

ILLINOIS POLLUTION CONTROL BOARD  
November 12, 1998

IN THE MATTER OF: )  
)  
PROPORTIONATE SHARE LIABILITY: ) R97-16  
35 Ill. ADM. CODE 741 ) (Rulemaking - Land)

DISSENTING OPINION (by R.C. Flemal):

I respectfully dissent from today's decision of the majority that proposes this matter for second notice. I dissent because I believe this matter is being unnecessarily and detrimentally rushed. I believe that the changes proposed today are so extensive that these rules are not ready to proceed to either a proposed or actual second notice, and cannot be made so under the schedule proposed by the majority.

Under the spirit of the Illinois Administrative Procedure Act, persons affected by a proposed rule are afforded an opportunity to review, reflect, and comment upon any proposed rule. Today's proposed rules are so different from those previously proposed (by the proponent, the participants, and by the Board at first notice), not only in their separate provisions, but in the interactions of those provisions, that it is not to be expected that any interested person will have time to meaningfully review, reflect, and comment during the time allowed.

Moreover, because the Board today provides only a minimal opinion in support of its intended actions, there is no way for interested persons to know why the Board has made many of its decisions, or how the Board sees the rules operating as a whole. No one can be expected to provide a fully informed comment without being provided this information. Under today's majority plan, in fact, the Board would issue its reasons for adopting the proposal only after comment is closed. I believe this is also contrary to the spirit of the APA, and to the rulemaking authority granted the Board under the Environmental Protection Act.

Notwithstanding concerns about ability of the public to meaningfully participate in the instant matter, I also have concerns about my own ability, as a decision maker, to make an informed decision absent the full perspective of the public, and sufficient time to reflect upon that comment.

I appreciate that today's majority action is driven by the desire to complete this rulemaking by the statutory January 1, 1999 deadline. I share that desire to the extent that I believe that statutory deadlines should be afforded great reverence and should be met under all possible scenarios, save probably one. That exception is timely but unworkable rules. Unworkable rules will collapse, and in the process will foil the legislature's intent more assuredly than a delayed, good decision. I do not, in fact, know that today's proposed rules will not work. But neither do I yet have faith that the majority has not selected a "haste makes waste" course.

It seems that the only resolution to the dilemma is for the Board to either much expand both its proposed second notice opinion and the time allowed for public comment on that opinion, or to withdraw the September 3 first notice proposal and restart first notice with today's proposal. I favor the latter.

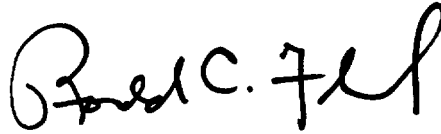
Finally, I also have reservations about some of the provisions proposed today by the majority. It is noteworthy, for example, that Agency, the Attorney General, and members of SRAC request that the Board withdraw from its first notice position on private cost recovery actions, and that the issue can be successfully addressed only by severing the issue from the current docket. I agree with this perspective. There is a whole range

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<sup>1</sup> One of the perspectives that appears to undergird the majority's position is the belief that the Board would lose jurisdiction over the instant rulemaking if the rules are not completed by the statutory deadline. I am aware of no case history that supports this position.

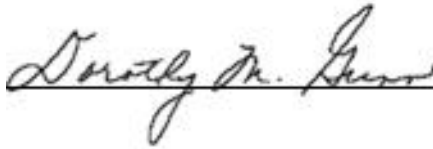
of serious questions regarding private causes of action which were not addressed by the Board at first notice, and remain unaddressed in today's opinion.

For these reasons, I dissent.

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Ronald C. Fernald  
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was submitted on the 12th day of November 1998.

A handwritten signature in black ink, appearing to read "Dorothy M. Gunn". The signature is written in a cursive style with a large initial "D".

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board