ILLINOIS POLLUTION CONTROL BOARD
February 8, 1990

IN THE MATTER OF:	)	
	)	
RACT DEFICIENCIES -	)	R89-16
AMENDMENTS TO 35 ILL. ADM.	)	(Rulemaking)
CODE PARTS 211 AND 215	)	

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

This matter comes before the Board upon a January 24, 1990 motion to dismiss or sever proposed changes to the Generic Rule and SOCMI Leaks Rule filed by the "Industry Group." On January 25, 1990, the Board adopted an Order which noted that the Stepan Company had filed a motion to strike and motion for application of Section 28 rulemaking and granted the Illinois Environmental Protection Agency (Agency) an extension of time to February 9, 1990 to respond to the motion. On January 31, 1990, the Agency filed a motion in response to the Industry Group's motion to dismiss or sever. Although entitled a "motion," the Board construes this filing as a response to the Industry Group's motion. As a result, the Industry Group's motion is ripe for decision. The Board today finds that the proposed amendments to the Generic Rule and the SOCMI Leaks Rule are not founded upon "federal law", grants the motion to sever, and creates a subdocket (B) in which to address these proposed amendments under Section 28 of the Act.

In its motion, the Industry Group requests the Board to dismiss or sever from this docket that portion of the docket which consists of proposed changes to the Generic Rule, (specifically 35 Ill. Adm. Code 215, Subparts AA, PP, QQ, and RR) and proposed changes to one of the rules governing the emissions from the synthetic organic chemical and polymer manufacturing industry, (specifically 35 Ill. Adm. Code 215.432, hereinafter the "SOCMI rule").

In support of its request, the Industry Group argues that the Agency incorrectly certified its proposed amendments as "federally required" and, thus, the amendments were improperly proposed pursuant to Section 28.2 of the Illinois Environmental Protection Act (Act). The Industry Group argues that unlike the other rules proposed in this docket, the United States Environmental Protection Agency (USEPA) has not disapproved the Board's existing Generic Rule or the SOCMI rule, and that the Agency's proposed rules will not become federally required until such time as USEPA takes final action on the existing rules. Further, neither of these sets of rules were mentioned in the State Implementation Plan call letter dated June 17, 1988 (SIP call letter).

The Industry Group points out that in the Agency's Certification [of the rules as federally required], the Agency noted that the Generic rule changes and the SOCMI rule changes were not based upon deficiencies identified by USEPA in the SIP call

letter, but rather were identified subsequently. The Industry Group argues that the justification documents provided to the Board to support the required nature of these changes do not support the proposition that these are in fact federally required rules. With regard to the Generic Rule, the Industry Group points out that the support provided consists of a document by a "mid-level" USEPA employee to his supervisor stating that he believed that the Illinois Generic Rule was insufficient. The Industry Group argues that USEPA has not issued a SIP call letter on the Generic Rule, nor has USEPA disapproved the rule, which has been submitted to USEPA for SIP approval. With regard to the SOCMI rule, the Industry Group states that the Agency has offered as support simply the Control Technique Guidelines (CTG) for SOCMI. The Industry Group argues that "as the Board and Agency are no doubt aware, the mere fact that the Illinois rule deviates from the CTG does not mean that the Illinois rule is deficient."

The Industry Group next argues that the additional support that the Agency has provided during the course of this proceeding (i.e., (1) the "Blue Book", (2) a Federal letter, and (3) the settlement agreement) is insufficient to support the required rule status. With respect to the Blue Book, the Industry Group argues

> The "Blue Book" is a USEPA document which was intended to provide "additional clarification of those areas" where SIP deficiencies were found. *** The document itself states that the clarification neither expands nor modifies existing federal regulatory requirements, but enhances previous information provided. With regard to SOCMI, for example, "The Blue Book" simply states, "inaccessible valves are required to be monitored at least annually. *** "The Blue Book" does not expand on this provision nor does it give any justification for the necessity of this provision. Further, the Industry Group submits that no deficiency in the Illinois SOCMI Leaks Rule has been finally determined by USEPA, thus making the Blue Book inapplicable. IERG would submit that the mere reference to this rule in "The Blue Book" does not support the proposition that this rule change is required.
>
> (Industry Group Motion, p.2)

The "Federal letter," also used as justification for the required nature of these rules, is a letter dated September 28, 1989 from USEPA which constitutes USEPA's review of the regulations which the Agency subsequently proposed in this docket. The Industry Group believes that this letter was solicited by the Agency from USEPA to justify these rule changes. The Industry

Group argues that while this letter states that the rule changes being proposed are federally required, this letter is neither a SIP call letter nor the disapproval of the present Illinois Generic rule or SOCMI rule.

