

ILLINOIS POLLUTION CONTROL BOARD
July 21, 1994

IN THE MATTER OF:)
)
REVISIONS OF TREATABILITY) R94-18
TESTING EXCLUSION LIMITS:) (Rulemaking)
Amendments to 35 Ill. Adm. Code)
721.104(f)(3) through (f)(5))

ORDER OF THE BOARD (by E. Dunham):

Burlington Environmental Inc. (Burlington) filed a petition for rulemaking on July 1, 1994, pursuant to Section 22.4(b) of the Environmental Protection Act (Act) (415 ILCS 5/22.4(b) (1992), which would require the Board to engage in a general rulemaking under Title VII of the Act. Burlington filed a request for an emergency rulemaking in this matter on July 18, 1994. The Agency filed a response to the request for emergency rulemaking by telefax on July 20, 1994. Having reviewed the petition for procedural sufficiency, the Board hereby accepts the petition. However, we temporarily stay this matter and order Burlington to submit appropriate comments to be received by the Board on or before August 24, 1994, as indicated below. The request for emergency rulemaking is denied for reasons given below.

The petition essentially seeks to have the Board adopt amendments made by U.S. EPA on February 18, 1994, at 59 Fed. Reg. 8365. On that date, U.S. EPA amended the treatability study samples exemption rule, which allows a conditional exemption from Subtitle C regulation for a person that ships and uses samples of the waste for treatability studies. The action increases the amount of hazardous waste that the person can use.

The Board recently reserved docket R94-17 for U.S. EPA RCRA Subtitle C amendments that occurred in the period January 1 through June 30, 1994. Included in that docket are the federal amendments of February 18, 1994 that Burlington Environmental proposes in this rulemaking. R94-17 appears on the Regulatory Discussions segment of today's agenda, and the Board presently intends to vote on a proposal for public comment at our regularly-scheduled meeting on August 11, 1994. This docket is presently due for filing with the Secretary of State no later than January 4, 1995.

A rulemaking proceeding under Title VII would require the Board to employ the procedures of Section 5 of the Administrative Procedure Act (APA) and Section 27 of the Act. This would require the Board to conduct at least two hearings in different areas of the state, to submit the proposed rule for First Notice publication in the Illinois Register, to receive public comments for a period of 45 days, to submit the proposed rule to Second

Notice review by the Joint Committee on Administrative Rules for a period of 45 days.

Using identical-in-substance procedures, the rulemaking procedure is greatly expedited. Section 22.4(a) provides for quick adoption of regulations that are "identical in substance" to federal RCRA Subtitle C regulations. It provides that Title VII of the Act and Section 5 of the APA do not apply. Thus, under Section 22.4(a), the Board submits the proposed rule for First Notice publication in the Illinois Register, receives public comments for a period of 45 days, and adheres to a 30-day post-adoption U.S. EPA review period before the amendments are filed and become effective. Identical-in-substance proceedings are equally open to public comment as are general rulemaking proceedings.

Since the Board presently anticipates that the desired amendments will become effective by identical-in-substance procedures before January 4, 1995, in docket R94-17, and since the general rulemaking procedures would unnecessarily delay their adoption, we temporarily stay this proceeding. The Board directs Burlington Environmental to review the Board's August 11, 1994 proposal in docket R94-17 and to identify any areas in which its own R94-18 proposal requests relief not proposed in the identical-in-substance docket. The Board further directs Burlington Environmental to file comments with the Board on or before August 24, 1994 indicating whether this petition can be dismissed as unnecessary in light of the R94-17 rulemaking.

The request for emergency rulemaking states that "...a threat to the public interest and welfare..." exists because, "Absent this relief, Burlington may lose the contract which will permit development of the mercury recovery technology." The 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.

(5 ILCS 100/1005-45 (1992), formerly Section 5.02.)

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.

(415 ILCS 5/27(c) (1992).)

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).) In this case, Burlington contends that the threat to the public interest or welfare consists of an economic disadvantage to an Illinois company resulting from failure of the State of Illinois to immediately adopt federal rules relating to the treatability testing exclusion limits. This threat is insufficient to invoke the emergency rule powers of the Board.

In its response to the request for emergency rule, the Agency supports the emergency rule, but states that the Agency did not find that the information provided by Petitioner established an arbitrary or unreasonable hardship sufficient to grant a provisional variance. The Agency also stated that the requested relief was not of the type that the Agency has granted in the past. In the Board's view, the "arbitrary or unreasonable hardship" variance requirement establishes a lesser, more easily satisfied burden of proof than the emergency rulemaking requirement of a "threat to public interest, safety or welfare". It appears inconsistent, therefore, that an emergency rule should issue where a provisional variance could not.

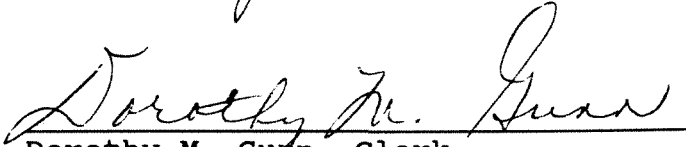
The Board also notes that a variance petition is proceeding under docket PCB 94-177 concurrently with this rulemaking petition.

The Board denies the request for emergency rulemaking and stays the proceedings on this rulemaking. Burlington is ordered to file comments on the relationship between this rulemaking and

the identical-in-substance rulemaking in docket R 94-17.
Comments shall be filed with the Board on or before August 24,
1994.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control
Board, do hereby certify that the above order was adopted by the
Board on the 21st day of July, 1994, by a vote
of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board