

ILLINOIS POLLUTION CONTROL BOARD  
May 5, 1993

IN THE MATTER OF: )  
 )  
EMERGENCY RULE AMENDING ) R93-12  
THE STAGE II GASOLINE VAPOR ) (Rulemaking)  
RECOVERY RULE IN THE METRO- )  
EAST AREA, 35 ILL. ADM. CODE )  
219.586(d) )

ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board on a motion, dated April 30, 1993 and filed with the Board May 3, 1993, submitted by the Illinois Environmental Protection Agency (Agency). The Agency petitions the Board to adopt an emergency rule that extends for 150 days the May 1, 1993 compliance deadline for implementation of Stage II vapor recovery systems in the Metro-East area, a moderate ozone nonattainment area consisting of Madison, Monroe and St. Clair counties. The Agency seeks to amend 35 Ill. Adm. Code 219.586(d) so that gasoline dispensing facilities located in the Metro-East area which commenced construction after November 1, 1990 have an extension of time until September 28, 1993 in which to install vapor collection and control equipment. The Agency concludes its motion by stating that it "offers whatever support for the emergency rule that the Board may require". (Motion, p. 4.)

For the reasons stated below, the Board cannot rule on the motion today. The Board instead solicits additional information and comments from the Agency, the Attorney General, the United States Environmental Agency (USEPA) and other interested persons. The Board will consider any information and comments received on or before May 17, 1993. The Board presently anticipates ruling on this motion at its May 20, 1993 meeting.

The Stage II Vapor Recovery Rules

Prior to presentation of the substance of the Agency's motion, the Board will provide a brief background concerning the circumstances of our adoption of the Stage II rules at issue here.

On August 13, 1992, the Board adopted the Stage II rules in Docket R91-30, In the Matter of: Stage II Gasoline Vapor Recovery Rules: Amendments to 35 Ill. Adm. Code Parts 215, 218 and 219. These were regulations for the installation and operation of systems for recovery of gasoline vapor emissions from the fueling of motor vehicles. These regulations are effectuated through amendments to the Board's reasonably

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available control technology (RACT) regulations found at 35 Ill. Adm. Code 215, 218, and 219<sup>1</sup>. Pursuant to Section 182(b)(3) of the Federal Clean Air Act Amendments of 1990, Public Law 101-549 (CAAA), Illinois was to submit these regulations for the recovery of gasoline vapors as a revision to its state implementation plan (SIP) by November 15, 1992.

The CAAA require that owners or operators of gasoline dispensing facilities located in nonattainment areas for ozone designated as moderate or above (*i.e.*, serious, severe, or extreme) install and operate gasoline vehicle refueling vapor recovery systems (Stage II systems). The Chicago nonattainment area has been designated by USEPA as "severe", and the Metro-East nonattainment area has been designated by USEPA as "moderate". The CAAA require in pertinent part:

(3) GASOLINE VAPOR RECOVERY

(A) GENERAL RULE

Not later than 2 years after November 15, 1990, the State shall submit a revision to the applicable implementation plan to require all owners or operators of gasoline dispensing systems to install and operate, by the date prescribed under subparagraph (B), a system for gasoline vapor recovery of emissions from the fueling of motor vehicles.  
\* \* \* (42 USC 7511a(b)(3)).

To enable the State of Illinois to comply with these requirements, the state legislature amended Section 10 of the Act to mandate that the Board adopt gasoline vapor recovery regulations<sup>2</sup>:

The Board shall adopt regulations requiring the owner or operator of a gasoline dispensing system that dispenses more than 10,000 gallons of gasoline per month to install and operate a system for the recovery of gasoline vapor emissions arising from the fueling of motor vehicles that meets the requirements of Section 182 of the federal

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<sup>1</sup> The Chicago area RACT regulations are found at Part 218; the Metro-East area RACT regulations occur at Part 219; Part 215 contains RACT regulations applicable to areas other than the Chicago and Metro-East nonattainment areas.

<sup>2</sup> The Act at Section 10 had previously contained a prohibition against Board adoption of regulations requiring Stage II systems in Illinois. That prohibition remained in effect until the legislature's action in response to the CAAA noted here.

