

ILLINOIS POLLUTION CONTROL BOARD
November 7, 2024

IN THE MATTER OF:)
)
PROPOSED CLEAN CAR AND TRUCK) R 24-17
STANDARDS: PROPOSED 35 ILL. ADM.) (Rulemaking - Air)
CODE 242)

ORDER OF THE BOARD (by B.F. Currie, J.A. Van Wie):

The Sierra Club, Natural Resources Defense Council, Environmental Defense Fund, Respiratory Health Association, Chicago Environmental Justice Network, and Center for Neighborhood Technology (collectively, Proponents) propose that the Board adopt a new Part 242 of its air pollution rules. The Proponents request that the Board adopt three California motor vehicle emissions regulations addressing light-, medium-, and heavy-duty vehicles: the Advanced Clean Cars II (ACC II), Advanced Clean Trucks (ACT), and Heavy-Duty Low NOx [Nitrogen Oxide] Omnibus (Low NOx) rules. The Proponents state that ACC II rules apply to the sale of new light-duty vehicles and place obligations on vehicle manufacturers by setting pollution standards for conventional vehicles and sales requirements for zero-emission vehicles. Statement of Reasons at 11. ACT rules set annual sales requirements for zero-emission and near zero-emission medium- and heavy-duty vehicles. *Id.* Low NOx rules set standards on emission of smog-forming pollutants by medium- and heavy-duty combustion engines. *Id.*

The Indiana, Illinois, Iowa Foundation for Fair Contracting (IIFFFC) and the Illinois Fuel & Retail Association (IFRA) move to dismiss the proposal on various grounds. For the reasons discussed below, the Board denies the motions to dismiss and directs its hearing officer to proceed to conduct the hearing as scheduled by the hearing officer order of August 21, 2024.

Below, the Board first provides the procedural history and the statutory and regulatory authorities. The Board then discusses the issues raised in the motions to dismiss before reaching its conclusion and issuing its order.

PROCEDURAL HISTORY

On June 27, 2024, the Proponents submitted a rulemaking proposal. The proposal included the Proponents' Statement of Reasons (SR), attached to which were 13 exhibits. The proposal also included a proposed new Part 242 of the Board's air pollution rules (Prop. 242) and a petition in support of the proposal (*see* 35 Ill. Adm. Code 102.202(g)).

In an order on July 11, 2024, the Board accepted the proposal for hearing. Also on July 11, 2024, the Board requested that the Department of Commerce and Economic Opportunity (DCEO) conduct an economic impact study of the proposal by August 26, 2024. *See* 415 ILCS 5/27(b) (2022). In a letter dated August 28, 2024, DCEO reported that "[t]he Department does not have the industrial engineering expertise to meaningfully participate in this docket." DCEO respectfully declined the request to perform an economic impact study.

On August 13, 2024, the hearing officer scheduled the first hearing on December 2 and 3, 2024, and set deadlines of September 16, 2024, to pre-file testimony; October 28, 2024, to pre-file questions; and November 18, 2024, to pre-file answers. A hearing officer order on August 19, 2024, clarified a deadline of September 3, 2024, to file a motion to dismiss.

On August 29, 2024, IIFFC filed a motion to dismiss (IIFFC Mot.). On September 3, 2024, IFRA filed a motion to dismiss (IFRA Mot.). On September 4, 2024, a hearing officer order set a deadline of September 17, 2024, to respond to the motions. On September 12, 2024, the hearing officer granted the Proponents' unopposed motion to extend the deadline to October 1, 2024.

On September 16, 2024, the Proponents pre-filed the joint testimony of Ms. Kathy Harris and Mr. Muhammed Patel and the testimonies of Mr. Tom Cackette, Dr. Peter Orris, Dr. Daniel E. Horton, Ms. Juliana Pino, Mr. Brian Urbaszewski, Ms. Myrna Salgado, and Mr. Justin Flores.

On October 1, 2024, the Proponents responded to the motions to dismiss (Resp.).

