ILLINOIS POLLUTION CONTROL BOARD
April 9, 1990

IN THE MATTER OF:	)	
	)	
RACT DEFICIENCIES -	)	R89-16
AMENDMENTS TO 35 ILL. ADM.	)	(Rulemaking)
CODE PARTS 211 AND 215	)	

ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board upon a March 15, 1990, motion by the Illinois Environmental Protection Agency ("Agency") for the Board to reconsider and void its Order of February 8, 1990. On March 26, 1990, the Illinois Environmental Regulatory Group ("IERG") filed a response to the Agency's motion. For the reasons set forth below, the Board grants the Agency's motion to reconsider; however, on reconsideration, the Board declines to grant the Agency's requested relief.

In support of its motion, the Agency argues that the Board erred in deciding (1) that it possesses the authority to review an Agency certification of a proposed rule as "federally required" and (2) that the proposed changes to the Generic rule and the SOCMI rule are not "required" within the meaning of Section 28.2 of the Environmental Protection Act ("Act"). In addressing the Agency's motion, the Board notes that the factual background is adequately set forth in the Orders in this docket dated February 8 and March 16, 1990. The facts in and the Board's rationale for those Orders will not be repeated here.

(1) Agency Certification

The Agency argues that the Board does not have the authority to review an Agency certification of a proposed rule as a required rule pursuant to Section 28.2 of the Act. First, the Agency states that there is no specific grant of authority to the Board to reject and dismiss the Agency certification in a Section 28.2 proceeding and that the Board is an administrative body subject to the statutory rule that without a specific grant of authority, such authority does not exist. Village of Lombard v. Pollution Control Board, 66 Ill. 2d 503, 363 N.E.2d 814, 6 Ill. Dec. 867 (1977); Illinois Power Company v. Illinois Pollution Control Board, 137 Ill. App. 3d 449, 484 N.E. 2d 898, 92 Ill. Dec. 167 (4th Dist. 1985); Chemetco, Inc. v. Illinois Pollution Control Board, 140 Ill. App. 3d 283, 488 N.E.2d 639, 94 Ill. Dec. 640 (5th Dist. 1986).

The Board does not disagree with these cited cases. However, the Board notes that the courts have also held that where there is an express grant of authority, there is likewise the clear and express grant of power to do all that is reasonably necessary to execute the power or perform the duty specifically conferred. Chemetco, 488 N.E.2d 639, at 643. As discussed in the Order of February 8, 1990, under Section 5 of the Act, the Board is the

environmental rulemaking agency for the State of Illinois. In other words, the General Assembly has made an express grant of rulemaking authority to the Board. Along with that express grant of rulemaking authority goes the power to do all that is reasonably necessary to perform that duty.

The Board believes that, in Section 28.2 rulemaking proceedings, reviewing the correctness of the Agency's certification may in certain instances be a reasonably necessary step in performing the duty of adopting "a rule which fully meets the applicable federal law,..." Where, as here, (1) the federal law to which the proposed rule is alleged to respond is of such a general nature and/or (2) the underlying subject matter has been the source of controversy, the Board must discern exactly what is required before it can adopt a rule which fully meets the applicable federal law. In other words, discerning what is "required" goes hand in hand with adopting a rule which fully meets the applicable federal law. Thus, to perform the duty of adopting a rule which fully meets the applicable federal law, the Board must have the power to determine what the requirements of the applicable federal law are; and if that differs from what the Agency certifies as being required, the Board must have the power to review the Agency certification for correctness.

The Board finds further support for this view in the language of Section 28.2(b) wherein it states "[w]henever a required rule is needed, the Board shall adopt a rule which fully meets the applicable federal law,..." The words "is needed" call for a determination on the part of some entity that the required rule is needed. As the Board is the only entity named in that sentence, and as the Board is the rulemaking agency under the Act, the Board is the logical entity to make a determination that the required rule is needed, i.e., that the rule is indeed required. Thus, the Board's review of the Agency's certification is appropriate under Section 28.2(b) of the Act.

The Agency next argues that the Board's reliance upon Section 5(d) of the Act is misplaced. Section 5(d) states:

> d. The Board shall have authority to conduct hearings upon complaints charging violations of this Act or of regulations thereunder, upon petitions for variances; upon petitions for review of the Agency's denial of a permit in accordance with Title X of this Act; upon petition to remove a seal under Section 34 of this Act; upon other petitions for review of final determination which are made pursuant to the Act or Board rule and which involve a subject which the Board is authorized to regulate; and such other hearings as may be provided by rule.

