

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
NITROGEN OXIDES EMISSIONS,)
AMENDMENTS TO 35 ILL. ADM.) R11-24
CODE 217)
)
IN THE MATTER OF:)
)
ILLINOIS ENVIRONMENTAL)
REGULATORY GROUP'S EMERGENCY) R11-26
RULEMAKING, NITROGEN OXIDES) (Rulemaking – Air)
EMISSIONS: AMENDMENTS TO 35 ILL.) (Cons.)
ADM. CODE PART 217)

NOTICE OF FILING

TO: Mr. John T. Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 W. Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the **MOTION FOR RECONSIDERATION**, copies of which are herewith served upon you.

Respectfully submitted,

By: /s/ Alec M. Davis
Alec M. Davis

Dated: June 23, 2011

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CERTIFICATE OF SERVICE

I, Alec M. Davis, the undersigned, hereby certify that I have served the attached

MOTION FOR RECONSIDERATION upon:

Mr. John T. Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601

Kathleen C. Bassi
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via electronic mail on June 23, 2011; and upon:

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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on June 23, 2011.

/s/ Alec M. Davis
Alec M. Davis

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MOTION FOR RECONSIDERATION

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”), by and through its attorney, Alec M. Davis, and pursuant to 35 Ill. Admin. Code §101.520, hereby requests the Illinois Pollution Control Board (“Board”) reconsider its May 19, 2011 Order in this matter. In support of this Motion, IERG states as follows:

I. PROCEDURAL HISTORY

1. On April 21, 2011, IERG filed a Motion for Emergency Rule, asking the Board to amend its rules contained in 35 Ill. Admin. Code Part 217, to extend the compliance dates contained therein, pursuant to its emergency rulemaking authority. Motion for Emergency Rule, *In the Matter of: Illinois Environmental Regulatory Group's Emergency Rulemaking, Nitrogen Oxides Emissions: Amendments to 35 Ill. Adm. Code Part 217*, R11-26¹ (Ill.Pol.Control.Bd. Apr. 21, 2011) (hereafter cited as “IERG’s Motion”). In support of its motion, IERG explained that sources subject to the rules sought to be amended face both potential liability, as well as

¹ Subsequently consolidated with Docket R11-24, *In the Matter of: Nitrogen Oxides Emissions, Amendments to 35 Ill. Adm. Code 217*, a general rulemaking dealing with identical subject matter and seeking identical amendments, proposed by the Illinois EPA. (Consolidated dockets cited hereafter as “R11-24/R11-26”). Order at 1.

economic hardship sufficient to constitute a threat to the public interest warranting immediate action.

2. On May 19, 2011, the Board issued an Order denying IERG's Motion, holding that the situation described by IERG did not constitute a threat to the public interest, safety, or welfare. Board Order, *In the Matter of: Illinois Environmental Regulatory Group's Emergency Rulemaking, Nitrogen Oxides Emissions: Amendments to 35 Ill. Adm. Code Part 217*, R11-26, at 9-11 (Ill. Pol. Control. Bd. May 19, 2011) (hereafter cited as "Order").

II. STANDARD FOR RECONSIDERATION

3. The Board has observed that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." *Citizens Against Regional Landfill v. County Board of Whiteside*, PCB No. 93-156 (Ill. Pol. Control. Bd. Mar. 11, 1993) (quoting *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627 (1st Dist. 1992)); see also Board Order, *In the Matter of: Petition of Maximum Investments, LLC for an Adjusted Standard from 35 Ill. Adm. Code 740.210(a)(3) for Stoney Creek Landfill in Palos Hills, Illinois*, AS No. 09-2 (Ill. Pol. Control. Bd. Feb. 5, 2009). 35 Ill. Admin. Code § 101.902. As discussed in detail below, the Board has erred in the application of existing law by denying IERG's request for the adoption of an emergency rule as described in IERG's Motion.

III. THE BOARD ERRED IN DETERMINING THAT A THREAT TO THE PUBLIC INTEREST, SAFETY OR WELFARE DOES NOT EXIST

4. The Board's reliance on *Citizens for a Better Environment, et al. v. Pollution Control Board, et al.*, 152 Ill. App. 3d 105, 504 N.E.2d 166 (1st Dist. 1987) (hereinafter "CBE"), ignores a number of very important distinguishing factors that are present in this matter.

5. In *CBE*, the plaintiffs appealed an order of the Board adopting an emergency rule establishing regulations to implement Section 39(h) of the Illinois Environmental Protection Act. *Id.* at 108. CBE argued that the Board lacked authority because "there was no emergency, as defined by section 5.02 of the IAPA², to justify bypassing the general notice-and-comment rulemaking procedures." *Id.* at 109. The Board argued that the emergency rulemaking was proper because the emergency rules clarified Section 39(h), would reduce the "numbers of appeals to the Board" regarding waste stream authorizations, would ease the "transition period when final rules [were] adopted," and gave effect to Section 39(h) since the "argument [could] be made that section 39(h) [was] not self-executing." *Id.*

6. The Court concluded that "the need to adopt emergency rules in order to alleviate an administrative need, which, *by itself*, does not threaten the public interest, or welfare, does not constitute an 'emergency.'" *Id.* (emphasis added). The Court, however, stated in regards to the delay in initiating the rulemaking, "[w]e *do not hold* that in all instances of delay the emergency rulemaking powers of section 5.02 cannot be utilized. Rather, only when the delay has resulted in a situation that threatens the public interest, safety, or welfare is the use of section 5.02 proper." *Id.* at 110. (Emphasis added). Thus, *CBE* establishes that an emergency rulemaking is inappropriate to alleviate administrative needs *only*, but may be appropriate in the instance where failure to promulgate a rule or other delay would threaten the public interest, safety, or welfare.

