

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PROPOSED CLEAN CAR AND TRUCK) R 2024-017
STANDARDS) (Rulemaking – Air)
)
PROPOSED 35 ILL. ADM. CODE 242)

NOTICE OF FILING

TO: Don Brown Vanessa Horton
Clerk of the Board Carlie Leoni
Illinois Pollution Control Board Hearing Officers
60 E. Van Buren St., Suite 630 Illinois Pollution Control Board
Chicago, IL 60605 60 E. Van Buren St., Suite 630
Chicago, Illinois 60605

(VIA ELECTRONIC MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, the **ENTRY OF APPEARANCE of ALEC MESSINA** and **MOTION TO DISMISS** on behalf of the ILLINOIS FUEL and RETAIL ASSOCIATION, copies of which are hereby served upon you.

Respectfully submitted,
ILLINOIS FUEL & RETAIL ASSOCIATION,

By: /s/ Alec Messina
One of Its Attorneys

Dated: September 3, 2024

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CERTIFICATE OF SERVICE

I, the undersigned, on the oath state the following: That I have served the attached

ENTRY OF APPEARANCE and MOTION TO DISMISS, via electronic mail upon:

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That my email address is Alec.Messina@heplerbroom.com

That the number of pages in the email transmission is 13.

That the email transmission took place before 5:00 p.m. on September 3, 2024.

Date: September 3, 2024

/s/ Alec Messina
Alec Messina

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PROPOSED 35 ILL. ADM. CODE 242) (Rulemaking – Air)
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ENTRY OF APPEARANCE OF ALEC MESSINA

NOW COMES Alec Messina, of the law firm HEPLERBROOM, LLC, and hereby enters his appearance in this matter on behalf of the ILLINOIS FUEL and RETAIL ASSOCIATION.

Respectfully submitted,
ILLINOIS FUEL & RETAIL ASSOCIATION,

By: /s/ Alec Messina
One of its Attorneys

Dated: September 3, 2024

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ILLINOIS FUEL & RETAIL ASSOCIATION’S MOTION TO DISMISS

NOW COMES the Illinois Fuel & Retail Association, by its attorneys, HEPLERBROOM, LLC, and moves pursuant to 35 Ill. Admin. Code 102.212 for an order dismissing the Sierra Club, Natural Resources Defense Council, Environmental Defense Fund, Respiratory Health Association, Chicago Environmental Justice Network, and Center for Neighborhood Technology’s (collectively referred to as “Proponents”) regulatory proposal filed with the Illinois Pollution Control Board entitled “Proposed Clean Car and Truck Standards: Proposed Section 35 Ill. Admin. Code Part 242” (the “Proposal”) on the grounds detailed below. In support of this Motion to Dismiss, the Illinois Fuel & Retail Association states as follows:

Background

1. On June 27, 2024, the Proponents filed their Proposal with the Illinois Pollution Control Board (“Board”), proposing to adopt California’s Advanced Clean Cars II (ACC II), Advanced Clean Trucks (ACT), and Low-Nitrogen Oxides Omnibus (Low NOx) rules. The Proposal stated that if the rules are adopted in 2024, then the rules could be enforced beginning in 2027, which is vehicle model year (“MY”) 2028.
2. On July 11, 2024, the Board found the Proposal met the requirements of the Board’s procedural rules and accepted the proposal for hearing.
3. On August 13, 2024, a prehearing conference was held for this Proposal, and the Hearing Officer subsequently scheduled the first hearing for December 2 and 3, 2024.

4. Also at the prehearing conference, the Hearing Officer set a deadline to file any motions to dismiss the rulemaking to be filed on or before September 1, 2024, but later corrected that date to September 3, 2024, because of the holiday weekend.

5. Section 102.212 of the Board's regulations set forth the grounds upon which a rulemaking will be subject to dismissal or will be dismissed. Specifically, the regulations state that a rulemaking "proposal will be dismissed for inadequacy in cases in which the Board, after evaluating the proposal, cannot determine the statutory authority on which the proposal is made." 35 Ill. Adm. Code 102.212(c). As established below, this is such a case.

The Proposal Should be Dismissed for Lack of Statutory Authority

6. It is a well-established principle that, for a public body to promulgate a rule, that rule must be authorized by some grant of statutory authority. Beauchamp v. Dart, 2022 IL App (1st) 210091, ¶ 32 ("Administrative agencies have no common-law authority; rather, their power is derived from and limited to the power given them by the legislative body that created them."). This grant of authority may either be specifically provided by the plain language of the authorizing statute, or may be inferred by the general language of the statute, as long as that construction is logical and reasonable when read along with the remainder of the statutory provisions. Glass v. Dep't of Corr., 2022 IL App (4th) 220270, ¶ 29, reh'g denied (Apr. 27, 2022) (agencies have not only powers explicitly conferred by statutory language but also power to do all that is reasonably necessary to effectuate and execute the explicit powers and authorities provided by statute).

