

ILLINOIS POLLUTION CONTROL BOARD
January 17, 1972

In The Matter of)
)
) R71-21
ADMISSIONS AND TRANSCRIPTS)
)

Supplemental Opinion by Jacob D. Dumelle

On March 14 I asked the Board to reconsider its vote of January 17, 1972 in the matter of placing the cost burden of transcripts on the petitioner and applicant in variance and permit cases. The motion for reconsideration lost for want of a second but its purpose was to place me on record as now reversing my "yes" vote of January 17.

On March 15 I filed a dissent in the related proceeding R72-1, decided March 2, 1972 which required parties to an enforcement action to pay the cost of a transcript of proceedings. For similar reasons, which I sketch out below, I am now dissenting in this earlier matter.

I believe that the Board in passing on the transcript costs in variance and permit proceedings has changed the intent of the Environmental Protection Act and has acted beyond its powers. The Act, in the wisdom of the General Assembly, and as proposed and approved by the Governor, provided for a free pollution forum. The Board has no warrant in the Act to impose transcript costs which may run up to \$1,000 per day on the parties. Thus a desirable public policy has been suspended and an action for which there is no legal basis taken by the January 17 vote.

The usual argument for passing variance costs to the petitioner is that he is asking for a "license to pollute" and ought to pay. That I feel is a loaded phrase and a wrong conclusion. When regulations are enacted no one can foresee all the myriad ramifications and that is why variance proceedings are provided for by the statute. A petitioner may need more time to develop a better pollution control system which may benefit an entire industry or he may need more time because his consulting engineering is ill or he may conceivably need more time because the life of his plant is of a marginal nature and strict compliance with regulations would shut him down and eliminate the jobs associated with the operation. The Board must balance and weigh the effects on the environment and the public and the petitioner and it is in the best interests of the whole State of Illinois that this be done. A small industry or a potential home owner desiring relief from a sewer ban can ill afford heavy transcript costs on top of attorney's fees on top of consulting engineer's fees on top of loss of time from work, etc.

For permit proceedings one cannot say that the large utilities cannot afford these costs as they seek a nuclear plant permit. But the Act does not impose these costs upon permit applicants and I do not feel that the Board can or should do so.

As I stated in my dissent on R72-1 the Board could have pursued other alternatives. It could have sought an opinion from the Attorney-General on the legality of not stopping its hearings and thus incurring a deficit and it could have tried to precisely gauge the area of agreement on a deficiency appropriation among the legislative leaders. It has not done this. And even if pursuit of these alternatives proved fruitless it does not then follow that the state's pollution control program would close down. Cases could continue to be filed, discovery could proceed and necessary document exchanging and depositions could be completed in the few months until May when additional funds may be made available. If the 90-day variance period was ending and no waiver was forthcoming from a petitioner the Board could simply act without hearing using the Agency recommendation as a guide or dismiss without prejudice on the grounds that it could not incur a deficit to hold a hearing.

Crisis situations cry for immediate action. Often government has cause to regret its response to such emergencies since the luxury of contemplation and hindsight show that the action was unnecessary or wrong. The internment of the Nisei in 1942 was such a crisis response. The Board's action of January 17 and my original "yes" vote were in error.



Jacob D. Dumelle

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Supplementary Opinion was filed on the 20th day of March, 1972.



Christan L. Moffett, Clerk
Illinois Pollution Control Board