The settlement agreement, also relied upon as justification for the required nature of these rules, is an agreement entered into between the State of Wisconsin, USEPA, and the State of Illinois, which settled the law suit brought by the State of Wisconsin against USEPA claiming that USEPA had not acted in accordance with the Clean Air Act in regard to the Illinois SIP. In the settlement agreement, fifteen outstanding Illinois volatile organic compound deficiencies were listed, including deficiencies in the SOCMI rule and the Generic rule. The Industry Group believes that the mere fact that the deficiencies were noted in a voluntary settlement does not make these rules required rules for purposes of Section 28.2 of the Act. The Industry Group argues that:

> If any time that USEPA entered into a settlement agreement or a voluntary agreement of any sort which contemplated rule changes, when those rules were proposed, IEPA would take the position that those rules are required even though they were the product of a voluntary negotiated settlement and not the product of either a disapproval, a SIP call letter, or any definitive, final USEPA action of that sort. The Industry Group submits that in that way, any and all rules could become required rules simply by agreement.
>
> (Industry Group Motion, p. 3)

Finally, the Industry Group notes that in a Federal Register dated December 27, 1989, USEPA, for the first time, proposed to take Federal action regarding the Illinois Generic rule and the SOCMI rule by proposing to disapprove the rules. The Industry Group argues that the mere proposal by USEPA to disapprove these rules is insufficient to elevate these rules to required rule status for purposes of this rulemaking. The Industry Group argues further that (1) a proposal to disapprove is not final action, (2) such action is not appealable, and (3) it is an open question whether USEPA will ultimately finally disapprove the rules.

The Industry Group commented on other substantive issues currently pending in this docket, i.e., whether economic reasonableness and technical feasibility must be considered in a Section 28.2 rulemaking. The Board addresses this issue below.

In its response to the Industry Group motion, the Agency states as follows:

(1) The IEPA does not object to creating a separate docket for the Generic Rule and the SOCMI Leaks Rule. However, this separate docketed proceeding should be in accordance with Section 28.2 of the Act. The IEPA properly certified these regulations as federally required and the Board referenced the certification in its First Notice Order, dated October 5, 1989. Therefore, even if docketed separately, the proceeding should continue to be considered a federally required rulemaking under Section 28.2 of the Act.

(2) The IEPA strongly objects to the request to dismiss that portion of the R89-16 docket which consists of changes to the Generic Rule and the SOCMI Leaks Rule. The IEPA has repeatedly stated that these proposed regulations are federally required rules pursuant to Section 28.2 of the Act.

This constitutes the entire substance of the Agency response to the Industry Group's motion.

The Board notes that this is not the first time it has been called upon to determine whether proposed rules which have been certified as "required rules" by the Agency are in fact required rules for purposes of proceeding pursuant to Section 28.2 of the Act. The Board addressed similar issues in R88-21, (Water Toxics Control), First Notice, August 31, 1989, wherein after a review of the federal law identified by the Agency, the Board found that the proposed rules were federally required for purposes of Section 28.2 of the Act. The relevant portions of Section 28.2 are as follows:

a. For the purposes of this Section, "required rule" means a rule that is needed to meet the requirements of the federal Clean Water Act, Safe Drinking Water Act, Clean Air Act (including required submission of a State Implementation Plan), or Resource Conservation and Recovery Act, other than a rule required to be adopted under subsection (c) of Section 13, Section 13.3, Section 17.5, subsection (a) or (d) of Section 22.4, or subsection (a) of Section 22.7.

b. Whenever a required rule is needed, the Board shall adopt a rule which fully meets the applicable federal law, and which is not inconsistent with any substantive

> environmental standard or prohibition which is specifically and completely contained and fully set forth within any Illinois statute, except as authorized by this Act. In determining whether the rule fully meets the applicable federal law, the Board shall consider all relevant evidence in the record.
>
> * * *
>
> e. When the Agency proposes a rule which it believes to be a required rule, the Agency shall so certify in its proposal, identifying the federal law to which the proposed rule will respond. The Board shall reference such certification in the first notice of the proposal published in the Illinois Register pursuant to the Illinois Administrative Procedure Act. First notice of the proposal shall be submitted for publication in the Illinois Register as expeditiously as is practicable, but in no event later that 6 months from the date the Board determines whether an economic impact study should be conducted.