7. As there is no specific grant of authority, the Proponents rely on Sections 8 and 10 of the Environmental Protection Act to provide general authority for their submittal. Section 8 merely states that air pollution is a menace to public health and welfare, and that it is the purpose of the Act to restore, maintain, and enhance the purity of the air. 415 ILCS 5/8. Section 10 contains

the broad authority within the Act which authorizes the Board to adopt regulations that prescribe, among other items, standards and conditions regarding the sale of fuel and vehicles that “constitute an air-pollution hazard.”¹ 415 ILCS 5/10.

8. It is quite the leap Proponents ask the Board to make, to conclude that these very general provisions somehow provide the necessary authority to adopt rules that will effectively prohibit the sale of combustion engine vehicles. It would be curious to suggest that these general provisions provide such sweeping authority when Section 9.20 of the Environmental Protection Act, entitled Fleet Electrification Incentive Program, was adopted to merely promote the use of electric vehicles. 415 ILCS 5/9.20(b) (Agency is to establish rules “[t]o promote the use of eligible electric vehicles...”)

9. Further, this is not the first time the Board has been asked to consider the adoption of California’s clean car standards, and the Board’s Opinion in that matter also addressed the issue of statutory authority. In 1993, the Board dismissed a similar rulemaking proposal. In the Matter of: Application of California Motor Vehicle Control Program in Illinois, PCB R89-17(C), Opinion and Order (January 7, 1993). The Board noted that most of the evidence urged the Board *not* to adopt the California program, with interested parties citing “uncertainties associated with availability of required technology, effectiveness in reducing harmful emissions, fuel implications, and economic costs,” as well as the “unanswered questions regarding the appropriateness of California air standards to Illinois geography and climate.” Id. at 4. The Board also found that “there are a variety of questions raised regarding problems likely to arise if Illinois were the only state in the region to require California standards, including questions regarding enforcement of

¹ Notably, petroleum is specifically excluded from the definition of “hazardous substance” under the Act. 415 ILCS 5/3.215 (The term “hazardous substance” “does not include petroleum ... and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel or mixtures of natural gas and such synthetic gas.”) Thus, Section 10 of the Act does not provide authority for the proposal here.

the standards and impairment of competitiveness of Illinois businesses.” Id. at 5. In addition, the Board noted that Illinois EPA “has consistently opposed adoption of a California standards program in Illinois” for various reasons and that the Illinois Department of Natural Resources likewise recommended that the Board *not* adopt the California standards. Id. at 5-6. Accordingly, the Board may use its own precedent to dismiss this matter.

The Proposal Should be Dismissed Because the General Assembly Has Chosen
Not to Adopt These Standards

10. Various legislative proposals – including Senate Bills 2050 and 2839, and House Bill 1634 – were introduced earlier this Spring in the 103d General Assembly. Each of these proposals were similar in effect to the Proposal pending before the Board. As discussed in more detail below, none of these proposals was close to becoming law.

11. The Proposal before the Board is not the first time a proponent has sought to have environmental regulations adopted via a rulemaking before the Board on matters that the General Assembly has chosen not to adopt. This precise circumstance has been addressed by the Illinois Supreme Court in The Village of Lombard v. The Pollution Control Board, 66 Ill.2d 503 (1977). In that matter, the Court had to determine whether the Environmental Protection Act was either sufficiently specific enough or sufficiently broad enough to mandate regional water protection, concluding that it did *not* provide the statutory authority claimed by the proponent. Vill. of Lombard v. Pollution Control Bd., 66 Ill. 2d 503, 506 (1977) (“The Environmental Protection Act is neither sufficiently broad nor sufficiently specific to authorize the Pollution Control Board to mandate regional water treatment in a county.”) Part of the Supreme Court of Illinois’ reasoning was that “we find no legislative intent in the Environmental Protection Act to authorize the Pollution Control Board to promulgate a regulation involving detailed intervention by the Board

into the economic and political operation of a county and the municipalities and sanitary districts within the county.” Id. at 506–07.

12. In the present matter before the Board, the Environmental Protection Act contains no provisions authorizing the Proposal offered by the Proponents, nor have the Proponents pointed to any specific provision that authorizes the Proposal. Indeed, the Proponents have provided no authority remotely suggesting that a “detailed intervention by the Board into the economic and political operation” of certain types of motor vehicles in the State is authorized by any statute.

13. As noted in paragraph 8 above, with regard to whether the Environmental Protection Act is sufficiently broad to authorize the current Proposal, it would strain credulity to suggest that a reasonable reading of the Act includes both specific statutory provisions creating a vehicle electrification incentives program and broad authority to effectively eliminate the fuel-combustion engine.

14. Given the silence of the Environmental Protection Act as it relates to this matter before the Board, it is even more important to give the General Assembly’s efforts substantial weight. Earlier this spring, the Illinois legislature had the opportunity to take these issues up, as three proposals were introduced that would have the effect of either implementing the California standards entirely or implementing significant elements of those standards. The legislature did not enact any of these proposals; in fact, none even made it out of committee. By contrast, when choosing to take on significant environmental and energy-related legislation related to the energy transition, the General Assembly held dozens of hearings and took numerous committee votes before legislating on a similarly complicated and market-altering piece of legislation, the Climate and Equitable Jobs Act. The General Assembly has therefore demonstrated that when it delves

into energy consumption issues, it does not do so implicitly, as the Proponents suggest, but rather purposefully and explicitly.

