

ILLINOIS POLLUTION CONTROL BOARD
July 3, 1990

CITY OF BATAVIA,)
)
 Petitioner,)
)
 v.) PCB 89-183
) (Variance)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

DISSENTING OPINION (by B. Forcade):

I strongly dissent from today's action by the majority. In my opinion it represents a profound departure from the prior practices of this Board. Now, the majority alone may determine what information will be placed in the record and addressed by the parties, thus stifling dissent. In this particular situation, the majority action results in striking from the record the only information on fatal health impacts of radium for Batavia's water supply, which is one of the two most highly contaminated in the State of Illinois. The stricken information would allow calculation of the number of fatal head and bone sarcomas that would be expected to have occurred already from drinking Batavia water. Now the only information is an Agency calculation which vaguely refers to cancer. In short, today's majority action has managed to strike totally from the record the anticipated incidence of death.

It has been the practice at this Board (for at least my tenure of nearly seven years) that any individual Board Member who reviewed a variance petition and found it wanting could get a Board Order setting it for hearing - asking the parties to address the troublesome issues. Or, they could get a Board Order incorporating relevant documents into the record and asking the parties to address their significance. The courtesy of allowing individual Board members to secure a Board Order setting hearing continued at least up to and including my request in City of Braidwood, PCB 89-212, Order of March 8, 1990. That hearing process produced the very health impact information which has been stricken from this proceeding by the majority action today.

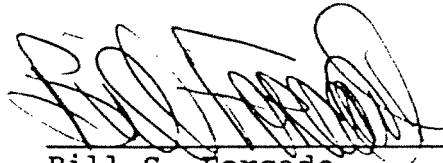
Certainly, the majority can continue to demand a hearing in any variance proceeding it wants. Pursuant to Section 37 (a) of the Act, any person can command that such a hearing take place. I requested a hearing in this proceeding to address the high radium levels and their health impacts, but it was not endorsed by the majority. This effectively curtailed the introduction of health impact information into this record.

A similar situation exists pertaining to the incorporation of documents into this record. The Board's own regulations, at 35 Ill. Adm. Code 101.106 (a), provide that, "[u]pon separate written request of any person or on its own initiative, the Board or hearing officer may incorporate..." such documents into the record. Here, the request by two Board Members for a Board Order that health documents be placed in the record was not afforded the treatment granted by Section 101.106 to any person. Certainly this Board, by majority action, has repeatedly referenced extra-record documents (or placed them in the record, or asked the parties to place certain documents into the record) and then asked the parties to comment on them. Indeed, in this particular proceeding the Board has already referenced an extra-record document, an Agency computer print-out called "Chemical and Radiological MAC violations" (See Order of March 8, 1990). It is regrettable that the majority would not support introduction of the only meaningful health information into this record.

Since the majority would not support a Board Order introducing the health effects information, Board Member Dumelle and myself introduced it into the record as a public comment, ensuring that it would be sent to the parties, and requesting comment. Neither party expressed any objection to the introduction of this material into the record as a public comment. In an unprecedented move, a bare 4-3 majority decided to strike this health effects information. There was no request to the Board to strike this health effects information, and the majority provided no explanation for their action.

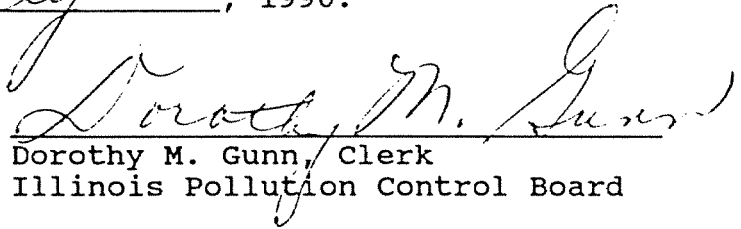
The information in question was not vague speculation by a fringe of the scientific community. It represented the informed opinion of the two most respected experts on the subject to testify in any past radium proceeding of this Board. Under the theory of Ecko Glaco Corp. v. IEPA, 542 N.E.2d 174 (1st Dist. 1989), and Caterpillar Tractor v. IPCB, 363 N.E.2d 419 (3rd Dist. 1977), this type of information cannot be considered by the Board Members in their decision making process unless it has been disclosed and put on the record for the parties to review. Because of the majority action striking this health effects information, it cannot be considered here. Perhaps the most troubling aspect is that the record now contains no basis for calculating the number of fatal cases of cancer expected from drinking Batavia water, nor information on how the existing cancer statistics were derived and what they encompass.

I note that on page 5 of the Recommendation, the Agency states that lifetime exposure to excess radium contamination in Batavia water will cause 1.88 plus 1.11, or essentially 3 additional cancers; then, on page 13 it states that, "the radium level does not pose any significant health risk." I believe that since three men, women, or children from Batavia are calculated to have developed cancer, the health risk is clearly significant.



Bill S. Forcade
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 19th day of July, 1990.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board