² Section 5.02 of the IAPA was renumbered to Section 5-45 in 1991. See Public Act 87-823 (Dec. 16, 1991).

7. The circumstances present in the current matter are entirely different than those present in *CBE*, as the purpose of IERG's Motion is not solely to alleviate an administrative need. IERG contends that the Board's determination that "the situation presented to it in this case more closely compares³ to that in [*CBE*]" is clearly erroneous, as described below. Order at 9.

A. A DELAY IN FILING IS IRRELEVANT TO EMERGENCY RULE ANALYSIS

8. The Board characterizes IERG's Motion as "an 'eleventh hour' emergency proposal that appears to be agency created and which could have been remedied sooner by an IEPA proposal," and seems to place the blame for the situation on both the Agency and the regulated community. *Id.* at 10. However, as quoted above, although the court in *CBE* does chastise the Board for delay in proposing a required rule resulting in the situation sought to be remedied by emergency rulemaking, the decision does not consider the existence of, nor the reasons for, a delay as relevant. Rather, the only important factor in determining whether an emergency rulemaking is appropriate is whether the situation threatens the public interest, safety, or welfare. To the extent that the Board relied upon the perceived delay in proposing a remedy to the situation in denying IERG's Motion, that reliance was in error.

B. AN EMERGENCY RULE IS THE APPROPRIATE REMEDY UNDER THE ADMINISTRATIVE PROCEDURE ACT

9. IERG's Motion sought immediate relief for affected sources, as can only be provided by an Emergency Rule, while the Board continued to consider the Agency's proposal to identically amend Part 217 in a general rulemaking. The Board relies on *CBE* in determining

³ As opposed to the cases cited in IERG's Motion, *In the Matter of: Emergency Rule Amending the Stage II Gasoline Vapor Recovery Rule in the Metro-East Area*, 35 Ill. Adm. Code 219.586(d), R93-12 (rulemaking hereafter cited as "R93-12") and *In the Matter of: Emergency Rule Amending 7.2 psi Reid Vapor Pressure Requirements in the Metro-East Area*, 35 Ill. Adm. Code 219.585(a), R95-10 (rulemaking hereafter cited as "R95-10"), discussed in more detail below.

that “the Board does not believe that alleviating concerns in the interim while the IEPA NO_x Compliance Date Rulemaking continues to run its course [is] a standard contemplated by the IAPA.” Id. This “belief” of the Board’s is incorrect. The emergency rulemaking provisions of the Illinois Administrative Procedure Act (“IAPA”), 5 ILCS 100/5-45(c), plainly contemplate an emergency rule being adopted while an identical general rulemaking progresses:

(c) 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 [5 ILCS 100/5-40] is not precluded.

(Emphasis added). This process is, in fact, commonplace. See 34 Ill. Reg. 11854, Emergency Rules to amend 35 Ill. Adm. Code 1150, Procedures for Operation of the Clean Construction or Demolition Debris Fill Operation Fee System, and 34 Ill. Reg. 11653, proposing identical amendments, both published in the August 13, 2010 *Illinois Register*. IERG contends the relief sought is the appropriate remedy for the situation faced by the regulated community, an immediately effective emergency rule, to be in place while the identical general rulemaking goes through the full procedural process.

C. AN EMERGENCY EXISTS NECESSITATING THE ADOPTION OF AN EMERGENCY RULE

10. As argued in IERG’s Motion, affected sources face both potential liability as well as financial harm if immediate relief from the current January 1, 2012 compliance date contained in the Illinois NO_x RACT Rules is not granted. IERG’s Motion at 12-17. IERG contends that this situation constitutes a threat to the public interest, consistent with past emergency rules issued by the Board.

11. Although the Board deemed that *CBE* is the most comparable case to the current situation, as IERG has discussed above, the R93-12 and R95-10 emergency rulemakings are more analogous. In the present matter, the Board again looked to *CBE* to determine whether

IERG's assertion of potential future liability could constitute a threat to the public. The Board drew a comparison between the threat of liability for noncompliance that IERG raised, to the Board's own argument (rejected by the court) in *CBE* that expending Board resources on appeals constituted a threat to the public. Order at 10. However, the *CBE* opinion included that argument within its characterization of the issue as "administrative." *CBE* at 110. The situation in this matter is not one of state agency resources potentially consumed by appeals, as in *CBE*, and is not intended to remedy an administrative need, but rather a real threat of liability faced by businesses in the state of Illinois for noncompliance with legally binding regulatory requirements that are not necessary at this time and may not be necessary in the future.

