

ILLINOIS POLLUTION CONTROL BOARD
August 20, 1993

IN THE MATTER OF:)
)
EMERGENCY AMENDMENTS TO THE) R93-15
OPEN-BURNING RULES, 35 ILL.) (Rulemaking)
ADM. CODE 237.121)

ADOPTED EMERGENCY RULE. FINAL ORDER.

OPINION AND ORDER OF THE BOARD (by C. A. Manning):

This matter comes before the Board on an August 18, 1993 proposal for emergency rulemaking filed by the Illinois Environmental Protection Agency (Agency). The purpose of the Agency's proposal is to allow the open burning, without permit, of certain combustible non-hazardous waste generated in twenty (20) designated "disaster area" counties which have been impacted by the recent flooding of the Mississippi River and its tributaries. These counties are Adams, Alexander, Calhoun, Carroll, Greene, Hancock, Henderson, Jackson, Jersey, Jo Daviess, Madison, Mercer, Monroe, Pike, Randolph, Rock Island, Scott, St. Clair, Union and Whiteside.

For the reasons stated below, the Board finds, pursuant to Section 27(c) of the Environmental Protection Act (Act) Ill. Rev. Stat. 1991 ch. 111 1/2, par. 1027(c), 5 ILCS 5/27(c) and Section 5-45 of the Illinois Administrative Procedure Act (APA) (Ill. Rev. Stat. 1991 ch. 127, par. 1005-45, 5 ILCS 100/5-45), that a "situation exists which reasonably constitutes a threat to the public interest, safety or welfare". The Board today adopts as an emergency rule new section 237.121 Emergency Exemption for 1993 Flood-Generated Wastes. This rule will become effective upon filing with the Secretary of State for a period of 150 days.

STATUTORY PROVISIONS

Open burning is governed by Section 9(c) of the Act. Section 9(c) provides that:

No person shall:

- c. Cause or allow the open burning of refuse, conduct any salvage operation by open burning, or cause or allow the burning of any refuse in any chamber not specifically designed for the purpose and approved by the Agency pursuant to regulations adopted by the Board under this Act; except that the Board may

adopt regulations permitting open burning of refuse in certain cases upon a finding that no harm will result from such burning, or that any alternative method of disposing of such refuse would create a safety hazard so extreme as to justify the pollution that would result from such burning.

The Board's regulations implementing this section are found at 35 Ill. Adm. Code Part 327. Subpart A establishes general provisions including prohibitions and exemptions and Subpart B establishes permit requirements.

The Board's rulemaking requirements in this matter are contained in the APA and the Act. Section 5-45 Illinois Administrative Procedure Act provides in pertinent part:

"Emergency" means the existence of any situation that any agency finds reasonably constitutes a threat to the public interest, safety, or welfare. If any agency finds that any emergency exists that requires adoption of a rule upon fewer days than is required by Section 5-40 and states in writing its reasons for that finding, the agency may adopt an emergency rule without prior notice or hearing upon filing of notice of emergency rulemaking with the Secretary of State under Section 5-70. . . Subject to applicable constitutional or statutory provisions, an emergency rule become effective immediately upon filing under Section 5-65 or at a stated date less than 10 days thereafter. The Agency shall take reasonable and appropriate measures to make emergency rules shown to the persons who may be affected by them.

An emergency rule may be effective for a period of not longer than 150 days, but the agency's authority to adopt an identical rule under Section 5-40 is not precluded.

Section 27(c) of the Environmental Protection Act provides:

When the Board finds that a situation exists which reasonably constitutes a threat to public interest, safety or welfare, the Board may adopt regulations pursuant to and in accordance with Section 5.02 of the Illinois Administrative Procedure Act.

Emergency rules are scrutinized by both the Joint Committee on Administrative Rules and by the courts to determine whether "there exists a situation which reasonably constitutes a threat to the public interest, safety or welfare". Citizens for a Better Environment v. Illinois Pollution Control Board, (1st Dist. 1983) 162 Ill. App.3d 105, 504 N.E. 2d 166, 169.

THE AGENCY'S PROPOSAL

Description of the Emergency

The Agency's August 18, 1993 four page statement of justification for its emergency rule proposal states that:

Due to a series of severe thunderstorms and torrential rains throughout the Mississippi River Basin, many Illinois counties have experienced record flood levels that have adversely impacted and continue to threaten public health, safety and welfare. The flooding has resulted in extensive damage to homes, farms, businesses, livestock, roads and other property. In an effort to aid those counties affected by the adverse weather, the President of the United States and Governor Edgar have declared numerous Illinois counties as federal and State disaster areas. In a number of Gubernatorial Proclamations, Governor Edgar has sought to coordinate the assistance of State agencies in providing reasonably necessary emergency measures to assist the flood victims.