When the Agency filed its proposal on September 29, 1989, the Agency certified that the proposed amendments met the "required rule" definition, noted above. In the first notice, published October 27, 1989, at 13 Ill. Reg. 16645, the Board referenced the Agency's certification. Publication of the first notice was effectuated within one month of the date the Agency filed its proposal. Thus, the procedural provisions of Section 28.2(e) have been satisfied.

Now, the regulated community has challenged the Agency's certification of a portion of these rules as "required rules." The Board notes that Section 28.2 is silent on any methods or procedures by which an Agency's certification is to be challenged. It is apparently the Agency's position that such silence is to be interpreted as meaning that there is no challenge to an Agency certification. In other words, the Agency apparently believes that once it certifies a proposal as a "required rule", the Section 28.2 rulemaking procedures automatically apply and there is no review of this certification.

However, the potentially regulated community strenuously opposes this position. The Board believes that the reason for such strong opposition, at least in this proceeding, is closely intertwined with the Agency's articulated position as to the scope of a Section 28.2 rulemaking. At hearing on December 7, 1989, a representative of the Agency stated:

> The Agency is not offering testimony on the technical feasibility of compliance, the economical reasonableness of these proposed regulations or the affected facilities. This regulatory package contains corrections to deficiencies in the RACT rules identified by USEPA. According to the Settlement Agreement, if the Board fails to timely adopt the corrections in an approvable form, USEPA will promulgate federal corrections. In either case, emission sources will be required to come into compliance with rules implementing these corrections. In addition, this information is not necessary for the Board to adopt a rule that fully meets the applicable federal law. (Emphasis added.)
>
> (R. 14-15.)

Obviously, the Agency's interpretation of Section 28.2 is that once it certifies a rule as a "required rule," the Board must adopt a rule without any consideration of economic reasonableness or technical feasibility. Moreover, the Agency has stressed that whatever the Board adopts must be in "approvable form." The Agency points to USEPA's filing of September 29, 1989, in which David Kee, Director of USEPA's Air and Radiation Division, states that if the Agency's proposed regulations were adopted by the Board, USEPA's intent is to approve the regulations as a SIP revision in lieu of federal promulgation. Based upon this statement, the Agency states that the Board must adopt the rules as written, or threaten the approvability of the SIP revision.

In its motion, the Industry Group offers comment and argument strenuously opposing the Agency's position as to whether economic reasonableness and technical feasibility are to be considered in a Section 28.2 rulemaking. The Board notes, also, that a good deal of hearing time was dedicated to a discussion of whether Section 28.2 of the Act requires or excuses a consideration of economic reasonableness and technical feasibility. Further, on January 18, 1990, the Illinois Steel Group filed a Memorandum of Law Regarding Adoption of RACT Rules, which addresses these very issues. In this Memorandum, the Steel Group argues very strenuously that the Board has full authority under federal and state law, including Section 28.2, to consider economic reasonableness and technical feasibility.

The Board notes that post-hearing comments are scheduled to be filed on February 9, 1990, and the Board expects further comment and argument on this issue of whether economic reasonableness and technical feasibility are to be considered in a Section 28.2 rulemaking. As a result, the Board does not today render a

decision on whether economic reasonableness and technical feasibility are to be considered in a Section 28.2 rulemaking. The Board will address this issue in detail in a forthcoming opinion.

As a preliminary matter on the issue of the Agency certification, the Board notes that it has today proceeded to Second Notice in the Board Procedural Rules rulemaking R88-5. In that Second Notice, the Board addresses the issue of the reviewability of an Agency certification in proposed amendments to 35 Ill. Adm. Code 102.Subpart F. Although those proposed rules are not yet effective, the Board's action today is intended to be consistent with that discussion.

The Board finds that, although Section 28.2 is silent on the issue, an Agency certification that it believes a proposed rule is a "required rule" is an Agency final determination on the issue and, thus, pursuant to Section 5(d) of the Act, it is reviewable by the Board. The Board believes that this is the only possible interpretation of Section 28.2 that allows it to be read consistently with the remainder of the Act. Sections 5, 27, and 28 of the Act make it quite clear that the Board is the rulemaking body in Illinois for substantive regulations that implement the various provisions of the Environmental Protection Act. To allow the Agency unfettered discretion in certifying a proposed rule as a "required rule" would give to the Agency a profound ability, at the outset, to influence or pre-define the scope of what is relevant evidence in a rulemaking proceeding. The Board does not believe that this was the intent of the General Assembly in adopting Section 28.2. Further, the Board notes generally that under the regulatory and enforcement scheme created by the Act, the Board is the agency authorized to review the decisions of the Agency.

