ILLINOIS POLLUTION CONTROL BOARD
August 30, 1990

IN THE MATTER OF:	)	
HAZARDOUS WASTE PROHIBITIONS	)	R86-9(B) (Rulemaking)

DISSENTING OPINION (by J.D. Dumelle and B. Forcade):

Today the Board has, by a 4-3 vote, decided that Section 39(h) of the Illinois Environmental Act is in need of a rulemaking. We respectfully dissent from that position.

Section 39(h) is a self effectuating statute. Moreover, the analysis which it demands is, by its very meaning, site-specific. In other words, the reduction of hazardous waste is so vital to the health of our environment that each case should be judged individually. Because a uniform set of guidelines would necessarily preclude some evaluation of site-specific circumstances and thereby lessen the potential impact of 39(h), we dissent.

BACKGROUND

In October of 1986, the Board adopted an emergency rulemaking essentially prohibiting the Illinois Environmental Protection Agency ("Agency") from enforcing certain interpretive provisions of Section 39(h) of the Environmental Protection Act. The Board enacted the emergency rule largely due to a concern that the Agency would attempt to initiate wide-scale industrial internal process changes. This rulemaking was appealed by Citizens For A Better Environment ("CBE"). On appeal, the court did not reach the substance of the proposal, but instead dismissed the rule finding that no emergency existed, CBE v. Pollution Control Board, 152 Ill. App. 3d 105 (1st. Dist. 1987). In the meantime, the Agency has implemented the rule with very little controversy, yet some participants still maintain that the potential ramifications are such that permanent rules are necessary.

DISCUSSION

The Agency and CBE have filed post hearing comments urging the Board not to adopt regulations. It is their general position that 39(h) has been implemented fairly and reasonably over the last four years and therefore any regulations would be unnecessary. More specifically, CBE contends that the Board is not legally required to adopt regulations implementing Section 39(h), nor is there any practical need to do so at the present time. CBE also maintains that the proposals put forth by the

Illinois Environmental Regulatory Group ("IERG") and Chemical Waste Management ("CWM") would severely and illegally restrict the reach of Section 39(h), and thus contravene the intent of the statute.

IERG and CWM, on the other hand, seek the adoption of regulations which are consistent with the Resource Conservation and Recovery Act ("RCRA") and do not have the inherent power to tamper with a complex manufacturing process. They argue that the Agency is not the appropriate source to dictate when process changes should occur. In short, IERG and CWM would like to adopt regulations similar to those of RCRA in that they could appease all levels of bureaucracy uniformly. While both IERG's and CWM's proposed regulations are, on the whole, consistent with RCRA, neither participant has demonstrated how Section 39(h) is inconsistent with RCRA.

It is no secret that IERG and those industries which fall under the auspices of 39(h) are already subject to RCRA. Any attempt to equate these standards with 39(h) would effectively nullify the statute. Barring extreme circumstances, we are reluctant to undertake such an endeavor. On the contrary, there exist a number of reasons why we should recognize Section 39(h) and applaud its implementation. Section 3009 of RCRA expressly allows states the ability to enact legislation more stringent than its federal counterparts. Section 39(h) is clearly such a case.

As CBE's post-hearing comments point out, Section 39(h) of the Act consists of a fundamentally different approach than those applicable federal requirements. That is, it is theoretically possible that an industry that would meet federal requirements would fail to meet those mandates inherent in 39(h). The federal standard of Best Demonstrated Available Technology ("BDAT") has been replaced by the state standard of "technologically feasible and economically reasonable" - a measurement which could be more stringent than BDAT. While IERG and CWM claim that Section 39(h) is too subjective and therefore has the potential for capriciousness, CBE and the Agency maintain that this statute affords Illinois the opportunity to tailor its needs and circumstances in the best possible light. We recognize the legitimacy of both arguments, but are loathe to disregard the clear language of the statute.

Section 39(h) states in full:

> Commencing January 1, 1987, a hazardous waste stream may not be deposited in a permitted hazardous waste site unless specific authorization is obtained from the Agency by the generator and the disposal site owner and operator for the deposit of that specific

> hazardous waste stream. The Agency may grant specific authorization for disposal of hazardous waste streams only after the generator has reasonably demonstrated that, considering technological feasibility and economic reasonableness, the hazardous waste cannot be reasonably recycled for reuse, nor incinerated or chemically, physically or biologically treated so as to neutralize the hazardous waste and render it nonhazardous. In granting authorization under this Section, the Agency may impose such conditions as may be necessary to accomplish the purposes of the Act and are consistent with this Act and regulations promulgated by the Board hereunder. If the Agency refuses to grant authorization under this Section, the applicant may appeal as if the Agency refused to grant a permit pursuant to the provisions of subsection (a) of Section 40 of this Act.

Ill. Rev. Stat. Chap. 111-1/2 Section 39(h)

The wording contained within Section 39(h) is discretionary so that the purpose of the Act can be implemented on a case-by-case basis. While this undoubtedly presents potential problems for industry, we cannot assume that the General Assembly did not consider this aspect. Instead, the plain language reveals that the reduction of hazardous waste is such a priority that the Agency would be given some discretion in the implementation of Section 39(h). This approach is further supported by the language giving discretion to the Board as to whether or not regulations should be promulgated in regards to Section 39(h). It is unequivocally clear that the Board is under no legal duty to adopt regulations.

