

ILLINOIS POLLUTION CONTROL BOARD
September 17, 1992

IN THE MATTER OF:)
TOXIC AIR CONTAMINANTS LIST) R90-1(A)
(35 ILL. ADM. CODE 232)) (Rulemaking)

SUPPLEMENTAL OPINION OF THE BOARD (by J.C. Marlin):

On September 2, 1992 Ford Motor Company (Ford) filed a comment on the June 4, 1992 second notice opinion in this proceeding. The final opinion and order, adopting the same rules concerning which Ford filed comments, issued on the morning of September 3, prior to distribution of the comment. The Board has deferred the filing of these rules with the Secretary of State in order to address some aspects of Ford's comment.

The substance of Ford's comment is that the second notice opinion mischaracterized its position on the Federal Hazardous Air Pollutant (HAP) list and failed to address its comment of December, 1991 (PC 48) regarding the listing/delisting process. Ford goes on to:

request that the Board delay further action on this docket until the State of Illinois properly addresses these issues. Ford believes it has raised several substantive arguments and questions in the December 6, 1991, submittal which merit the attention of the State of Illinois.

Further, Ford believes that the public comment period is meant to resolve any substantive issues and questions pertaining to the proposed rules, and avoid future litigation and appeals after promulgation. We would appreciate some explanation or analysis of the basis for rejection of the substantive comments Ford submitted previously.

At the outset, the Board agrees with Ford that the public comment period is intended to help the Board to resolve any substantive issues or questions. The public comment period in this proceeding ended March 30, 1992. The Board's June 4, 1992 opinion and order authorized submission of a set of proposed rules to the Joint Committee on Administrative Rules (JCAR) for its review. The rules were received by JCAR on June 17, 1992. Section 5.01(b) of the Administrative Procedures Act (Ill. Rev. Stat. 1991, ch. 127, par. 1005.01(b)) provides that "[a]fter commencement of the second notice period [i.e. JCAR's receipt of rules], no substantive change may be made to a proposed rulemaking unless it is made in response to an objection or suggestion of" JCAR. As explained in detail in the Board's September 3, 1992 actions in RES 92-1 (p. 1) and the R90-1(A) final opinion and order (p. 17), JCAR's only objection at its

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August 11, 1992 meeting was to the inclusion of the chemical styrene. The Board simply cannot "defer action" on rules in response to comments received after JCAR has reviewed rules. Ford's September 2, 1992 comment, received three months after the Board directed submission of rules to JCAR, is untimely.

However, review of Ford's comment leads the Board to conclude that the users of these adopted rules might benefit from some expansion of the Board's discussion of the record concerning the topics of toxicity scoring and listing and delisting procedures. This supplemental opinion is intended to provide this additional guidance.

HAP LIST

The Second First Notice opinion of September 26, 1991, at p. 17 [and subsequently the Final opinion of September 3, 1992] stated:

The public comments filed by the Sierra Club, Coalition for Consumer Rights, and Chicago Lung Association (PC 56) and Ford Motor Company (PC 48) recommended adding the Clean Air Act Amendments hazardous air pollutants (HAPs) list to the Illinois TAC list.

Ford believes that the Board misconstrued its comment and asserts that "Ford was not requesting the list to be enlarged, but to regulate only the HAPs listed in the Clean Air Act."

In comment 48 Ford stated:

Ford strongly recommends that Illinois Toxic Air contaminant List Rule be revised to specifically regulate the list of 189 hazardous air pollutants (HAP) defined by the Clean Air Act Amendments of 1990 (CAAA). Consistency between the federal and state legislation would limit confusion when the new CAAA toxic regulations come into effect.

The list in this proceeding is being developed pursuant to a State statute. The Federal Clean Air Act Amendments were adopted after the State Air Toxics provision became law. The two are separate and distinct and it is not unreasonable to expect differences in the two lists. The Federal list contains 189 chemicals, most, but not all, of which are on the State list of 263 chemicals.

The commenters in PC 56 clearly wanted the entire Federal list added to the Illinois list. In responding to Ford's comment they stated:

Ford Motor Company (Ford) contends that the Illinois Toxic Air Contaminant Rule should contain the list of HAPs in the Clean Air Act Amendments of 1990. As stated in our post-hearing comments, we agree that the Illinois program would be strengthened by the inclusion of the HAPs in the toxic air contaminants list.

The Board, like Sierra Club et al., interpreted comment 48 to mean that Ford wanted the Federal list added to the Illinois list. The Ford comment was ambiguous on this point. Ford has now clearly stated its intent and the Board notes that the language in the prior opinions does not reflect Ford's intent.

The confusion on this point has no bearing on the outcome of the Board's decision to proceed with the independent Illinois Air Toxics Contaminant List as directed by the statute. As pointed out in the prior opinions, changes to the list may come at a later time.

TOXICITY SCORING

Ford also commented that the second notice opinion did not address Ford's concerns pertaining to the listing/delisting methodology. After reviewing Ford's comments, the Board feels it useful to provide additional discussion regarding the method by which a toxicity score is determined. This method is contained in Section 232.310 of the rule.

The method proposed by the Agency has remained virtually intact since the amended proposal was filed with the Board in April 1990. Over the course of this proceeding, many questions and comments, including Ford's, have been directed towards the specifics of the Agency's proposed method. Among the concerns raised were the use of solely rat toxicity data for the acute lethality score (e.g. Tr1. at 330-331, 446-448, 470-471; PC 22 at 4), the required quality of studies evaluated (Tr1. at 664-670), and the significance of organ characterization and severity of effects scoring (e.g. Tr1. at 144-153, 325-327, 333-347). Other concerns included inclusion of mutagenic and teratogenic effects (e.g. Tr1. at 63, 353-358, 397-402, 406, 656-657), as well as the role of emission volume in toxicity (e.g. Tr1. at 127-130, 360-364).