Of what legal significance, then, is an Agency certification? The Agency certification is the official statement that it believes its proposed rule is a required rule and the formal identification of the federal law to which the Agency believes the proposed rule will respond. As such, the Board finds that the certification is simply the formal prerequisite required to invoke the Section 28.2 expedited rulemaking procedure. Further, because the certification requires (1) only the Agency's "belief" and (2) the specific identification of the federal law requiring the proposed rule, the Board finds that the Agency certification is not entitled to any deference or presumption of correctness. The Board, as the State's authorized rulemaking agency, can independently verify, based upon the record, whether or not the federal law relied upon by the Agency actually requires the proposed rule and, thus, utilization of the Section 28.2 process.

Having found the authority to review certifications, the Board further finds that the proposed amendments to the Generic rule and the SOCMI rule are not founded upon "federal law" as that term is

used in Section 28.2 of the Act. The Board is persuaded by the thorough analysis submitted in the Industry Group motion, which is discussed above. The Board is also persuaded by the lack of analysis in the Agency's response. The Board can find nothing in the record to directly support the characterization of the Generic rule and SOCMI rule proposed amendments as "required rules." As a result, the Board finds that these proposed sections must be removed from the existing docket.

Rather than dismissing these portions of the proposal outright, the Board believes that the wisest course is to open up a subdocket (B) in which to consider the amendments proposed to the Generic rule and the SOCMI rule. The Board hereby opens subdocket (B) and directs that the proposed amendments to the Generic rule and the SOCMI rule be placed therein. That which remains of the existing proposal and the record attendant thereto shall constitute R89-16, subdocket (A). As a result of this separation of dockets, the Agency must, in essence, re-propose the amendments to the Generic rule and the SOCMI rule. The Board notes that in light of the timeframes associated with these proposed amendments and in light of the federal parallel processing, the Agency may or may not wish to re-propose the subdocket (B) rules. The Agency is hereby instructed to inform the Board on or before February 20, 1990, whether or not it wishes to proceed with the subdocket (B) proposed rules under the Section 28 rulemaking process, and if so, whether or not it believes that an EcIS should be done.

The Board recognizes that at first blush this order may seem to imperil certain portions of the Wisconsin v. Reilly settlement agreement. It does not. The relevant portion of the settlement agreement states "that it [Illinois] will submit to EPA **some or all** of the reasonable available control technology ("RACT") rules and RACT rule improvements specified for Illinois in Exhibit B." (Emphasis added). (Settlement Agreement, p. 12). First, it was entirely up to the Agency's discretion which, if any, of the rules would be proposed to the Board to satisfy this provision of the settlement agreement. As this was entirely a discretionary decision by the Agency and as the Agency has **not** proposed all of the rules specified in Exhibit B, removing the Generic rule and SOCMI rule portions will simply place them in the same position as the other rules the USEPA is promulgating, and thus will not offend the settlement agreement. Second, the rules which Illinois submits to USEPA must be properly adopted under the Environmental Protection Act and the Administrative Procedure Act. The Board does not believe that the amendments proposed to the Generic rule and the SOCMI rule will be properly adopted under Section 28.2, and the Board wants all concerned to be aware of this determination as soon as possible. Finally, today's Board action in no way affects the federal rulemaking currently pending--USEPA itself proposed on December 27, 1989, all of the RACT rules and RACT rule improvements, including the Generic and SOCMI rules, specified for Illinois in Exhibit B. The federal promulgation will continue, at

its own pace, without regard to this action.

The Board further recognizes that this Order, and the circumstances surrounding this proceeding, may be of such a nature that the Agency might find it more expedient to appeal the holdings herein directly to the appellate court. If this is the Agency's wish, the Board would be willing to certify the issue for purposes of appeal pursuant to 35 Ill. Adm. Code 101.304.

Any issues remaining after today's order will be addressed when the Board proceeds on the remainder of the R89-16, subdocket (A) proposal.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 8th day of February, 1990, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk,
Illinois Pollution Control Board