The Agency argues that the only basic grant of authority to the Board in Section 5(d) is the authority to "conduct hearings". The Agency argues that there is no decision-making or review authority granted to the Board in Section 5(d), other than the authority to conduct a hearing. Further, the Agency focuses on the language "and which involve a subject which the Board is authorized to regulate". The Agency contends that the Agency certification is not a subject which the Board is authorized to regulate.

In its response, IERG notes that the Agency takes the position that the Board does not have the authority to review or dismiss a certification and that, as a result, any rule the Agency so designates as a required rule automatically becomes a "required rule" within the meaning of Section 28.2. IERG argues that should this contention prevail, taken to its logical extension, the Agency could certify any proposed rule as a required rule and the Board would have to so treat the rule, regardless of whether the Agency's position is with or without merit. IERG argues that this position is without legitimate basis. Further, IERG argues that Section 5(d) grants the Board the authority to review the Agency certification, and further the Board has, under Section 5(b) of the Act, general powers to make and implement rules. It is this broad grant of rulemaking authority that IERG relies upon to support its view that the Board possesses the authority to review Agency certifications.

The Board is not persuaded by the Agency on this point. First, with respect to the Section 5(d) grant of authority to the Board to "conduct hearings", the Board believes that the Agency construes this language much too narrowly. Implicit in the grant of authority to conduct hearings is the power to act upon the subject matter of the hearing. The Board construes this subsection as a general grant of authority to conduct hearings and to act in ways that reasonably flow from the holding of such a hearing. In this proceeding, the relevant language is:

> The Board shall have authority to conduct hearings ...upon petitions for review of final determinations which are made pursuant to the Act or Board rule and which involve a subject which the Board is authorized to regulate;...

The Board notes that the Industry motion filed January 24, 1990, constitutes a petition for review of a final determination of the Agency made pursuant to Section 28.2 of the Act. With respect to the second part of this provision, i.e., "and which involves a subject which the Board is authorized to regulate", the Board believes that, here too, the Agency construes this language too narrowly. Whereas the Agency would construe the "subject" as being the Agency certification separate and distinct from anything else, the Board construes the "subject" as being the subject matter of the proposed amendments, i.e., requirements of the federal Clean

Water Act, Safe Drinking Water Act, Clean Air Act (including required submission of a State Implementation Plan), etc. Clearly the emission of air pollution is a subject which the Board is authorized to regulate. Thus, the Board's reliance upon Section 5 of the Act is proper to base the authority to review an Agency certification.

The Agency next states that it is not asserting that, under Section 28.2, the Agency certification is beyond judicial review. The Agency contends that after the Board's final decision, any participant with a legitimate interest in the outcome of the proceeding may appeal. The Agency states that such an appeal could raise the issue of whether the proceeding is a required rule proceeding pursuant to Section 28.2 of the Act.

In its response, IERG notes that in an appeal from the adoption of an administrative regulation, the one who attacks the regulation bears the burden of establishing its invalidity. IERG argues that a reviewing court may set aside an administrative regulation only if it is clearly arbitrary, capricious, or unreasonable. Midwest Petroleum Marketers Association v. City of Chicago, 82 Ill. App. 3d 494, 402 N.E.2d 709 (Ill. App. 1980). Further, IERG argues that issues which are not objected to in the original administrative proceedings are waived and cannot be raised on appeal. Waste Management v. Pollution Control Board, 530 N.E.2d 682, 695, 125 Ill. Dec. 524, 537 (Ill. App. 2d 1988). Thus, IERG argues that if the Board is not permitted to decide the issue of whether a rule is a required rule pursuant to Section 28.2 of the Act at the administrative level, the Appellate Court cannot and will not decide that issue on appeal.

On this point, the Board agrees with IERG. Notwithstanding the Agency's assertions, the courts have been quite clear on the this issue. Issues that have not been presented or passed upon in an administrative hearing will not be considered on review. Village of Cary v. Pollution Control Board, 38 Ill.Dec. 68, 403 N.E.2d 83, 82 Ill.App.3d 793 (1980). In light of these holdings, the Board is persuaded that it must address appeals to the Agency certification during the course of the rulemaking proceeding. In this way the appellate court will have a complete record to review on appeal. Moreover, the Board believes that were it to subscribe to the Agency's theory, it would be required to proceed through a lengthy rulemaking proceeding on the possibly shaky ground of an erroneous Agency certification. It would be a waste of scarce state resources to have the Board, and all participants, expend the necessary time, energy, and resources to complete a rulemaking only to have the appellate court find on appeal that the Agency certification was erroneous, thereby voiding the entire rulemaking proceeding and any regulations resulting therefrom.