STATUTORY AND REGULATORY AUTHORITIES

Section 3.215 of the Environmental Protection Act (Act) defines “hazardous substance” as:

(A) any substance designated pursuant to Section 311(b)(2)(A) of the Federal Water Pollution Control Act (P.L. 92-500), as amended, (B) any element, compound, mixture, solution, or substance designated pursuant to Section 102 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510), as amended, (C) any hazardous waste, (D) any toxic pollutant listed under Section 307(a) of the Federal Water Pollution Control Act (P.L. 92-500), as amended, (E) any hazardous air pollutant listed under Section 112 of the Clean Air Act (P.L. 95-95), as amended, (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator of the U.S. Environmental Protection Agency has taken action pursuant to Section 7 of the Toxic Substances Control Act (P.L. 94-469), as amended.

The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, 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. 415 ILCS 5/3.215 (2022).

Section 8 of the Act provides in its entirety that:

[t]he General Assembly finds that pollution of the air of this State constitutes a menace to public health and welfare, creates public nuisances, adds to cleaning costs, accelerates the deterioration of materials, adversely affects agriculture,

business, industry, recreation, climate, and visibility, depresses property values, and offends the senses.

It is the purpose of this Title to restore, maintain, and enhance the purity of the air of this State in order to protect health, welfare, property, and the quality of life and to assure that no air contaminants are discharged into the atmosphere without being given the degree of treatment or control necessary to prevent pollution. 415 ILCS 5/8 (2022).

Section 9.20(b) of the Act, Fleet Electrification Incentive Program, provides that, “[t]o promote the use of eligible electric vehicles and to increase access to federal funding programs, the [Illinois Environmental Protection] Agency shall establish, by rule, a Fleet Electrification Incentive Program through which it provides eligible purchasers a grant” of specified amounts for the purchase of an eligible electric vehicle. 415 ILCS 5/9.20(b) (2022).

Section 10 of the Act, Regulations, provides that:

[t]he Board, pursuant to procedures prescribed in Title VII of this Act, may adopt regulations to promote the purposes of this Title. Without limiting the generality of this authority, such regulations may among other things prescribe:

* * *

- (b) Emission standards specifying the maximum amounts or concentrations of various contaminants that may be discharged into the atmosphere;
- (c) Standards for the issuance of permits for construction, installation, or operation of any equipment, facility, vehicle, vessel, or aircraft capable of causing or contributing to air pollution or designed to prevent air pollution;
- (d) Standards and conditions regarding the sale, offer, or use of any fuel, vehicle, or other article determined by the Board to constitute an air pollution hazard;
- (e) Alert and abatement standards relative to air pollution episodes or emergencies constituting an acute danger to health or to the environment;
- (f) Requirements and procedures for the inspection of any equipment, facility, vehicle, vessel, or aircraft that may cause or contribute to air pollution;

- (g) Requirements and standards for equipment and procedures for monitoring contaminant discharges at their sources, the collection of samples, and the collection, reporting, and retention of data resulting from such monitoring. 415 ILCS 5/10(A) (2022).

Section 102.212(c) of the Board’s procedural rules provides in its entirety that “[a] 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. Dismissal of a proposal will not bar a proponent from re-submitting a proposal in the absence of any deadline imposed by applicable law or Board regulations.” 35 Ill. Adm. Code 101.212(c).

DISCUSSION

Under the Board’s procedural rules for rulemaking, “[a]ny person may file a motion challenging the statutory authority or sufficiency of the proposal under 35 Ill. Adm. Code 101.Subpart E [Motions].” 35 Ill. Adm. Code 102.212(d).

As noted above under “Procedural History,” IIIFFC and IFRA have each filed a motion to dismiss the rulemaking proposal. IIIFFC requests that the Board dismiss the proposal “for lack of statutory authority.” *Id.* at 2, 13, citing 35 Ill. Adm. Code 102.212(d). Similarly, IFRA asserts that the Proponents have not cited statutory authority that would authorize the Board to adopt their proposal and requests that the Board dismiss it. IFRA Mot. at 2, 8, citing 35 Ill. Adm. Code 102.212(c).

