ILLINOIS POLLUTION CONTROL BOARD
August 9, 1990

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

DISSENTING OPINION (by J. D. Dumelle):

This case deals with radium-laden drinking water. If, as most scientists believe, a carcinogen has no threshold, then at the Batavia levels of radium some cancer will be induced. Will it be head cancer? Will it be bone cancer? Will it be leukemia? Anyone drinking Batavia water is at risk.

The risk to the residents drinking the water from Wells Nos. 2 and 3 at 21 pCi/l is about 1-in-3,400 over a lifetime. This is 294 times the usual accepted risk of 1-in-1,000,000 over a lifetime for most other carcinogens.

Had the Board not overruled IEPA and had it denied instead of granted the variance then additional persons would not be placed at risk.

In addition to these health concerns. the holding in this proceeding is procedurally defective. If ever a case existed which screams self-imposed hardship, it is the one at bar. Further, for the Board to find that Batavia has satisfied Section 36(b) of the Act in that it has progressed satisfactorily towards compliance is in direct contravention of the evidence, irrespective of how the language was couched as an "extremely close call".

Since Batavia procured its original variance more than five years ago (April 4, 1985), the municipality has done little, to bring itself into timely compliance. In accordance with its original variance, Batavia was supposed to drill several new wells, construct new treatment, storage and distribution facilities, secure professional assistance in regards to preparation of plans and improvements, advertise for bids and complete construction by January 1, 1990. The majority opinion found that "Batavia has not complied with any of these conditions" (Opinion and Order, pg. 3).

Batavia's sole reason for disregarding these interim deadlines remains that it has been "unable to obtain the property necessary for the new wells and treatment facilities". This proposition is so lame that it should be dismissed on its face. Batavia is a municipality and, as such, possesses the power to condemn property via eminent domain. Batavia has provided no proof to this Board that it initiated condemnation proceedings in 1985-1988, yet the Board has now found that the municipality has "progressed satisfactorily". Indeed, the evidence indicates that Batavia did not initiate condemnation proceedings until July of 1989.

The real reason that Batavia has not complied with any of its responsibilities in a timely fashion is because it has been stalling. As evidenced by its Amended Petition, Batavia does not want nor does it understand why it has to allocate funds to reduce cancer-causing radioactive elements from its water supply in that the federal standards may be relaxed in 1992. Not only is the City relying upon speculation, but it disregarded this Board's 1985 variance order based upon that speculation. For the Board to turn around and ratify this transparent strategy is disappointing. Is a Board variance order a mere "paper tiger"?

Equally disturbing is the fact that the Board found that Batavia complied with Section 36(b) of the Act because the necessary property "has finally been obtained". Not only did it take the City five and half years to do so, but any property obtained by Batavia can be just as easily sold in the future. This is merely a last-ditch effort to appease the Board while delaying compliance. For the Board to be "particularly persuaded" by this reluctant and late action is to ignore the vast array of other, more profound evidence to the contrary.

Finally, in the "Hardship" section of the Opinion and Order, the Board discusses Batavia's plight as well as the Agency's recommendation to deny the City's application, but makes no finding there. Pursuant to Section 36(a) of the Act, Batavia must prove and the Board must find that the City will suffer an unreasonable or arbitrary hardship should its variance petition be denied. In support thereof, Batavia lists several residential and commercial developments which have already been approved by the city as well as several other projects, including a new junior high school. There is no question that Batavia knew of these projects and their impact to the community. The question then becomes: why did the City blow its deadlines and ignore the conditions imposed upon them? Further, why did it not inform the Board of the alleged impediments preventing compliance?

The answer is simple in that the City was hoping that the federal standards would be relaxed. There were no uncontrollable circumstances or other logistical problems which stood between Batavia and compliance. There is therefore, nothing unreasonable

or arbitrary about denying Batavia another variance (See Village of Braidwood v. IEPA, PCB 89-212, June 21, 1990). Batavia knew what it had to do but chose not to. For the Board to ratify this behavior is not only bad policy, but legally incorrect. Moreover, the precedent is extremely shaky. Will the Board, in further proceedings, grant variances from public health, cancer-preventing regulations because a municipality merely alleges that within the course of more than five full years, it was unable to obtain the necessary property? I sincerely hope not. And as such, I would urge the majority to re-evaluate its reasoning should a motion to reconsider be filed by IEPA.

For the reasons contained herein, I would have denied Batavia's petition for a variance extension on the basis that its actions extended a cancer hazard and constitute a self-imposed hardship. In the alternative, I would hold that Batavia did not fulfill the requirements of Section 36(b). Accordingly, I dissent.

Jacob D. Dumelle, P.E.
Jacob D. Dumelle
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 22nd day of August, 1990.

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