2. Generic and SOCMI rules status

The Agency argues that the proposed changes to the Generic and SOCMI rules are required rules as defined in Section 28.2(a) of the Act. The Agency points to the language in the Board's February 8, 1990 Order, wherein it states:

> Having found the authority to review certifications, the Board further finds that the proposed amendments to the Generic rule and the SOCMI rule are not founded upon "federal law" as that term is used in Section 28.2 of the Act. The Board is persuaded by the thorough analysis submitted in the Industry Group motion, which is discussed above. The Board is also persuaded by the lack of analysis in the Agency's response. The Board can find nothing in the record to directly support the characterization of the Generic rule and SOCMI rule proposed amendments as "required rules." As a result, the Board finds that these proposed sections must be removed from the existing docket.

With respect to the lack of analysis in the Agency's response, the Agency states that its comments on the issue of the proper interpretation of Section 28.2 were not due until February 9, 1990. The Agency states that it requested and received an extension of time to February 9, 1990, to respond to the motion to strike filed by Stepan. The Agency states further that it had every expectation that this issue would be decided on the basis of all available information and arguments. Therefore, the Agency believes that, having acted on February 8, 1990, the Board acted on an issue of great importance before the Board's own deadline had passed.

In its response, IERG notes that the Agency never requested an extension of time to respond to the Industry Group's motion to dismiss. IERG states that the Board waited for the allowable time for responses to pass before acting on the motion. IERG believes that the Board acted expeditiously after that time. IERG states further:

> IEPA appears to be claiming that the Board acted too expeditiously in ruling on the Motion, even though the Board had no way of knowing that the IEPA ever intended to respond to that Motion. Indeed, the IEPA does not state that it ever intended to respond to the Motion of the Business Group [Industry Group] which was decided by the Board.
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> (IERG Response, pp. 3-4.)

To put this matter into perspective, the Board notes that the

Agency did, on January 31, 1990, file a response to the Industry Group's motion--in fact, the complete substantive response by the Agency was fully reprinted in the Board's Order of February 8, 1990. The Board understood this filing to be the Agency's response to the Industry Group's motion. Although the Agency stated at the conclusion of that response that it "reserves the right to brief or comment on the issues contained in the Industry Group's Motion prior to the close of the comment period", the Board notes that its procedural rules allow participants 7 days to file a response to a motion. 35 Ill. Adm. Code 101.241(b). No participant can extend a properly adopted procedural deadline simply by "reserving the right" to file a subsequent document. Further, the Agency's reliance on its extension of time to respond to Stepan's motion is not persuasive--the extension was simply for that limited purpose, a response to Stepan's motion. The Board notes that Stepan's motion and the Industry Group's motion were two separate and distinct motions. Had the Agency requested additional time to respond to the Industry Group's motion, as it had with respect to the Stepan motion, and had the Board granted the motion, then the Agency's post hearing comments could have and would have been considered before the decision on the motion. However, as the Agency filed a response that was complete in and of itself within 7 days of the filing of the motion, the motion was ripe for decision. The Agency cannot now argue that the motion was not ready for decision; the Agency's own action made the motion ripe.

The Agency next argues that the Generic and SOCMI rule amendments fall within the definition of "required rule" in Section 28.2(a) of the Act. The Agency notes that the Board relied upon the term "federal law" in finding that the Generic and SOCMI rule amendments were not required, and apparently argues that, in so doing, the Board erroneously interpreted Section 28.2(b) when it should have interpreted Section 28.2(a). The Agency states:

> The term "federal law", which the Board relies on in making this decision, has nothing to do with determining whether a rule is a required rule; in fact, the term "federal law" appears in Section 28.2(b) and specifically refers to the Board's obligation to adopt a rule which "fully meets the applicable federal law".

On this point, the Agency appears to be splitting hairs. Either a rulemaking is "required" under federal law or it is not. The terms "required rule" and "federal law" are two sides of the same coin. In other words, it is the result of a federal law which makes a proposed rule "required". Further, the Agency's statements ignore Section 28.2(e), wherein it states in pertinent part:

> When the Agency proposes a rule which it believes to be a required rule, the Agency shall so certify in its proposal, identifying

> the federal law to which the proposed rule will respond. (Emphasis added.)