Proponents assert that the motions to dismiss effectively ask the Board to “ignore the plain language” of the Act. Resp. at 1-2, 22. They further argue that the motions ask the Board to overlook “explicit Board precedent finding Board jurisdiction” to consider the proposal. *Id.* at 2, 22. Finally, they argue that the motions ignore “express legislative action endorsing the Board’s authority to issue regulations that address greenhouse gases from the transportation sector.” *Id.* at 22; *see id.* at 2. Proponents request that the Board deny the motions, proceed to consider the proposal, and ultimately adopt it. *Id.* at 22.

Under the Board’s procedural rules for rulemaking, “[a] 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). However, if the Board dismisses a rulemaking proposal, the dismissal “will not bar a proponent from re-submitting a proposal in the absence of any deadline imposed by applicable law or Board regulations.” *Id.*

In the following subsections, the Board addresses the issues raised in the motions to dismiss and the Proponents’ response.

Board Authority To Consider and Adopt Proposal

As noted above under “Statutory and Regulatory Authorities,” the General Assembly has established that the purpose of the Act’s air pollution provisions is “to restore, maintain, and

enhance the purity of the air of this State in order to protect health, welfare, property, and the quality of life and to assure that no air contaminants are discharged into the atmosphere without being given the degree of treatment or control necessary to prevent pollution.” 415 ILCS 5/8 (2022).

The General Assembly has also provided the Board authority to “adopt regulations to promote the purposes of this Title,” including rules in six specific categories. 415 ILCS 5/10(A) (2022). IIIFFC acknowledges that “[a]n agency charged with enforcing a statute is given inherent authority and wide latitude to adopt regulations or policies reasonably necessary to perform the agency’s statutory duty.” IIIFFC Mot. at 2, citing Chemed Corp. v. Ill. Dept. of Revenue, 186 Ill. App. 3d 402, 410 (1989). IFRA also acknowledges that Section 10 of the Act provides the Board authority to adopt rules. IFRA Mot. at 2-3. Under Section 10(A)(d), these rules include “[s]tandards and conditions regarding the sale, offer, or use of any fuel, vehicle, or other article determined by the Board to constitute an air pollution hazard.” 415 ILCS 5/10(A)(d) (2022).

The Proponents assert that they propose to “establish standards for vehicle emissions and conditions regarding the sale of new vehicles in the state.” SR at 16; *id.* at n.23; *see* Resp. at 4. They argue that their proposal falls within the Board’s statutory rulemaking authority because it “would establish standards for vehicle emissions – *i.e.*, by defining “ZEV [zero-emission vehicle]” and “near-ZEV” in reference to emissions levels of specific air pollutants – and condition the sale of vehicles by creating increasing sale requirements in reference to those emissions standards.” Resp. at 4. The Proponents conclude that the Act provides the Board authority to consider and adopt the proposal. SR at 16; *see id.*, Exh. 9 at 8 (Harris & Patel original testimony); Prop. 242 at 2 (citing Section 10 of Act).

The Board notes that – on its own motion – it previously considered California vehicle emissions standards. Application of California Motor Vehicle Control Program in Illinois, R 89-17(C) (Oct. 11, 1990). Although the Board in that proceeding determined to rely on federal standards and not to adopt California standards, it held a hearing, accepted testimony and public comment, and published two first-notice proposals. Application of California Motor Vehicle Control Program in Illinois, R 89-17(C), slip op. at 3-4 (Jan. 7, 1993). Proponents suggest that the Board’s statutory authority to consider has not changed. *See* Resp. at 8. While the Board in that case cited technological and economic uncertainties in dismissing its docket, it stated that it shared the perspective offered by the Illinois Environmental Protection Agency (IEPA) in its final comment:

[a]s California proceeds with the implementation of its program and manufacturers develop their technologies and production operations, currently unresolved issues will be addressed. . . . If Illinois later decides that further emission reductions are necessary, it can turn once again to the California program and proceed to adoption with much greater certainty than is now possible. *Id.*, slip op. at 7.