[T]his Emergency Rulemaking is being proposed in order to provide necessary assistance to persons in various Illinois counties whose health, welfare and safety have been and continue to be directly impacted by the Mississippi River and its tributaries....

Under the current open burning restrictions, this waste may have to be stored and stockpiled for many weeks while an application for a permit is prepared by the applicant and submitted to and acted upon by the Agency. The physical storage of this waste has and may continue to create a severe hardship for many flood victims. Since the waste products are often in contact and/or soaked with raw sewage, the stockpiling of the waste may also pose a serious public

health risk.

The stockpiling of this flood-generated waste could also critically hinder efforts toward rebuilding homes and farms and re-establishing communities.

The expeditious disposal of this flood waste through the safe burying practices provided in this proposal will mitigate the risks to public health, safety and welfare and the obstacle to rebuilding and restoration created by the excessive waste. (Proposal, p. 1-2, 3.)

Description of the Proposed Amendments

The Agency describes its proposed amendments as follows:

The current open burning regulations at 35 Ill. Adm. Code 237 allow persons to lawfully engage in open burning under very specific conditions; otherwise, a person may engage in open burning only if a permit for such activity has been issued by the Agency. The flooding of the Mississippi River and its tributaries has resulted in the generation and accumulation of excessive amounts of landscape, agricultural and other combustible waste. Under the current rules, much of this waste could not be burned until a permit had been applied for and issued by the Agency.

This Emergency Rulemaking proposal exempts open burning of flood generated waste from these permit requirements, while expanding the provisions for lawful open burning of agricultural and landscape waste caused by the flood. Conditions have been included in this proposal that are necessary to assure the protection of public health. They include a prohibition from open burning of potentially dangerous materials such as weed killers, electrical components, and asbestos containing materials. This Emergency Rulemaking proposal is applicable to the counties all along Illinois' western border, which have been directly impacted and threatened by the flooding of the Mississippi River and its tributaries. (Proposal, p. 2)

THE BOARD'S ADOPTED RULES

Consistent with the Governor's directive to the executive agencies to coordinate flood relief activities, the Agency advised the Board of its intent to file this proposal. Upon receipt of the proposal, on August 18 the Board scheduled this special emergency meeting. The staff of the Administrative Code Unit of the Division of Index, for its part, has graciously agreed to give prior review for format of the copy for filing with the Secretary of State to avoid paperwork delays.

In prior regulatory proceedings¹ the Board has given exhaustive consideration to the dangers to public health posed by unmanaged waste, which may become a breeding ground for disease vectors including mosquitoes, vermin and birds. The decomposition of unmanaged putrescible wastes can lead to contamination of surface water and groundwater. The sheer volume of waste created by the recent flooding which must be relatively quickly and efficiently handled is unprecedented in the state's history and, more specifically in the Board's 23-year history. While landfill disposal of all flood-generated wastes may be possible given extended periods of time and unlimited funds, this disposal must be made at the same time that individuals and governments are struggling to restore essential community elements and services including drinking water supplies and sewage treatment systems, housing and medical facilities, and highways and bridges. Under these circumstances, while controlled burning of certain wastes may have potential adverse impacts on air quality, any such impacts are outweighed by the more immediate impacts on surface water and groundwater quality in the most heavily flood-impacted areas.

Having considered these factors and the information provided by the Agency, the Board finds that "a situation exists which reasonably constitutes a threat to the public interest, safety or welfare", within the meaning of Section 27(c) of the Act and Section 5-45 of the APA.

The Board further finds, as required by Section 9(c) of the Act, that:

"no harm will result from such burning, or that any alternative method of disposing of such refuse would create a safety hazard so extreme as to justify the pollution that

¹ See, e.g. In the Matter of: Development, Operating and Permit Requirements for Non-Hazardous Waste Landfills, R88-7 (Opinion and Order of March 1, 1990) and In the Matter of: Managing Tire Accumulations to Limit The Spread of the Asian Tiger Mosquito, R88-12 (Emergency Opinion and Order of April 2, 1988).

would result from such burning".

The Board is aware that today's rule does not allow controlled open burning in all disaster counties (Section 237.121(a)). While the Agency has not presented a county-by-county assessment, the Board will defer to the Agency's assessment of the field conditions in the affected counties. Further, the Board agrees with the Agency's assessment that combustion of asbestos and chemical-laced wastes is not in the best interests of the People of the State even under the current emergency, disaster conditions.

The Board, as proposed by the Agency, has adopted language in many of the rules which is somewhat familiar to the community which will be using these rules. Examples of such language include Section 237.121(b), which duplicates language found in the permanent exemption found in Section 237.120(a)(6), and Section 237.121(b), and (c)(2). Similarly, the wording of the conditions found in Section 237.121(e-i) is taken from language which has been appearing as standard conditions on Agency-issued open burning permits since at least 1985. (See IEPA form APC171, dated July 1, 1985).

