

ILLINOIS POLLUTION CONTROL BOARD  
December 6, 1989

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

CONCURRING OPINION (by B. Forcade):

I concur from the majority in Docket B so that I might raise questions regarding two aspects of today's first notice proposal. In both instances, my questions relate in general to how the proposed language would affect the enforceability of Board regulations.

The first section of concern is Section 305.102(e). That Section seems to imply that when an NPDES permit contains a condition to study the biological impact of an effluent, the NPDES permittee may not be subject to an enforcement action for either violations of the Board's water quality standards for toxic chemicals or for actual violations of in-stream toxicity in the receiving stream.

The second section of concern is Section 309.152(b). That Section seems to imply that the applicability of the Board's toxic chemical water quality standards to an NPDES permittee does not commence until (1) Agency notification, (2) an additional 30 days to file an application, and possibly (3) an additional 240 days for the Agency to act on the permit application.

The Board has traditionally adopted regulations that may be enforced against NPDES permittees regardless of any permitting decisions made by the Agency. In that manner, the Attorney General, local governments, and private citizens might enforce Board regulations designed to protect the environment. If the Board adopts either of these two sections, then Agency permitting decisions would appear capable of vacating Board environmental protection standards. I question whether this is wise and whether it is workable.

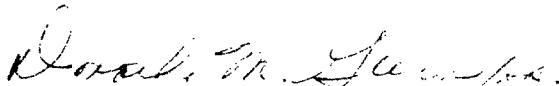
In addition, third parties are not allowed to appeal NPDES permits. Under Landfill, Inc. v. PCB, 387 N.E.2d 258 (1978) our Supreme Court has allowed what is, in effect, a suit to reform the permit filed against the permittee by a third party. If the Board adopts either of these sections, I question how third parties would be able to secure permit reform. If, by mistake, the Agency issued an NPDES permit with a toxic chemical limitation that was clearly and woefully inadequate, would third parties be able to seek reform of that permit? If so, how?

These questions would need to be clearly answered before I could support additional activity on these sections.



Bill S. Forcade, Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 12<sup>th</sup> day of December, 1989.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board