“A 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). Having reviewed the Proponent’s proposal and Statement of Reasons, the Board can readily determine that the proposal is made on the Board’s authority under Section 10 of the Act. Neither that statutory authority nor the Board’s own precedent provides a basis to dismiss this proposal under Section 102.212 of the Board’s rules.

Although the Board has considered the arguments in the motions to dismiss, it is not persuaded that they lead to a different conclusion on the Board’s authority to consider this proposal.

Consideration of *Lombard v. PCB*

In *Lombard v. PCB*, the Court framed “[t]he critical issue” as whether the Board has authority under the Act “to adopt regulations mandating the regional treatment of water in counties.” *Lombard v. PCB*, 66 Ill. 2d 503, 505 (Ill. 1977). The rules divided DuPage County into nine water-treatment regions, each of which was required to establish a centralized water-treatment program; designate regional authorities; and plan, construct, and maintain sewage-treatment plants. *Id.* Noting the Board has general rulemaking authority under the Act to adopt various standards, the Court concluded that that authority does not extend to the authority “to coordinate sewage treatment through regional water-treatment plans.” *Id.* at 509. It added that the Act “does not empower the Board to consider the authority of existing governmental units and sanitary districts or to determine who is to fund the new water-treatment plants.” *Id.* For purposes of deciding the pending motions, the Board cannot conclude that *Lombard* requires dismissal of the Proponents’ proposed standards as the Board’s authority to promulgate emission standards under the Act is clear and was supported by the Court in *Lombard*.

Definition of “Hazardous Substance”

Under Section 10(A)(d) of the Act, the Board is authorized to prescribe “[s]tandards and conditions regarding the sale, offer, or use off any fuel, vehicle, or other article determined by the Board to constitute an air-pollution hazard.” 415 ICLS 5/10(A)(d) (2022). IIIFFC cites the Act’s definition of the separate term “hazardous substance,” which provides that it:

does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, 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. IIIFFC Mot. at 8, citing 415 ILCS 5/3.215 (2022); *see* IFRA Mot. at 3, n.1.

Based on this exception to the definition of “hazardous substance,” IIIFFC suggests that these fuels cannot constitute an “air pollution hazard” that the Board is authorized to regulate. *See* IIIFFC Mot. at 8.

The Board does not consider the defined terms of “air pollution” and “hazardous substance” under the Act to be synonymous. *See* 415 ILCS 5/3.115 (definition of “air pollution”) and 415 ILCS 5/3.215 (definition of “hazardous substance”). And, the Board is not

persuaded that its authority to consider and adopt rules regarding “an air-pollution hazard” is limited to addressing air pollution resulting from separately defined “hazardous substances.” The General Assembly has not amended Section 10 to provide that only a “hazardous substance” can generate an “air pollution hazard.” Since it has not done so, the Board agrees with the Proponents that exceptions to the definition of “hazardous substance” do not require dismissing the proposal.

Federal Clean Air Act

IIFFC disputes the Proponents’ position that the Board is authorized to consider and adopt their proposal under the federal Clean Air Act (CAA). IIFFC Mot. at 2; *see* SR at 17-18, citing 42 USC § 7507. IIFFC asserts that “an agency may not unilaterally adopt rules without the State legislature first authorizing it to do so.” IIFFC Mot. at 8. It asserts that the Illinois General Assembly has not provided the Board with this authority. *Id.* Also, IFRA asserts that the Board in 1993 dismissed a proposal to adopt California clean car standards. IFRA Mot. at 3, citing Application of California Motor Vehicle Control Program in Illinois, R 89-17(C) (Jan. 7, 1993). IFRA noted that in that case IEPA had “consistently opposed adoption of a California standards program in Illinois” and that the Department of Natural Resources recommended not adopting them. IFRA Mot. at 4, citing Application of California Motor Vehicle Control Program in Illinois, R 89-17(C), slip op. at 5-6 (Jan. 7, 1993).

