ILLINOIS POLLUTION CONTROL BOARD
October 2, 1986

IN THE MATTER OF:	)	
	)	
HAZARDOUS WASTE PROHIBITIONS	)	R 86-9
	)	

DISSENTING OPINION (by B. Forcade):

I dissent from today's action. Because of the speed with which this action is being taken, and the short time available for review of each draft of the proposed emergency rules, I can only chronicle the major areas of my disagreement.

My first area of concern is that there is no emergency to support bypassing the normal regulatory process. The statutory provision which these regulations are intended to implement did not spring forth in the last few months. Section 39(h) has been the adopted law in Illinois for five years. The Pollution Control Board knew it existed, the Environmental Protection Agency knew it, as did the regulated community and the public interest sector. This association of individuals (myself included) exercised their collective indifference for over four years. Now the cries of emergency are deafening.

This Board frequently receives requests for variance from the regulated community. If the Board determines that the regulated entity knew of the constraints in advance but failed to adequately plan ahead, the variance is denied because of "self-imposed hardship." Today's action represents the ultimate response to self-imposed hardship.

The second aspect demonstrating no emergency is that Section 39(h) is self-implementing. If the General Assembly had required that the Board adopt regulations before the proscriptions of Section 39(h) became effective, the situation would be different. But the language of that provision is clear. On January 1, 1987, the prohibitions become effective whether or not the Board acts. In fact, the Agency has stated it is fully prepared to process Section 39(h) authorization applications without Board action. On page 3 of the majority opinion, it is argued that Section 39(h) may not be self-effectuating and will not become effective until the Board adopts rules. I believe it would be a substantial surprise to the General Assembly to learn that they cannot prohibit certain hazardous waste disposal practices unless a majority of this Board agrees.

The third aspect cautioning against an emergency rule is that this is not "a situation which...reasonably constitutes a threat to the public interest, safety, or welfare" (Administrative Procedures Act, Section 5.02). Hazardous waste will not pile up on the streets of Chicago or Peoria. At most, one Agency of state government (the IEPA) will implement the provisions of Section 39(h) in a manner that a portion of another branch of state government (this Board) deems inappropriate. Turf fights between sister agencies about statutory interpretation may indeed constitute a "threat to the public interest," but they provide a very poor basis for emergency rulemaking. Nearly all of the proposed emergency rules are an attempt to remove Agency jurisdiction in areas where they have expressed an intention to act, or to restrain the time and method by which the Agency will act.

My primary concern with the substance of the proposed emergency rule continues to be the exceptions. The primary substantive focus of today's action by the majority is to remove certain materials, in Section 709.202 of the regulations, from the wastestream authorization requirements of Section 39(h) of the Act, and to remove certain types of facilities, in Section 709.110(b) of the regulations, from the prohibitions of disposal in Section 39(h) of the Act. Most of my objections were articulated in my dissenting opinion of June 11, 1986, and will not be repeated here.

The majority continues to ascribe great importance to the fact that Section 39(h) prohibits the "deposit" of hazardous waste rather than the "disposal." They argue that deposit is a much more restrictive word than disposal as evidence by the definition of disposal in Section 3(e) of the Act, which provides:

> e. "DISPOSAL" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constitutent thereof may enter the environment or be emitted into the air or discharged into any waters, including groundwaters.

If disposal is distinct from deposit, then surely spilling and dumping are distinct from deposit. Using this theory, it would be permissible to discharge, to inject, to dump, to spill, to leak, or to place a hazardous waste into a hazardous waste disposal facility without an authorization (even those few facilities that would remain under the scope of today's proposed emergency rule), so long as you did not "deposit" it in the facility. I have great difficulty with that interpretation.

In Section 729.122(a), the proposed rule precludes the Agency from considering process substitutions or waste minimization in making its determinations. While I do not believe the Agency should tell industry how to make it products, today's language is far too sweeping. A substantial portion of the Board's existing regulations to control ozone are expressed in terms of pounds of volatile organic material per gallon of coating material used. 35 Ill. Adm. Code 215.204. This is clearly process control. I would need a much better reason than the record provides before I could categorically prohibit a concept in an emergency rule for hazardous waste that is so clearly established for ozone control. Waste minimization sounds like a laudable goal if the objective is to reduce the amount of hazardous waste going to hazardous waste disposal sites. If, as the majority opinion states at page 9, generators are already required to consider and implement reasonable waste reduction processes, why is the Agency precluded from looking at this information?

In Section 729.122(f), the proposed rule precludes the Agency from denying a facility a wastestream authorization based on violations of other permits the facility might hold. Recently at an air pollution conference, an Agency employee expressed his view that the Agency was empowered by the Act to deny air permits for violations of water permits. Others have expressed contrary views. If the idea has legal merit, it will survive, if it does not, it will fail. But surely so profound a concept deserves full legal briefing and consideration by all sides. It should not sneak in the backdoor as one sentence in a nineteen page emergency rule that has had less than two weeks review.

Section 709.106 and 709.404 represent last minute additions to the proposed regulation. They establish a ninety-day deadline for Agency decisionmaking. When the deadline is not met, the authorization is granted by default. This concept has never before seen the light of day in this regulatory proceeding. While there appear to be some strong legal arguments that this is exactly what the law requires, there could be strong legal arguments against it. If the Board intends to impose such draconian measures against the Agency, at least they deserve the opportunity to raise arguments against.

The short time I have had to review the proposed rule precludes a more detailed critique. I have had little opportunity to explore the consequences of the interplay of the various sections. This I believe argues strongly against the haste with which this emergency rule is proceeding. Accordingly, I dissent.

Bill S. Forcade
Member of the Board

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