Clean Air Act (42 USC 7511a). These regulations shall apply only in areas of the State that are classified as moderate, serious, severe or extreme nonattainment areas for ozone pursuant to Section 181 of the federal Clean Air Act (42 USC 7511), but shall not apply to areas classified as moderate nonattainment areas for ozone if the Administrator of [USEPA] promulgates standards for vehicle-based (onboard) systems for the control of vehicle refueling emissions pursuant to Section 202(a)(6) of the federal Clean Air Act (42 USC 7521(a)(6) by November 15, 1992[3]. (Ill. Rev. State. 1989, ch. 111 1/2, par. 1010)

The Agency proposed the Stage II rules on January 22, 1992. The Board expedited the rulemaking proceeding, and adopted the amendments seven months later on August 13, 1992.

The adopted amendments apply to gasoline dispensing facilities located in the Chicago nonattainment area counties of Cook, DuPage, Kane, Lake, McHenry, and Will, as well as Oswego Township in Kendall County and Aux Sable and Goose Lake Townships in Grundy County and in the Metro-East moderate nonattainment area, consisting of Madison, Monroe and St. Clair Counties.

#### The Emergency Motion

In support of its motion, the Agency recites that at Section 202(a)(6), the CAAA requires the United States Environmental Protection Agency ("USEPA") to promulgate rules for onboard vapor recovery systems by November 15, 1991. USEPA failed to do so. Rather, USEPA determined that Stage II accomplished the same or nearly the same reduction in emissions of volatile organic materials ("VOM") as onboard vapor recovery and was safer. (57 Fed. Reg. 13200, April 15, 1992.)

As explained in more detail above, Section 182(b)(3) of the CAAA (42 USC § 7511a(b)(e)) requires implementation of Stage II vapor recovery in moderate nonattainment areas by November 15, 1992. However, Section 202(a)(6) provides that Stage II shall not apply in moderate nonattainment areas once USEPA has promulgated onboard vapor recovery rules. Because USEPA did not promulgate the onboard vapor recovery rules by the date required in the CAAA, the Agency proposed and the Board adopted Stage II vapor recovery rules for Metro-East in R91-30 in accordance with the requirements of the CAA.

The National Resources Defense Council ("NRDC") and others brought suit against USEPA for its failure to promulgate the

onboard vapor recovery rules. The Court found in NRDC v. Reilly, No. 92-1137, slip op. (D.C. Cir. Jan. 22, 1993) that USEPA did not have discretion with regard to promulgating or not promulgating onboard vapor recovery rules and ordered USEPA to proceed with its obligation.

Section 202(a)(6) of the CAAA does not excuse implementation of Stage II vapor recovery in moderate nonattainment areas until such time as USEPA promulgates the onboard vapor recovery rules. The Agency asserts that:

This raises the specter of very large capital outlay in an economically depressed area of the State for what theoretically should be a relatively short period of time. Specifically, the Agency estimates that the capital outlay for installation of Stage II vapor recovery systems at the Metro-East's approximately 400 affected stations to be approximately \$14 million. Once the onboard vapor recovery rules are merely promulgated, there is no longer a federal requirement that those Stage II vapor recovery systems be there. Moreover, once onboard vapor recovery begins penetrating the market, the Stage II systems in Metro-East will be duplicative controls in an area that does not require them. (Motion, p. 2)

On March 25, 1993, the Director of the Agency wrote a letter to USEPA Administrator Browner (Attachment 2). After relating the cost estimates stated above, the Director states:

Therefore, I request that you immediately develop national guidance in light of the Court's order. In the meantime, absent national guidance, the Illinois Environmental Protection Agency must assume that USEPA is leaving the discretion to the states whether to implement the initial phase Stage II vapor recovery, which is due May 15, 1993 (sic), in the moderate ozone nonattainment areas. Illinois intends to invoke emergency measures to delay the initial implementation date for the Metro-East area unless we receive national guidance by mid-April. (Id., p. 2)