For purposes of deciding the pending motions, the Board is not persuaded that the requirements of the CAA require dismissing the proposal at this stage. Above, the Board has addressed its authority to consider the proposal under the Act. In addition, the Board notes the Proponents’ position that this consideration is consistent with the CAA. *See* Resp. at 4. They assert that the CAA “requires all new motor vehicles sold in the U.S. to be certified to the emissions standards set by either the U.S. Environmental Protection Agency or the State of California.” Resp. at 4, citing 42 USC §§ 7521, 7543. They further assert that another state can adopt California standards if the state meets specified conditions. Resp. at 4-5, citing SR at 30; *see* SR at 17-18. Proponents argue that considering and adopting its proposal are consistent with this authorization. Resp. at 5. While these conditions may be the subject of testimony and comment, the Board is not convinced that they require granting the motions to dismiss.

Legislation

IIFFC argues that legislators in the 103rd General Assembly have introduced several bills to implement Proponents’ program, which have included related rulemaking authority. It further argues that these bills “ultimately failed.” IIFFC Mot. at 10. IIFFC argues that, when legislation granting rulemaking authority fails, courts have cited that failure to find that the contested authority did not exist. IIFFC Mot. at 9-10, citing Lombard v. PCB, 66 Ill. 2d at 508; Lombard v. PCB, 37 Ill. App. 3d 440, 444 (2nd Dist. 1976). IFRA similarly cites Lombard to argue that proponents seek to have the Board adopt rules on a matter on which the General Assembly has not acted. IFRA Mot. at 4, citing Lombard v. PCB, 66 Ill. 2d 503 (1977).

Senate Bill 2839 required adopting rules to implement the California ACC II program, including the Zero-Emission Vehicle (ZEV) program, the Low-Emission Vehicle (LEV)

program, the ACT program, and the Low NO_x rules. Senate Bill 2839, 103rd General Assembly. IIIFFC emphasizes that the bill gives rulemaking authority to IEPA and not to the Board. IIIFFC Mot. at 10.

Both House Bill 1634 and Senate Bill 2050 proposed to amend the Illinois Vehicle Code by requiring IEPA by December 1, 2023, to adopt rules implementing California motor vehicle emission standards including the ZEV program, the LEV program, the ACT program, and the Low NO_x omnibus program. House Bill 1634 and Senate Bill 2050, 103rd General Assembly. IIIFFC emphasizes that both bills give rulemaking authority to IEPA and not to the Board. IIIFFC Mot. at 10.

Among its provisions, House Bill 5829 created the Zero-Emission Vehicle Act with the purpose “to accelerate the adoption of on-road zero-emission vehicles and to reduce emissions of air pollution, including, but not limited to, nitrogen oxides (NO_x), particulate matter, hazardous air pollutants, and greenhouse gases from vehicles owned and operated by governmental units in Illinois.” The bill set a series of deadlines, the first of which is that “all on-road vehicles purchased or leased on or after January 1, 2028 must be a manufactured zero-emission vehicle, repowered zero-emission vehicle, manufactured near zero-emission vehicle, or repowered near zero-emission vehicle.” House Bill 5829, 103rd General Assembly. IIIFFC stresses that the bill gives authority to adopt rules regarding the scope of any exception and “to establish guidance for governmental units transitioning fleets” to the Department of Central Management Services and not to the Board. IIIFFC Mot. at 10.

