ILLINOIS POLLUTION CONTROL BOARD
October 2, 1986

IN THE MATTER OF:	)	
	)	
HAZARDOUS WASTE PROHIBITIONS	)	R86-9, Docket A
	)	

DISSENTING OPINION (By R. C. Flemal):

I dissent from the Board's action today for the reason that the facts of the matter do not justify adoption of an Emergency Rule.

THREAT TO THE PUBLIC INTEREST, SAFETY OR WELFARE

The conditions necessary for the Board to promulgate an Emergency Rule are not present in the instant matter. The Act specifically identifies that an Emergency Rule is appropriate where the Board can find "that a situation exists which reasonably constitutes a threat to the public interest, safety or welfare". I do not see that the public interest, safety or welfare would be threatened in the absence of today's proposed Board action. Rather, Board adoption of a Emergency Rule now may actually create such a threat.

There might conceivably be a threat to the public interest, safety or welfare if failure of the Board to adopt emergency rules left a vacuum wherein the directive of 39(h) could not be carried out. However, this is clearly not the case. The Agency has given an extensive apprisal of the guidelines it intends to follow in implementing 39(h). Thus, a clearly defined direction already exists.

A clear threat to the public interest, safety or welfare might also exist if the direction that the Agency has taken were obviously faulty. This is also clearly not the case. While there may remain some uncertainties which will have to be worked out by the Agency, and some facets of the Agency's direction will undoubtedly require adjudication, these are no more numerous nor complex than is to be reasonably expected when any new authorization procedure "comes on line". Moreover, it cannot be overlooked that three of the four principal groups who offered testimony in this matter, the Agency, CBE, and Waste Management, unanimously urged that the Agency's guidelines be given a fair test; this testimony must be given weight against a determination that a threat to the public interest, safety and welfare exists.

It might be argued, in fact, that Board adoption of an Emergency Rule at this time would create a threat to the public interest, safety and welfare, rather than alleviate one. By inserting itself into the 39(h) authorization process at this

time, the Board will certainly alter and possibly disrupt a process which is already well advanced and which is being carried out under a very tight time limitation. Disruption now would seem to constitute a much clearer threat to the public interest than could be anticipated by abidance with any of the Agency's guidelines.

The Board's desire to have regulations in place for January 1, 1987, is occasioned by a sincere desire to eliminate confusion as of this critical date. However, in so doing, the Board seemingly fails to recognize that the truly critical date for having the implementation procedures for 39(h) identified is not January 1, 1987, but a date already past. This date was the time when applicants were required to draft and submit their applications to the Agency. Should these many applications need to be redrafted and resubmitted as a consequence of a Board action, the public interest could be severely compromised; confusion could not be escaped as applicants and the Agency faced the difficult task of trying to complete the authorization process in the few weeks remaining before January 1, 1987.

Another source of confusion which would appear to be a consequence of the Board adopting an Emergency Rule at this stage arises from the fact that 150 days from enactment of the Emergency Rule the rule would lapse and nothing would be in place. At this time, neither the Board's regulations nor those Agency's guidelines overruled by the Board's Emergency Rule would be existent. How, in these circumstances, does the Agency continue to carry out the authorization process? Does the Board's lapsed rule have weight? These are fundamental questions to which I don't see obvious answers, and to which I am concerned that the majority has not given due consideration.

Seemingly implicit in the Board's anticipation of adopting an Emergency Rule is the belief that, upon its expiration, the rule can be altered to reflect evolution in the Board's thinking. While technically correct, this is a very poor defense for the Board acting precipitously when demonstration of threat to the public interest, safety and welfare is not present.

Finally, to argue, as some have, that failure of the Board to adopt rules now would encourage midnight dumping and the like, and thereby provide threat to public safety and welfare, is not very realistic. There is absolutely no reason to suppose that midnight dumping would have greater encouragement under the Agency's guidelines than under the Board's emergency rule.

COMMENT PERIOD ON EMERGENCY RULE

It has been argued that it is appropriate, in the instant matter, for the Board to place its Proposed Emergency Rule out for comment. I cannot agree. If the concept of an Emergency Rule is flawed now, it will be as flawed two or three weeks from

now. Perhaps it will be even more flawed due to greater intrusion into the short time remaining for the permit process to be carried out. An Emergency Rule therefore should not be adopted at the end of the comment period, and the public should not be given the impression that it might be adopted.

This situation is significantly different from the circumstance where the Board puts out a proposed non-emergency rule for public comment, as in fact the Board did in its June 11, 1986, action in this matter. There the Board's intent is clearly to begin a long dialogue process, which involves ample opportunity for interested individuals and groups to act and react, propose and counter-propose. These elements are absent in the instant matter.

REFLECTIONS RELATIVE TO THE NORMAL RULEMAKING PROCESS

The Board's regular rulemaking process is occasionally critized for its lack of speed. However, lack of speed is not the deficiency of the process, but rather its crowning strength. The rulemaking process is intentionally slow, because in being slow it is guaranteed to be deliberate, in the best meaning of this word.

An Emergency Rule in the instant matter would contravene this intentionally deliberate strength of the Board's rulemaking process. Except for the quite limited opportunity to submit written comments, interested individuals and groups would have none of the opportunities for participation in rulemaking to which they are entitled. There is no good in attempting to counter this argument by citing the fact that the Board has already held four hearings under R86-8, because what the Board has proposed today is such a significant departure from that which was before the Board at the time of the hearings. Moreover, the four hearings were but a fraction of the opportunity to participate to which the public and the State are entitled.

CONTENT OF THE EMERGENCY RULE

Because I am of the belief that the Board cannot adopt an Emergency Rule in this matter, I do not intend to present my perspective on the content of the Proposed Emergency Rule, other than to make a few general observations. For one, I believe that the Proposed Emergency Rule constitutes a substantial improvement over the rule as originally proposed on June 11. It should be noted that the improvement has arisen, in major measure, because the regular rulemaking procedure has provided the Board with the information necessary to make the improvements, and is therefore futher testimony to the strength of this procedure.

At the same time, I do not think the Proposed Emergency Rule is fully acceptable. Significant problems yet need to be

resolved with respect to such aspects as the range of the disposal facilities covered by the rule and the criteria which the Agency must consider in reviewing permit applications. There are also aspects of a fully developed rule which are not addressed in the Proposed Emergency Rule; these will need resolution. The only way to reach a final determination on these matters is via the same route used to achieve the improvement witnessed by the Proposed Emergency Rule. That is, the regular rulemaking process must be employed.

I am aware that it is impossible for the Board, given the statutory conditions for adoption of rules, to complete the R86-9 rulemaking for some significant time. I am also aware that the Board may have to address some of the unresolved matters in permit appeals prior to its ability to promulgate a full rule. While this may not constitute the most ideal of all possible worlds, it is, at the worst and given the fatalities of Emergency Rule promulgation and the necessity of following regular rulemaking procedures, the least of possible evils.

SUMMARY

None of the foregoing should be construed to suggest that it is my belief that there is no place for emergency rulemaking in Board actions. There most clearly is such a place, but the instant matter is not an example. For this reason I dissent.

Ronald C. Flemal
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 6th day of October, 1986.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board