The Agency asserts that USEPA has not issued definitive guidance with regard to this problem; the Director has not received a response to her letter. (Motion, p. 3)

Under these circumstances, it is the Agency's opinion that

"enforcement of compliance with the Stage II rules in the Metro-East area, at this time, is onerous and not in the best interests of the welfare of the people of the State". (Motion, p. 3)

In its motion, the Agency further notes that Illinois is the first state in the nation, according to Region V, to have adopted its Stage II rules pursuant to the CAAA requirement<sup>3</sup>. Other states, not having proceeded as far as Illinois in this area, are in the position of being able to sit back and wait and see what transpires regarding the promulgation of the onboard vapor recovery rules. They have no compliance dates facing their sources, forcing their sources into possibly duplicative and unnecessary control measures.

The Stage II rules adopted by the Board establish a phased-in compliance schedule for sources affected by the rule. The first phase of the compliance schedule requires operations that commenced construction after November 1, 1990, to have installed and begun operating its Stage II equipment by May 1, 1993. The second compliance date is November 1, 1993, for operations that commenced construction before November 1, 1990, and dispense an average monthly volume of more than 100,000 gallons of gasoline. Given the uncertainty of USEPA's position with regard to onboard vapor recovery, the Agency requests that the first compliance date be delayed by the 150 days provided by emergency rules pursuant to Section 5.02 of the Administrative Procedure Act [5 ILC 100/5-45].

#### BOARD RESPONSE

The Agency concludes its motion by stating that it "offers whatever support for the emergency rule that the Board may require" (Motion, p. 4). For the reasons stated below, the Board finds that it needs additional information before it can rule on the merits of the Agency's request.

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

When the Board finds that a situation exists which reasonably constitutes a threat to the 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.

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<sup>3</sup> Other states that have employed Stage II for a number of years have done so at their discretion: that is, Stage II is a control measure they chose to implement rather than some other control measure; it was not required by the CAAA at the time these states adopted the Stage II rules.

Section 5.02 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 an 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 a 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 known 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.

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) 152 Ill. App.3d 105, 504 N.E. 2d 166, 169 (emphasis in original) (vacating rules on the basis that no emergency existed).

The Board may only adopt rules on the basis of the record before it, and this record contains no information or legal argument to support the Agency's conclusion that an emergency exists. While the Agency states that it estimates there are some 400 affected gas stations in the Metro-East area and that required capital expenditures are estimated at \$14 million, its unsworn motion contains no information to lead the Board to conclude that any of these stations were out of compliance as of May 1. The Board itself has received no petitions for variance or adjusted standards which could lead it to conclude that non-compliance exists. The Agency motion as worded speaks of "the specter of a very large capital outlay", rather than of a reality. While the Agency may well have identified or been approached by sources who have yet to comply with the Stage II requirements, evidence of this has not been submitted into this

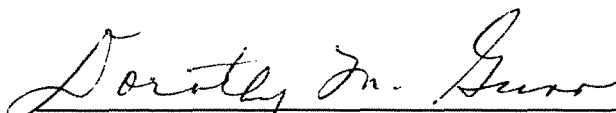
record. The Board accordingly invites the Agency to supplement its motion by any appropriate filing to be received by the Board on or before May 17, 1993.

The Board also notes that this motion has been served only upon the Board. It was not served upon the Attorney General and the Department of Energy and Natural Resources as required by the Board's procedural rules in 35 Ill. Adm. Code 102.120, or upon any of the approximately 50 participants in the R91-30 proceeding.

As the Board does not feel that it can proceed today in this matter based on the record before it, and as the May 1 compliance date had already passed before the Board's May 3 receipt of this motion, the Board believes it would be prudent to solicit comment from those potentially affected by the proposed rule change. The Board accordingly directs the Clerk to serve copies of this order on all persons on the R91-30 notice list. The Board will consider any public comment on whether it should adopt the proposed emergency rule that is received by the Board on or before May 17, 1993. The Board presently anticipates ruling on this matter at its May 20, 1993 meeting.

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, 1993, by a vote of 5-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board