

ILLINOIS POLLUTION CONTROL BOARD  
January 25, 1990

IN THE MATTER OF: )  
 )  
AMENDMENTS TO TITLE 35, ) R88-21, Docket A  
SUBTITLE C (TOXICS CONTROL) ) (Rulemaking)

DISSENTING OPINION (by J.D. Dumelle and M. Nardulli):

We dissent from the Board's Final Opinion and Order adopted today in this docket. While we totally support the adoption of rules and regulations which attempt to assure that there shall be no toxic substances present in toxic amounts within the waters of the State, we feel strongly that that which is to be adopted by the Board be rules and regulations as those terms are used by the Illinois Environmental Protection Act (Act) and the Illinois Administrative Procedure Act (APA). We do not believe that portions of this rulemaking can properly be characterized as "rules and regulations."

In particular, our concern is directed to the "narrative standard" provisions, Section 302.210 and Subpart F, Procedures for Determining Water Quality Criteria. We believe that these sections (1) are vague, (2) delegate Board rulemaking authority to the Illinois Environmental Protection Agency (Agency), and (3) do not allow for a consideration of economic reasonableness, as required by Section 27(a) of the Act.

First, some commenters have pointed out the vagueness of the rule by stating that it is possible for two scientists working through the narrative standard provisions to arrive at completely different results. We agree. And we firmly believe that a rule should not have such a result. Section 5(b) of the Act states:

The Board shall determine, define and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of this Act. (Emphasis added.)

Consistent with this directive, we believe that every discharger in Illinois should know, or should be able to determine with reasonable accuracy, what is expected of his facility. We do not believe that the narrative standard rules, as written, provide such information.


Second, the argument was made early and often in this proceeding that if the Board adopts the narrative standard provisions as proposed by the Agency, the Board will be delegating its rulemaking authority to the Agency. There was a good deal of hearing time dedicated to this issue, and the post-hearing comments

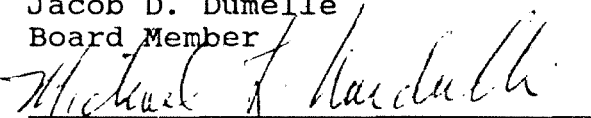
address it amply. Further, the Joint Committee on Administrative Rules (JCAR) during the course of its review addressed the issue and adopted a formal Objection to the rule on this basis.

We, too, believe that the narrative standard provisions constitute a delegation of rulemaking authority to the Agency, and we do not support it. Whether the adopted language is called "standards" or "criteria", it is clear that the Agency will be determining the numerical limitations on a case by case basis. This strikes us as rulemaking in disguise, which raises a number of additional concerns. First, with the Agency setting numerical standards on a case by case basis without following established APA rulemaking procedures, public notice and comment are ignored. How can we ensure that the Agency is subjecting facilities within a certain class to the same or similar requirements? Second, when the Board adopts a rule, it must first consider economic reasonableness and technical feasibility pursuant to Section 27(a) of the Act. But when, where, and how will economic reasonableness and technical feasibility be considered under the narrative standard provisions? By the Agency in a permit application, or by the Board on review of an Agency permitting decision? How will this determination be made consistent with the Board's scope of review as articulated in City of East Moline v. Illinois Environmental Protection Agency, PCB 86-218, September 8, 1988? These questions raise many troublesome issues which will haunt us for a long time.

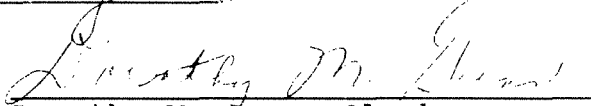
We would prefer, as an alternative to the narrative standard, "option 1" which is set forth in the USEPA guidance document (Exh.46) and also noted in the Board's Opinion under "Required Action." We believe that this option offers a workable approach under the system of environmental regulation created by the Illinois General Assembly in adopting the Environmental Protection Act.

For these reasons, we respectfully dissent.

  
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Jacob D. Dumelle  
Board Member

  
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Michael L. Nardulli  
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 30<sup>th</sup> day of January, 1990.

  
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Dorothy M. Gunn, Clerk,  
Illinois Pollution Control Board