

ILLINOIS POLLUTION CONTROL BOARD
November 15, 1989

IN THE MATTER OF:)
)
IDENR SPECIAL WASTE) R89-13(A)
CATEGORIZATION STUDY)

DISSENTING OPINION (by Mr. J.D. Dumelle and Mr. M.L. Nardulli):

We dissent from the Board's Second Notice Opinion and Order dated November 15, 1989 in this docket. We are concerned that the end result of this rulemaking will be a rule that operates differently from that intended not only by Section 22.9 of the Environmental Protection Act but also by Section 5.01 of the Illinois Administrative Procedure Act, and rules and regulations adopted thereunder.

Specifically, our concern relates to proposed Subpart C, "Criteria and Data Requirements," which governs criteria and data requirements used to predict the degree of hazard pursuant to Section 808.245. Section 808.302, entitled "Data Base," governs that "which may be employed to assess the physical, chemical and toxicological properties of waste constituents." Subsection (b) states that:

[t]he data base shall consist of data from any source which the Agency determines is reasonably reliable as a basis for decision. Reasonable reliability of a source shall be assessed by reference to factors including, but not limited to ,its scientific validity, the consistency with which the source reflects directly observable data, including monitoring data, and the consistency of results of repeated applications of data and formulae. Such data sources include, but are not limited to the following:

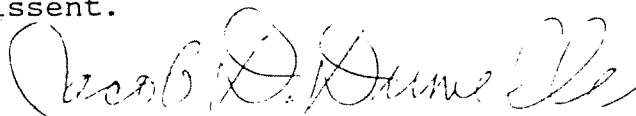
- 1) Data from standard reference sources;
- 2) Data published or incorporated by reference by a federal regulation or by a regulation adopted by an agency of the State of Illinois;
- 3) Data included in the application under consideration and in written communications between the applicant and the Agency or their representatives, with respect to the application;

- 4) Data previously used by the Agency in other wastestream categorization determinations; and
- 5) Data from Agency inspection, permitting and enforcement files relating to the generator or the wastestream, excluding complaint forms except where the complainant will be available voluntarily for deposition and examination under oath at any hearing on appeal pursuant to Subpart G.

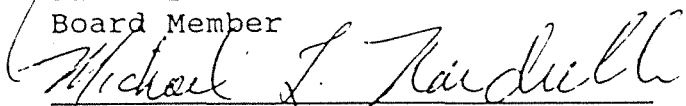
As stated in subsection (a), this data base will be used to determine the physical, chemical and toxicological properties of the waste constituents in question. In this regard, what information exists in this data base will in large measure determine the values to be applied in the calculation set forth in Appendix B for determining the toxicity hazard. As a result, the information in the data base will in large part determine what toxicity score a given wastestream will have. Because of the fundamental role that this data base plays in the classification process, we believe it essential that the data base contents themselves be adopted under the APA rulemaking procedures, i.e., notice and comment, and be set forth in the rule so that those who are subject to them have advance notice.

Thus, we do not believe that such an important determination as to what will be included in the data base should be left to what the Agency believes is "reasonably reliable as a basis for decision." This language permits the Agency too much leeway in making its determinations and does not give adequate notice to the regulated community as to how the rule works. Further, even though Section 808.302(b) sets out what "reasonable reliability" shall include, the Agency is not limited to those sources. Finally, we are troubled by the inclusion of subsection (b)(4); data previously used by the Agency in other determinations. This information may not always be available to the regulated community such that it can perform its own independent assessment under the rule. Also, it seems to us, if these data were previously used, it must have come in under one of the other listed sources; thus, subsection (b)(4) may well be redundant.

For these reasons, we dissent.



Jacob D. Dumelle
Board Member



Michael L. Nardulli
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 16th day of November, 1989.

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