This section, too, references "federal law," and in the specific context of the Agency certification. Thus, the Board disagrees with the Agency when it asserts that "federal law" has nothing to do with determining whether a rule is a required rule--it has everything to do with it.

Finally, the Agency argues that its certification "clearly establishes" the Generic and SOCMI rules as required rules. Further, the Agency argues that the federal requirement is not contained in the SIP call letters, the "blue book", federal letters or settlement agreements, but rather in the Clean Air Act. The Agency then proceeds to argue against the analysis offered by the Industry Group in its motion and relied upon by the Board in its February 8, 1990 Order.

In its response, IERG notes that the "IEPA appears to be filing what would have been its response to the Industry Group's Motion." IERG submits that there is nothing contained in the Agency's motion that provides any support for its position that the Generic and SOCMI rules are required rules. IERG argues that the Agency's motion is basically a lengthy quotation from the Agency certification, which was reviewed by the Board and found to be inadequate support for the position that the rules are required. Finally, IERG argues that the Clean Air Act does not require any particular rule content to be adopted by the states, but rather leaves it to each state to determine the proper mix of controls to achieve and attain the National Ambient Air Quality Standards ("NAAQS"). As a result, IERG argues that none of the Clean Air Act rules are required rules pursuant to Section 28.2 simply because the rule will be a part of a State Implementation Plan. IERG argues that for a rule under the Clean Air Act to become a required rule, for purposes of Section 28.2 of the Act, the rule must be adopted by the Board, submitted to USEPA, and disapproved as a SIP revision for a particular deficiency.

The Board agrees that the Agency's motion contains arguments which should have been timely raised in its response to the Industry Group's motion. The Board has already determined that under the procedural rules the Agency's two-paragraph response constituted its complete response to the motion. To the extent that the Agency now raises new arguments, i.e., arguments not raised in its response to the Industry Group motion, the Board finds these arguments waived. Arguments cannot be raised on reconsideration that were not offered during consideration of the underlying Order, without specific justification for the failure to raise those arguments earlier. In this case, the Agency has failed to provide such justification.

However, even if the Agency's arguments were not found to be

waived, the Board would still decline to reverse its February 8, 1990 decision. As the Board discussed at length in its March 16, 1990 Second Notice Order, Reasonably Available Control Technology ("RACT") rulemakings are extraordinary rulemakings in that a state is to decide for itself what constitutes reasonably available control technology based upon the circumstances found within its borders. Then the state's decision, i.e., its regulations, are submitted to USEPA for approval as part of the State Implementation Plan. The Board agrees, to a certain extent, with IERG that the Section 28.2 required rule proceeding does not lend itself well to the RACT rulemaking requirements of the Clean Air Act--simply because RACT rulemakings are inherently state decisions. Thus, in the first instance, there is no clear federal requirement except that the State adopt rules which it believes to be RACT. In this case, the State of Illinois has already adopted Generic and SOCMI rules that it believes to be RACT for Illinois. Those rules were adopted in R86-18 and R86-39, respectively, in late 1987 and early 1988. Further, those rules were submitted to USEPA as revisions to the SIP. However, when the Agency proposed this rulemaking on September 29, 1989, USEPA still had not acted upon those SIP submittals. In other words, although USEPA had had the rules for approximately a year and a half, it had not proposed to approve or disapprove the rules, nor had it formally adopted an approval or disapproval of those rules. However, on December 27, 1989, at the same time that USEPA published its notice of proposed regulations constituting a federal implementation plan for Illinois, 54 Fed. Reg. 53080, USEPA also published a notice of proposed disapproval of Illinois' Generic and SOCMI rules, and thereby began a public comment period. To date, USEPA has still not proceeded to final adoption of those disapprovals. Thus, Illinois' Generic and SOCMI rules have not been officially disapproved as yet. Given this particular state of affairs, the Board does not believe that the Generic and SOCMI rules can be said to be required until USEPA officially adopts a disapproval of them as SIP revisions.

As a result, the Board believes its February 8, 1990 decision is correct. The Agency's motion to reconsider is granted; however, upon reconsideration, the Board affirms its Order of February 8, 1990.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 9th day of September, 1990, by a vote of 5-0.

Dorothy M. Gunn, Clerk,
Illinois Pollution Control Board