

ILLINOIS POLLUTION CONTROL BOARD  
May 5, 1994

IN THE MATTER OF: )  
 )  
Amendments to 35 Ill. Adm. )  
Code 302.302, 302.208, 302.212 ) R94-1  
302.213, 302.407, 304.122 and ) (Rulemaking)  
304.301 (Ammonia Nitrogen, Lead )  
and Mercury) )

ORDER OF THE BOARD (by C. A. Manning, R. C. Flemal, E. Dunham)

On February 24, 1994, the Illinois Environmental Protection Agency (Agency) filed a regulatory proposal as part of its mandatory review of the applicable water quality standards of the State of Illinois pursuant to 33 U.S.C. §§ 1251-1387 (1987).<sup>1</sup> The Agency filed the proposal pursuant to Section 27 of the Environmental Protection Act (Act) and the Board's procedural rules at 35 Ill. Adm. Code §§ 102.120 and 102.121.<sup>2</sup> (415 ILCS 5/27 (1992).) Pursuant to Section 28.2 of the Act and the Board's procedural rules at 35 Ill. Adm. Code § 102.121(e) the Agency certified that the proposed rulemaking is needed to fulfill the requirements of the Federal Clean Water Act and therefore was federally required. (415 ILCS 5/28.2 (1992).) However, the Agency only certified to part of the proposed rulemaking and did not include a written confirmation letter from the United States Environmental Protection Agency (USEPA). Based on the Agency's proposal and certification, the Board on March 17, 1994, rejected that the rulemaking was federally required. The subject of this Order is the Agency's motion to reconsider that determination which was filed on April 11, 1994.

In its motion for reconsideration the Agency states that the entire rulemaking is federally required. Additionally, the Agency attaches to the filing the confirmation letter from USEPA Region V. The USEPA confirmation letter states that the proposed changes for the ammonia, mercury and lead standards would address the inconsistencies of the current State law to the Federal Water

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<sup>1</sup> The Federal Water Pollution Control Act commonly know as the Clean Water Act (CWA) §§ 101-607 requires the Agency to periodically, but at least every three years, review the water quality standards applicable in that State. The Agency refers to this as the "Triennial Review."

<sup>2</sup> The Agency is proposing to amend 35 Ill. Adm. Code §§ 302.302, 302.208, 302.212, 302.407, 304.122 and 304.301 to update the ammonia nitrogen, mercury and lead general water quality standards, secondary contact and indigenous aquatic life standards and other applicable regulations. In addition, the Agency is proposing to add a new section 35 Ill. Adm. Code 302.213 entitled "Effluent Modified Waters."

Pollution Control Act (FWPCA).<sup>3</sup> (33 U.S.C. §1313(c)(2)(A) and §1313(c)(2)(b).) The confirmation letter also states that the proposal would be consistent with the FWPCA and federal regulations. The Agency argues that in order to effectuate the required rule changes, the amendments to 35 Ill. Adm. Code 304.122 and the addition of 302.213 are also required. The Agency therefore concludes that the entire regulatory proposal is federally required.

The Board received three responses to the Agency's motion for reconsideration. The responses were filed by B.F. Goodrich Company, the Illinois Association of Wastewater Agencies on April 25, 1994, and by the Illinois Environmental Regulatory Group on April 26, 1994. Generally the responses make three arguments: that there is no basis to grant the Agency's motion for reconsideration citing to Atlanta Meadows, LTD and R.O.C.G.G.P. Corp. Partner v. Illinois Environmental Protection Agency (March 17, 1994), PCB 93-72; that the Board in making this determination must independently verify, based upon the "record", that the proposed rule is federally required, as established in RACT Deficiencies Amendments to 35 Ill. Adm. Code Parts 211 and 215 (May 10, 1990), R89-16(a); and that even if the proposed rule is federally required the Board must weigh the economic reasonableness and technical feasibility of the proposal.

We will grant the Agency motion for reconsideration. As argued by those responding to the Agency's motion, the Board must independently verify, based upon the record, whether a proposed rule is federally required. The USEPA's confirmation letter submitted with the Agency's motion for reconsideration is evidence in this record, albeit new, addressing whether the proposed rules are federally required. We are persuaded by this new evidence, and find that these proposed rules are federally required.<sup>4</sup> In addition, the language of §101.246, "...the Board will consider factors including, but not limited to, error in the decision and facts in the record which are overlooked" does not limit the Board in its consideration. Finally, we also agree that pursuant to our ruling in RACT Deficiencies Amendments the Board should consider in adopting this type of rule the economic reasonableness and technical feasibility.

Therefore, based on the record before the Board, the proposal will be accepted as federally required. Pursuant to

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<sup>3</sup> The FWPCA is also know as the Clean Water Act(CWA). (40 C.F.R. §131.11(a)(1) and (2).)

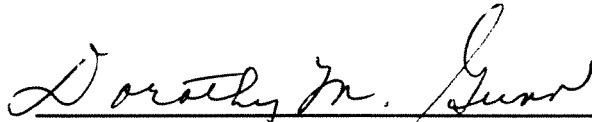
<sup>4</sup> Additionally, we note that in Atlanta Meadows the Board was determining a motion for reconsideration of a Board's final order that clearly is appealable. Here, we have a motion for reconsideration of a Board's interim order in a rulemaking which was not dispositive of the ultimate matter before the Board.

Section 28.2 of the Act that the first notice of the proposal shall be submitted for publication in the Illinois Register as expeditiously as is practicable, but in no event later than six (6) months from the date of this order.

For the above stated reasons, we grant the motion to reconsider and accept the Agency proposal as a federally required rule pursuant to Section 28.2 of the Act.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 5<sup>th</sup> day of May, 1994, by a vote of 6-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board