ILLINOIS POLLUTION CONTROL BOARD
July 7, 1977

IN THE MATTER OF:)
) R71-23
EMISSION STANDARDS)

DISSENTING OPINION (by Mr. Young):

I must dissent from the action of the Board on July 7, 1977, to "validate" Rules 203(g)(1), 204(a)(1) and 204(c)(1)(A) despite the excellent opinion of Mr. Goodman. David P. Currie, former Pollution Control Board Chairman, has written "We should be alert to improve regulations when we obtain better knowledge, but it would be the height of folly to do nothing until we knew everything - for it seems likely that we would do ourselves enormous and unjustified harm while waiting."[1] I believe it is in the spirit expressed by Professor Currie that the Board took action to repromulgate the remanded regulation; unfortunately, I believe that the route chosen will result in delaying the establishment of valid regulations rather than expediting that result. Because a contrary inference might be drawn from that which follows, it should be understood that I am in complete agreement with Professor Currie's conclusion.

It is my judgment that in repromulgating these remanded regulations, the Board was obligated to follow the statutory and procedural requirements for the adoption of regulations, specifically, Sections 6 and 27(b) of the Act and Rule 214 of the Board's Procedural Rules, which require an economic impact study and economic impact hearings prior to adoption.

The action of the Board on a remand is controlled by the remanding order and opinion (Roggenbuck v. Brehaus (1928) 161 N.E. 780, 330 Ill. 294) and it is incumbent upon the Board to examine the remanding opinion and to proceed in conformity with the views expressed therein, including a determination of the necessity for additional hearings and proper further proceedings (Roggenbuck; NLRB v. Donnelly Garment Co. (1947) 330 US 219, 67 S. Ct. 40). After remand, further proceedings are clearly a continuation of the prior proceedings (Fry Roofing Co. v. PCB (1977) 361 N.E.2d 412, 46 Ill.App.3rd 412) and are

1. Currie, D. P., "Rulemaking Under the Illinois Pollution Law" 42 University of Chicago Law Review 457 (1975).

governed by the Environmental Protection Act and the Board's rules and regulations. While a remand to an administrative board by a reviewing court does not require a trial de novo (McCaffery v. Civil Service Board (1955) 129 N.E.2d 257, 7 Ill. App.2d 164), the administrative board must proceed after remand in accordance with statutory requirements (Fry; Ford Motor Company v. NLRB (1938) 305 US 364, 59 S. Ct. 301).

The statutory requirements against which this action of the Board would be reviewed include the amendments to Sections 6 and 27 of the Environmental Protection Act added by Public Act 79-790 effective October 1, 1975. A reviewing court would be obliged to dispose of the appeal under the law in force when the decision of the reviewing court was rendered (People ex rel. Eitel v. Lindheimer (1939) 21 N.E.2d 318, 371 Ill. 367; Dolan v. Whitney (1952) 109 N.E.2d 198, 413 Ill. 274).

The recitals contained in Senate Bill 805, which set forth the reasons upon which the statutory enactment (PA 79-790) was founded, stated that proposed regulations were pending before the Board and that the economic and social costs of any new regulation must be weighed against the environmental health and welfare benefits of such regulation. It is clear that the General Assembly intended that the economic impact study and hearing requirements of PA 79-790 apply to all new regulations of the Board adopted after October 1, 1975, including 203(g)(1), 204(a)(1) and 204(c)(1)(A).

Rule 214 of the Board's Procedural Rules requires hearings on the Economic Impact Study before the final adoption of any proposed regulations and the Board is required to follow its own Procedural Rules (Margolin v. Public Mutual Fire Insurance Co. (1972) 281 N.E.2d 728, 4 Ill.App.3rd 661; Berwyn Savings & Loan Association v. Illinois Savings & Loan Board (1975) 331 N.E.2d 254, 29 Ill.App.3rd 965). The fact that the Board did not do so would be sufficient, in my judgment, for a further remand for the economic impact study and hearings, and I cannot agree to the adoption of Rules 203(g)(1), 204(a)(1) and 204(c)(1)(A) until the requirements of Section 27(b) of the Act and Rule 214 of the Board's Rules have been fulfilled.

The Board has received a number of comments following an announced intention on May 12, 1977, to re-adopt the remanded regulations; a Motion for Hearing and Preparation of Economic Impact Study was also filed. Both the comments and Motion generally protest the "validation" of the remanded regulations both for failure to comply with Section 27(b) of the Act and the Board's Procedural Rules relating to the economic study and economic hearing requirements and for failure to hold additional substantive hearings to receive new or amplifying evidence en-

compassing virtually the entire spectrum of considerations germaine to the regulation of SO_2 and particulate including, for example, an analysis of ambient air quality data to be prepared "within a matter of weeks."

