state that Pollution Control Board authority does not supplant

the express authority of the Illinois Department of Labor to enforce occupational safety and health standards under the Illinois Health and Safety Act, Illinois Revised Statutes, Chapter 48.

If we were to have authority over the indoor air, Section 10(g) would probably have stated that "the Board may adopt standards for the designation of health hazard areas in any public facility and requirements for public notice of such health hazard areas". The third sentence of Section 27 could have said: "In promulgating regulations under this Act, the Board shall take into account the existing physical conditions, the character of the area or public facility involved..."

When the Statute was adopted, the General Assembly mandated the Environmental Protection Agency to operate and arrange for the operation of devices for the monitoring of environmental quality [Section 4(b)]. The Legislature provided only such funds as were necessary for the monitoring of the external air. We believe that there was no intention to include inside air as a part of the environment subject to such control.

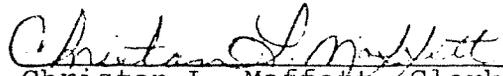
For all of these reasons we conclude that the Board has no jurisdiction to adopt the proposed regulation. Therefore, we find that the petition is plainly devoid of merit and we decline to schedule hearings on it.

This Opinion constitutes the findings of fact and conclusions of law of the Illinois Pollution Control Board.

ORDER

It is the Order of the Pollution Control Board that the Petition for Regulation filed by The Environmental Lawyers Clinic on October 22, 1974 be and it is hereby dismissed.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order was adopted the 26<sup>th</sup> day of June, 1975 by a vote of 4-0.

  
Christan L. Moffett, Clerk  
Pollution Control Board