12. The issue of existence of liability is a simple one. The Illinois NO_x RACT Rules are legally binding on the sources to which they are applicable. Those sources need to take action *now* to plan for and be able to comply with the rules on the current compliance date (January 1, 2012). Sources that do not take action now will be unable to comply, and as testified to by Illinois EPA's witness, Robert Kaleel, at the Board's June 2, 2011, hearing in this consolidated matter: "it's pretty safe to say that a company that isn't complying with a state regulation is potentially facing some sort of enforcement action." Transcript, R11-24/R11-26 at 18 (Ill.Pol.Control.Bd. June 8, 2011).

13. Both R93-12 and R95-10 dealt with emergency rules to extend compliance dates of Board rules that were not federally required, and resulted in hardship to the sources subject to those rules. In R93-12, the Board identified the "extreme economic hardship," "intolerable uncertainty" faced by industry without U.S. EPA guidance, and facilities being "subject to legal action by the Agency, or any citizen, if they fail to comply" in finding that an emergency existed and extending the compliance dates contained in the Stage II Gasoline Vapor Recovery Rules for

the Metro-East Area. Opinion and Order of the Board, R93-12 at 8 (Ill.Pol.Control.Bd. May 20, 1993). The current matter is directly comparable, as described in IERG's Motion, in that subject sources face a very real economic hardship, uncertainty regarding what NO_x control requirements will ultimately be required absent U.S. EPA action, and the threat of legal action for noncompliance with the existing rules. IERG's Motion at 14-17.

14. In R95-10, the Board identified hardships faced by businesses in the petroleum industry, including: acceleration of production schedules; a need to ship separate, low RVP gasoline during the month of May; and a shortening of time to "blend-down" tanks from higher volatility gasoline, resulting in higher risk of being out of compliance. Opinion and Order of the Board, R95-10 at 5 (Ill. Pol.Control.Bd. Feb. 23, 1995). The hardships described can be distilled to economic factors (accelerating schedules, shipping complications) and risk of liability. These same hardships have been shown to exist in the current matter by IERG in its Motion, and the Board erred in not following its applicable precedent to arrive at the same conclusion: that the situation constitutes a threat to the public interest, safety, or welfare.

15. Although IERG has characterized the Board's holding in the above cited emergency rulemakings as being based on a combination of economic hardship, uncertainty, and potential liability faced by business, the Board has offered a more simplified analysis: "In [R93-12]⁴ and R95-10, the Board found a threat to the public interest because of economic hardships that would be placed on businesses dispensing and producing gasoline in the Metro East area."

Order of the Board, *In the Matter of: Proposed Amendments to: Regulation of Petroleum*

Leaking Underground Storage Tanks (35 Ill. Adm. Code 732), R04-22, consolidated with

⁴ The Board order references R93-15, an emergency rulemaking dealing with open burning of waste left behind after flooding. IERG believes that this reference to be in error, as the Board discusses the R93-15 case in the immediately preceding sentence, being based on potential health hazards, as well as the Board's previous description of R95-10 and R93-12 in conjunction with each other. IERG believes that the Board intended to describe R93-12 in the sentence quoted.

Proposed Amendments to: Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 734), R04-23, at 6 (Ill.Pol.Control.Bd. June 3, 2004). (Emphasis added). Under either analysis, IERG's requested relief is appropriate.

16. In its Order denying IERG's Motion, the Board notes that "IERG has not cited any authority that financial hardship alone is sufficient to support an emergency rulemaking," and holds that "[i]n light of a lack of authority stating the contrary, the Board holds that the financial hardship imposed on the industry does not on its own constitute a threat to the public interest, safety, or welfare. Order at 10-11. IERG is concerned that the Board would take the position that there is no threat to the public interest in forcing businesses in this State, in these times, to spend significant resources to comply with requirements that are not deemed by U.S. EPA or Illinois EPA to be necessary at this time.

17. Further, if the Board has a legal theory as to immunity from enforcement for non-compliance with the current RACT requirements and compliance date, IERG would be very interested in that rationale. Otherwise, IERG remains resolute that the public interest is threatened by the legal risk and financial exposure created by the Rule's looming compliance obligations.

IV. CONCLUSION

18. The Board erred in applying the ruling in *CBE* to this matter, as the situations are clearly dissimilar. The threat of liability faced by sources subject to the current Illinois NO_x RACT Rules, coupled with the economic harm those sources will suffer, amounts to a threat to the public interest, safety, or welfare; such harms are not simply "administrative," as was the situation in *CBE*. Further, even if the Board does not recognize the existence of a threat of liability, IERG contends that the Board has ample discretion to determine that economic harm is

sufficient to constitute a threat to the public interest, safety, or welfare. The Board should reconsider its denial of IERG's Motion requesting an emergency be found, and promptly publish an emergency rule to remedy the situation.

WHEREFORE, for the above and foregoing reasons, the ILLINOIS ENVIRONMENTAL REGULATORY GROUP hereby respectfully requests the Illinois Pollution Control Board grant this Motion for Reconsideration, and adopt the emergency rule, as detailed in Attachment A to IERG's Motion.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: June 23, 2011

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