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September 20, 1991

Mary Grismore Cowles  
Administrative Code Division  
Office of the Secretary of State  
288 Centennial Building  
Springfield, Illinois 62756

R90-11

Re: Land Disposal Restrictions (35 Ill. Adm. Code 728)  
15 Ill. Reg. 2209 (Feb. 15, 1991)

Dear Ms Cowles:

At its 9/17/91 meeting, the Joint Committee on Administrative Rules adopted a motion expressing its concerns with PCB's August (15 Ill. Reg. 11937) attempt to correct an exempt rule filed by the Board in June (15 Ill. Reg. 9462). Neither PCB rules (35 Ill. Adm. Code 102.362) nor Secretary of State rules (1 Ill. Adm. Code 100.240) would appear to allow a technical correction to be made in adopted rules 2 months after the original filing. Nor would the PCB's attempt to depict the August filing as a separately adopted rule seem to adhere to the exempt rules adoption procedures specified in PCB rule.

As you know, the Board later requested to withdraw its August filing, seeming to acknowledge that the procedure followed was an incorrect one. However, Board legal counsel contacted JCAR on 9/16/91 indicating that the Board now wants to renege on its request to withdraw the correction.

JCAR is very strong in its belief that the June filing cannot be corrected by the simple act of filing different language with the Secretary's office 2 months after the original filing. First, we do not believe that the Secretary's office should be asked to accept such exempt rule language as a correction when the Secretary's rules regarding correction do not allow corrections to be made this long after the original filing nor for the reason that an agency omitted language in its original filing.

Secondly, we do not believe that the August correction cannot be characterized as a newly adopted rule amending the June adoption because the PCB did not follow the guidelines of its own rule 35 Ill. Adm. Code 103.345 and Section 7.2 of the Environmental Protection Act that requires that an exempt rulemaking be published and that 45 days be allowed for public comment before adoption.

In short, JCAR does not believe that the August filing by the PCB has effectuated any changes in the language of Land Disposal Restrictions (35 Ill. Adm. Code 728; 15 Ill. Reg. 2209, 2/15/91) as adopted on 6/17/91 and that the Administrative Code Division should accept the request for withdrawal of the August correction that the PCB has filed with you. If the PCB persists with its intent to renege on its request for the withdrawal, we would encourage the Administrative Code Division to reject the August filing on the grounds that it was not adopted through the process dictated by PCB rule and Section 7.2 of the Environmental Protection Act and hence is not a lawful amendment of the Code.

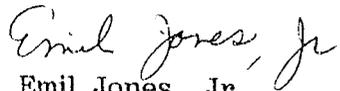
JCAR's major concern in this matter is that no agency is allowed to be successful in changing the language of the Administrative Code by merely filing new language with the Administrative Code Division and ignoring all other established procedures.

Additionally, JCAR instructed its staff to monitor further PCB action with respect to the attempted correction and to report back to the Committee at its October meeting, and to present at the October meeting a draft of legislation more clearly outlining a mechanism for correcting technical errors that may be found in a rulemaking after it is filed with the Administrative Code Division and/or published as an adopted rule. I'm sure JCAR staff will be contacting you for your input into this draft.

JCAR will also be contacting the PCB with respect to JCAR's position on this issue and the advice it is offering to your office.

Thank you for your consideration in this matter.

Sincerely,

  
Emil Jones, Jr.  
Chairman

CC: Roger Bickel, SOS Chief Counsel  
John Marlin, PCB Chairman

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