The Proposal Should be Dismissed Because Adopting it Would Subvert the Purpose of Notice and Comment Rulemaking

15. The purpose of “Notice and Comment” rulemaking is to give the public a chance to meaningfully participate in the rulemaking process, and for those public comments to be weighed and thoughtfully considered by the public body undertaking the rulemaking process. Champaign-Urbana Pub. Health Dist. v. Illinois Labor Relations Bd., 354 Ill. App. 3d 482, 488, (4th Dist. 2004) (agencies must comply with the public notice and comment requirements of the Administrative Procedures Act by giving 45 days’ notice of its intended action and accepting comments; rules that do not conform to the public notice and comment requirements are not valid) (citing 5 ILCS 100/5–40 (b), (c)).

16. These tenets run throughout Illinois’ rulemaking processes and are represented through the inclusion of provisions in Illinois’ Administrative Procedures Act, Environmental Protection Act, and the Board’s procedural regulations. *See id.*; *see* 35 Ill. Adm. Code 102.108.

17. In the submittal filed with the Board, and as articulated by legal counsel for the Proponents during the August 13, 2024, Hearing Officer’s conference call, Proponents argue that the decision before the Board is a binary one: either the standards are adopted as presented to the Board verbatim; or the standards are not adopted. There is no in-between according to the Proponents. Under this approach, while the public may comment on the appropriateness of the California standards being implemented in Illinois, they may not comment on particular provisions and the effectiveness of those provisions in striking the right balance between environmental protection and economic impact in Illinois. Nor may the Board exercise its prerogative to amend or adjust the regulatory proposal to better reflect the needs of Illinois and its citizens, and the Joint

Committee on Administrative Rules' (JCAR) authority to oversee the rulemaking process is substantially curtailed.

18. The aforementioned opportunities for the public, the Board, and JCAR to meaningfully participate in the rulemaking process – in the same fashion as in the vast majority of regulatory proceedings where the initially proposed language is typically modified as a result of public comment – are not absolute. Those limitations, or exceptions, to notice and comment rulemaking are necessitated by specific circumstances, and are therefore specifically set forth in the Administrative Procedures Act, Environmental Protection Act, and Board rules.

19. Section 5-45 of the Administrative Procedures Act sets forth the procedures when adopting rules pursuant to an emergency; Section 5-50 sets forth the procedures for adopting peremptory rules when adopting such rules are required as a result of federal law, federal rules and regulations, an order of a court, or a collective bargaining agreement. 5 ILCS 100/5-45 and 5-50. None of those circumstances are present in the pending matter.

20. The Environmental Protection Act contains a number of specific examples where “notice and comment” rulemaking is curtailed. Sections 7.2, 13.3, 28.2, and 28.4 of the Act pertains to “identical in substance” rulemakings, which pertain to proceedings that are used to adopt verbatim text of USEPA regulations that are necessary to authorize a federal program. Section 28.2 of the Act addresses federally required rules, which must be accompanied by a certification from the Illinois EPA and confirmation from USEPA that the rule is in fact “federally required.” 415 ILCS 5/7.2, 13.3, 28.2, and 28.4. None of those circumstances are present in the pending matter.

21. The Board has adopted procedural rules to address all of these aforementioned circumstances, and as with those provisions, none of those circumstances are present in the pending matter.

22. The Board's rules acknowledge the importance of "notice and comment" rulemaking, appropriately narrowing its exceptions to very narrow, very specific types of rulemaking. None of these exceptions are present here, and in fact the opposite is true: this is a significant rulemaking with enormous implications. Consequently, the Proponents' "take it or leave it approach" is wholly inconsistent with the required notice-and-comment procedure engrained in Illinois rulemaking, which is yet another reason to dismiss the Proposal.

Conclusion

23. As noted previously, Section 102.212(c) states a rulemaking "proposal will be dismissed for inadequacy in cases in which the Board, after evaluating the proposal, cannot determine the statutory authority on which the proposal is made." In the matter pending before the Board, the Proponents have simply not pointed to any statutory authority that would authorize the adoption of its proposal.

24. For the foregoing reasons, the Illinois Fuel and Retail Association respectfully requests the Board to dismiss this rulemaking.

WHEREFORE, the Illinois Fuel & Retail Association respectfully prays that the Illinois Pollution Control Board enter an Order granting its motion to dismiss, dismissing this rulemaking in its entirety, and granting such other and further relief in its favor as the Board deems just and proper.

Respectfully submitted,
ILLINOIS FUEL & RETAIL ASSOCIATION

By: /s/ Alec Messina
One of its Attorneys

Dated: September 3, 2024

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