Discussion

For purposes of deciding the pending motions, the Board is not persuaded that any of these bills requires dismissing the proposal. Above, the Board has addressed its inherent authority under the Act to consider the proposal. The proposal identifies Section 10 of the Act as the authority under which the Board can consider it. None of the proposed bills listed above would have limited or eliminated the Board’s rulemaking authority. Also, the Board finds that the motions’ reliance on Lombard is misplaced. Here, as in Lombard, the Board’s authority to set pollution standards is clear – the Act authorizes the Board to establish standards to “promote the Environmental Protection Act’s purposes and provisions.” 66 Ill 2d at 507. The court in Lombard found “no existing statutory authority for the Board to create the mandatory regional planning structures at issue.” Resp. at 15, citing Lombard, 66 Ill 2d at 506. The court also noted that, although bills had been introduced in the General Assembly to provide for regional water treatment, they had not been enacted. Lombard, 66 Ill. 2d at 508. Because the Board’s rulemaking authority in that case required statutory amendment to create a novel cross-governmental and regional system for water-pollution treatment, rejecting the legislative authorization was relevant. *Id.*

Whether Other Agencies Have Authority to Consider and Adopt Proposal

IIIFFC notes the Proponents’ position that the Board should adopt their proposal to help implement the Climate and Equitable Job Act (CEJA) and advance the State’s goal of increasing the adoption of electric vehicles. IIIFFC Mot. at 11, citing Public Act 102-662, eff. Sept. 15,

2021. IIIFFC argues that CEJA amended the Electric Vehicle Act and gave rulemaking authority to implement electrification goals and programs specifically to IEPA and not to the Board. IIIFFC Mot. at 12, citing 20 ILCS 67/40, 45, 55 (2022).

IIIFFC asserts that CEJA also amended the Public Utilities Act, including establishing a multi-year integrated grid plan. IIIFFC argues that the General Assembly gave authority to implement the plan and adopt rules specifically to the Illinois Commerce Commission and not to the Board. IIIFFC Mot. at 13, citing 220 ILCS 5/16-105.17(i) (2022).

IIIFFC argues that Proponents justify their proposal by relying on statutes granting rulemaking authority to agencies other than the Board and that the Board lacks authority to adopt the rules. IIIFFC Mot. at 13.

For purposes of deciding the pending motions, the Board is not persuaded that the rulemaking authority of other State agencies requires dismissing the proposal. Above, the Board has addressed its inherent authority under the Act to consider the proposal. The proposal identifies Section 10 of the Act as the authority under which the Board can consider it. The Board is not convinced that the rulemaking provisions of CEJA limited or repealed the Board's authority under Sections 8 and 10 of the Act to set emission standards.

Notice and Comment Rulemaking

IFRA states that “[t]he 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.” IFRA Mot. at 6, citing Champaign-Urbana Pub. Health Dist. v. Ill. Labor relations Bd., 354 Ill. App. 3d 482, 488 (4th Dist. 2004); *see* 5 ILCS 100/5-40(b, c); 35 Ill. Adm. Code 102.108. IFRA argues that Proponents consider the Board's decision in this proceeding to be binary: “either the standards are adopted as presented to the Board verbatim, or the standards are not adopted.” IFRA Mot. at 6. IFRA concludes that “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.” IFRA Mot. at 8.

The Board is not persuaded that IFRA's position requires dismissing the proposal. First, the Board notes that, although the Proponents propose to adopt the ACC II rule, the ACT rule, and the Low NO_x rules together, they assert that each of them is “a separate emission standard that can be adopted independently” of one another. Resp. at 20, citing SR at 12; *see* Resp. at 20, n.8. The Board also notes Proponents' assertion that the Board can amend other aspects of the proposal including enforcement, inspections and recordkeeping, and effective dates. *Id.* at 20-21. Second, and more importantly, the Board's rulemaking activity is governed by statutory and regulatory requirements intended to provide public notice and opportunities for public comment. These include public hearings, first-notice publication of any proposed rules followed by a comment period of at least 45 days, and second-notice review by the Joint Committee on Administrative Rules. The motions do not persuasively argue that the Board has failed or will fail to meet any of these requirements.

CONCLUSION

For the reasons detailed above, the Board concludes to deny the motions to dismiss. In doing so, the Board makes no findings on the substantive merits of the proposal or on matters including its economic reasonableness or technical feasibility.

ORDER

Having denied the motions to dismiss, the Board directs its hearing officer to proceed to conduct the hearing as scheduled on December 2 and 3, 2024.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 7, 2024, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board