These issues were addressed by the Agency witnesses in the first four hearings of this proceeding and consumed nearly the entire four days of testimony and questions equaling 884 pages of transcript. At the June 25 and 26, 1990 hearings, the Agency answered questions regarding toxicity scoring from Sierra Club, Chicago Lung Association, Illinois Steel Group, the Illinois Department of Energy and Natural Resources, as well as the Board. At the September 6 and 7, 1990 hearings, the Board heard testimony from several industry groups including Chemical

Manufacturer's Association, Climax Metals Company, Chemical Industry Council of Illinois, Illinois Environmental Regulatory Group, Illinois Steel Group, and the Chlorobenzene Producers Association. Each of these groups expressed some concern with the Agency's proposed scoring method. As one result of this testimony, the Agency added a reference to Good Laboratory Practices Standards for use in evaluating the quality of data in calculating a chronic toxicity score. In addition, a definition of "critical gestation days" was added to clarify the minimum length of exposure required for acceptable developmental studies in animals. These amendments were included in the Agency's second amended proposal which was filed December 14, 1990. The March 21, 1991 hearing primarily addressed the Agency's second amended proposal. Very little testimony at that hearing was directed to the toxicity scoring method.

Public Comments 1, 2, 4, 7, 9, 10, 11, 14, 16, 18, 27, 32, 34, 37, 46, 48, 50, 56, 57, 60, and 61 addressed the nature or use of the toxicity scoring method. Only one public comment (PC 48: Ford Motor Company) addressed specific concerns with the general scoring method after the second first notice was adopted in September 1991 (all other public comments filed after this time were concerned with specific chemicals). Sierra Club, in PC 56, asserts that the concerns raised by Ford Motor Company in PC 48, "have been addressed previously by the Agency, and the Agency's responses can be found in the record." (PC 56, p. 4) The Board notes that no testimony was given at the January 7, 1992 hearing concerning specific questions with the calculation of the toxicity score.

The Board appreciates Ford's comments in this proceeding and notes that the issues raised in Ford's eight questions generally fall into the categories discussed above. For example, concerns regarding acute toxicity based solely on rat data was discussed at the June and September 1990 hearings (Tr1. at 330-331, 446-448, 470-471) and in the Agency's public comment 22. Ford's third question regarding the exposure time for an LC50 value may be answered by the referral to the definition of "LC50" in Section 232.210:

"LC50" means the concentration in the air of a contaminant that kills, or is estimated to kill, 50 per cent of a population of laboratory animals where the exposure is brief (8 hours or less) and where the route of exposure is inhalation. (Emphasis added)

Other comments regarding the use of acute lethality, adverse health effects, uncertainty factors, and inhalation retention factors were taken into consideration when the Board reviewed all comments and testimony prior to adoption of the second notice order and opinion.

The Board's decision at second first notice to retain the Agency's proposal was not a wholesale endorsement of the method but rather an acknowledgement that the Agency had provided substantive justification for the method's use as a screening method, rather than as a detailed risk assessment. The Board also notes that no substantive amendments or alternatives to the toxicity scoring method (other than those adopted by the Agency prior to filing of their second amended proposal, see above) were provided by any of the participants in this proceeding.

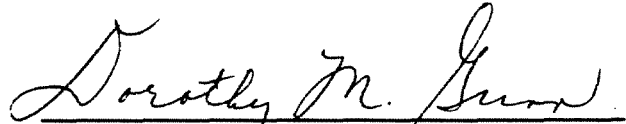
The Agency has testified that this method is intended to be used solely in creating the list and not to prioritize chemicals in the control strategy (Tr1. at 313). The Agency also comments that, "[t]he purpose of the scoring procedure is solely to array the 400-plus chemicals into a spectrum of potential hazards, based on their ability to cause adverse health effects. This is necessary in order to enable the Agency to identify those chemicals whose potential hazards fit the Legislature's description of a Toxic Air Contaminant (i.e. causes or significantly contributes to an increase [sic] in mortality or an increase in serious irreversible or incapacitating reversible. [sic] illness)." (PC 22 p. 10)

The Board acknowledges the concerns raised during the hearings and comment periods of this proceeding and recognizes the potential for gaps in the Agency's method. But the Board is persuaded by the Agency's extensive comments and testimony that the toxicity scoring method exists as an objective screening method to differentiate chemicals of concern from the many with little to no hazard. However, we also recognize that screening methods are, by nature, imprecise. Therefore, the Board crafted these rules to contain a provision by which a chemical could be listed or delisted using considerations outside the Agency's protocol. We feel that this provides a safety net for those chemicals which might slip through. Using the listing/delisting procedure adopted by the Board in Section 232.500, a concerned party may introduce evidence that, among other things, the toxicity scoring method is not appropriate for a chemical or that studies exist which may result in a different score or require an alternate evaluation of the chemical. It is the Board's position that a scientifically-defensible list of toxic air contaminants will result from the use of a combination of the Agency's screening method and the listing/delisting procedure.

The Board will proceed to file these rules with the Secretary of State.

0136-0101

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above supplemental opinion was adopted on the 17th day of September, 1992, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board