Much of the material presented in these comments may be dismissed on the basis that it constitutes an "as applied" argument which was rejected by the First District Appellate Court as a valid challenge to the adoption of a general regulation in Commonwealth Edison Company v. Pollution Control Board (1974) 25 Ill.App.3rd 271; 323 N.E.2d 84, at pages 89 and 90.

I am unable to agree with the contention advanced that even if the Board had complied with the provisions of Section 27(b) and Rule 214, additional substantive hearings would have been required under the remand before the regulations could be validly adopted.

I believe that the record in R71-23, R74-2 and R75-5 contain more than sufficient legislative facts on which regulations establishing limitations on particulate and sulfur dioxide emissions in Illinois could be predicated (Shell Oil Company v. Pollution Control Board (1976) 37 Ill.App.3rd 264, 346 N.E.2d 212).

I do not believe that the Act or the Courts mandate continuing rounds of regulatory hearings on the prospect of new technology or better data just over the horizon or around the corner before the Board can take regulatory action to protect the public health and welfare. To hold otherwise would establish a requirement for a circularity of hearings, appeals and remands ad infinitum. Virtually all of the regulatory proposals considered by the Board present varying degrees of technological, medical and scientific uncertainty in a climate of ever expanding technology, medical and scientific knowledge which by its nature inevitably introduces further uncertainty even when resolving or redefining previous questions. To adopt an all or nothing approach to environmental regulations would surely be logically bankrupt.

The question of the adequacy of the record in R71-23 to support the remanded regulations raised by the First District Appellate Court is most ably discussed in a comment on that opinion by David P. Currie, former Chairman of the Pollution Control Board, and currently Professor of Law, the University of Chicago, in 42 U. Chicago L. R. 457, pages 501 to 505 and by the Fifth District Appellate Court in their Shell opinion. Reading the Shell opinion in conjunction with the Supreme Court opinion in Commonwealth, I do not believe that it is necessary to devote much time or space to a discussion of the question of whether or not the Board complied with the mandate of the First District before repromulgating the regulations.

If the function of the present Board in this matter was merely to sit in appellate review following the rules established by the Fifth District in Shell and the Supreme Court in Illinois Coal Operators Association v. Pollution Control Board (1974) 59 Ill.2d 305, and Monsanto Company v. Pollution Control Board (1977) Docket 48748 _____ N.E.2d _____, of the 1972 Board's adoption of these regulations after consideration of the additional record taken in R74-2 and R75-5, the decision would be easy; I would affirm. However, I do not believe that appellate review is our function in this situation any more than it is the function of the reviewing court to weigh the evidence and then apply the manifest weight of the evidence test when reviewing administrative rules and regulations.

The nagging problem for me in establishing emission limitations for the pollutants and class of sources here, is, first, whether or not the emission limitations adopted are those necessary to attain and maintain the National (and the Board's) Ambient Air Quality Standards and, second, that any emission limitation more stringent than necessary to protect the public health and welfare is solidly based and economically justified. I am fully aware of the extreme difficulty in establishing an exact relationship between emission limitations and ambient air quality, however, I believe the Board suffers here from the legacy of prior application of what was, or was rapidly becoming, a stale data base used to set emission limitations to ensure compliance with state and federal secondary sulfur dioxide ambient air quality standards subsequently repealed.

Irrespective of the final disposition of R71-23 by this Board or the Courts, a thorough review of the sulfur dioxide emission limitations must be undertaken as soon as a new data base has been developed which contains a current accurate emission source inventory and includes actual ambient air quality monitoring information through at least 1976. Fortunately, a review of the 1976 Illinois Annual Air Quality Report does not indicate a SO_2 ambient air quality problem considering the applicable primary and secondary air quality standards as the point of departure. I would hope in the next iteration that what has been learned and observed since the data in R71-23 was taken will be spread upon the record sufficient to establish a more thorough understanding of the relationship between SO_2 emissions as they relate to the attainment and maintenance of ambient air quality standards and thereby allow the Board to establish these emission limitations with the greater precision made possible by a current and more comprehensive data base.

James L. Young
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I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Dissenting Opinion was submitted to me on the 30th day of August, 1977.

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board