Finally, the Board observes that today's emergency rule will expire within 150 days of its filing the maximum term of any emergency rule. The APA prohibits adoption of an emergency rule "more than once in any 24 month period" (5 ILCS 100/5-45), so that any extension of this five month emergency exemption must be obtained through regular rulemaking or through the Act's other regulatory relief mechanisms.

ORDER

The Board hereby adopts the following emergency rule. The Clerk is directed to cause its filing with the Secretary of State.

TITLE 35: ENVIRONMENTAL PROTECTION
 SUBTITLE B: AIR POLLUTION
 CHAPTER I: POLLUTION CONTROL BOARD
 SUBCHAPTER i: OPEN BURNING

PART 237
 OPEN BURNING

SUBPART A: GENERAL PROVISIONS

Section
 237.101 Definitions
 237.102 Prohibitions
 237.103 Explosive Waste

237.110 Local Enforcement
 237.120 Exemptions
237.121 Emergency Exemptions for 1993 Flood-Generated Waste
 EMERGENCY
 237.130 Freeport Air Curtain Destructor

SUBPART B: PERMITS

Section
 237.201 Available Permits
 237.202 Permit Application
 237.203 Permit Conditions
 237.204 Standards of Issuance
 237.205 Duration and Renewal
 237.206 Revision
 237.207 Revocation

Appendix A Rule into Section Table
 Appendix B Section into Rule Table

AUTHORITY: Implementing Sections 9(c) and 10 and authorized by Section 27 of the Environmental Protection Act (Ill. Rev. Stat. 1991, ch. 111½, pars. 1009(c), 1010 and 1027 [415 ILCS 5/9(c), 5/10 and 5/27]).

SOURCE: Adopted as Rules 401 through 406, R70-11, 2 PCB 373, filed and effective September 7, 1971; Renumbered as Chapter 2: Air Pollution, Part V: Open Burning, R72-11, 6 PCB 199, filed and effective November 10, 1972; amended at 3 Ill. Reg. 51, p. 117, effective December 7, 1979; amended at 6 Ill. Reg. 14521, effective November 8, 1982; codified at 7 Ill. Reg. 13579; emergency amendment in R93-15 at 17 Ill. Reg. _____, effective _____ for a maximum of 150 days.

SUBPART A: GENERAL PROVISIONS

Section 237.121 Emergency Exemptions for 1993 Flood-Generated Waste
 EMERGENCY

The burning of wooden building debris, landscape and agricultural wastes, as defined in this Part, and other combustible waste, caused by the 1993 Mississippi River flood disaster, without obtaining a permit from the Agency shall not constitute a violation of Section 9(c) of the Act or of this Part, if the following criteria are met:

a) Burning and generation of materials burned occurs only in the following counties:

1) Adams;

- 2) Alexander;
- 3) Calhoun;
- 4) Carroll;
- 5) Greene;
- 6) Hancock;
- 7) Henderson;
- 8) Jackson;
- 9) Jersey;
- 10) Jo Daviess;
- 11) Madison;
- 12) Mercer;
- 13) Monroe;
- 14) Pike;
- 15) Randolph;
- 16) Rock Island;
- 17) Scott;
- 18) St. Clair;
- 19) Union; and
- 20) Whiteside.

- b) No other economically reasonable alternative method of disposal is available.
- c) Atmospheric conditions will readily dissipate the contaminants.
- d) In an incorporated area, notification is provided to the appropriate fire protection district or fire department prior to burning.
- e) The burning site is provided with adequate fire protection and with such equipment as is necessary to control the fire and the burning is conducted safely.

- f) The burning will not result in the production of obnoxious odors or excessive emissions of particulate matter so as to cause a violation of Section 9(a) of the Act.
- g) Wind velocity at the time of burning exceeds 5 miles per hour.
- h) Burning shall not create a visibility hazard on roadways, railroad tracks or air fields.
- i) Burning is supervised at all times.
- j) Ashes, residue, and other by-products of burning are disposed of in a manner consistent with the Act and regulations promulgated thereunder.
- k) Materials burned do not include asbestos containing products, tires, household appliances, electrical components, carpets, weed killers, paints, drain cleaners, motor oil, fuel solvents, or insect poisons.

(Source: Emergency rule added at 17 Ill. Reg. _____, effective _____ for a maximum of 150 days)

IT IS SO ORDERED.

J. Anderson concurred.

Sections 29 and 41 of the Environmental Protection Act, 415 ILCS 5/41 (1992), provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 20th day of August, 1993, by a vote of 5-0.

Dorothy M. Gunn
 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board