CBE and the Agency maintain that within the 3-1/2 year period of implementation, there has been only one permit appeal. They construe this to mean that permits have been provided for fairly and reasonably. IERG and CWM acknowledge only that one permit appeal has gone forward. While we find that this aspect may be considered, it is by no means dispositive. This merely indicates that the Agency has not pursued those powers that it maintains Section 39(h) has conferred upon it. At the same time, however, the post-hearing comments of the Agency reveal that reductions in hazardous waste disposal has been significant without wide-scale Agency intervention in regards to process changes. We are therefore less than eager to adopt rules where there is evidently no need to do so. To date, industry has had few practical complaints and significant reductions have been achieved. Nor do we view the possibility of future Agency action as a legitimate basis for adopting regulations; that is, in terms

of environmental impact, Section 39(h) has been successful in reducing land disposal of hazardous wastes. There is no guarantee that any of the proposals submitted will be equally effective. Accordingly, the effectiveness of Section 39(h) coupled with the lack of generator complaints necessarily begs the question as to why any further rules are needed.

The representatives of industry assert that guidelines are necessary because if Section 39(h) does in fact authorize the Agency to scrutinize internal processes, then standards should be set in place so as to avoid arbitrary results. As mentioned above, the language of 39(h) is very discretionary. The burden of demonstration lies with the generator, and the statute authorizes the Agency "to impose such conditions as may be necessary to accomplish the purposes of the Act..." The question presented, then, remains just how far the Agency can go. When issues such as these arise, it becomes quite clear why industry seeks uniform regulations. Yet because the statute applies to all generators of hazardous waste and the purpose of the statute is clearly to reduce hazardous waste disposal, the legislature drafted the statute to allow the Agency discretion with respect to varying circumstances.

Notwithstanding the last four years, however, yet another issue is whether process intervention is within the appropriate scope of the Agency. Implicit in the comments of IERG and CWM is the premise that the Agency's power to evaluate internal processes might impede a generator's ability to compete in the marketplace. Yet any such result would clearly contravene the "economically reasonable" standard inherent in the statute and therefore afford a generator appeal rights with the Board as well as the courts. With that in mind, we can conceive of some circumstances whereby intervention - albeit that of a relatively simple nature - might be beneficial. For example, IERG argues that the answers the Agency solicits are, in some cases, improper:

> Unfortunately, in the "Request for Authorization to Deposit Hazardous Waste in a Disposal Facility" prepared by the Agency, the instructions for generators to use in applying for a Section 39(h) wastestream authorization appear to go outside the statute and the agreement as to interpretation. The Agency continues to require the generator to respond to such questions as "(d)escribe any changes made to the process to reduce the hazardous waste generated through the use of different raw or intermediate materials" and "(w)hat equipment or other process changes have been or can be made to reduce or recycle hazardous waste." It is improper for the Agency to continue to require the kind of information.

(IERG Post-Hearing Comments at 14)

We can envision a scenario whereby the gathering of this type of information might help achieve the purpose of the Act. Assuming that the information requested is not a trade secret or otherwise proprietary in nature, the Agency could conceivably gather and ultimately share data resulting in the reduction of hazardous waste.[1] At the same time, we caution that any such practice would be limited in scope and probably of the most simplistic nature. We do not foresee - nor do we think it appropriate - that the Agency will second-guess a process system which it does not completely understand. Further, we feel that for the Agency to expend a great deal of its energy and resources analyzing the manufacturing processes of highly-specialized industries would be less than pragmatic.

In that regard, we note that irrespective of 39(h) there exists incentive within the marketplace to reduce hazardous wastes. And according to the record, research is currently underway to that effect. In any event, we note that the concerns of industry elicited here are meritorious and well-noted. In light of the fact that no problems have arisen thus far, however, we are unwilling to undermine a statute whose purpose we applaud and replace it with regulations similar to those federal provisions already in effect. We emphasize the fact that dismissing this proceeding today would in no way undermine the Board's power in this matter. The Board, with or without a rule,

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[1]HR 1457, entitled the Waste Reduction Act, recently passed through the House of Representatives and is currently pending before the Senate. This federal legislation goes even further than Section 39(h) of the State Act. It declares that the national policy is to reduce or prevent pollution at its source wherever possible. In that regard, the program requires the EPA to: (1) make matching grants to States for programs promoting the use of source reduction techniques by businesses; and (2) establish a Source Reduction Clearinghouse to compile information generated by States receiving grants on management, technical, and operational approaches to source reduction. HR 1457 further mandates that the filings of annual toxic chemical release forms required under the Superfund Amendments and Reauthorization Act of 1986 include toxic chemical source reduction and recycling reports for toxic chemicals which are the subject of such filings. These reports include information on a facility-by-facility basis as to:(1) the amounts and source reduction practices used with respect to such chemicals; (2) measurements of changes from past to anticipated levels of chemical reduction and recycling; and (3) the techniques used to identify source reduction opportunities. Finally, all of the information gathered by virtue of this bill will be available to the public.

still retains jursidiction for hearing appeals pursuant to Section 40 of the Act. Further, if the Board had dismissed this rulemaking today, it would still possess the power to initiate a rulemaking if the stated concerns of industry did in fact arise in the future.

Jacob D. Dumelle, P.E.
Board Member

Bill S. Forcade
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above Dissenting Opinion was submitted on the 24th day of September, 1990.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board