

ILLINOIS POLLUTION CONTROL BOARD  
January 5, 1989

THE EUREKA COMPANY, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 88-85  
 )  
 ILLINOIS ENVIRONMENTAL PROTECTION )  
 AGENCY, )  
 Respondent. )

CONCURRING OPINION (by J.D. Dumelle):

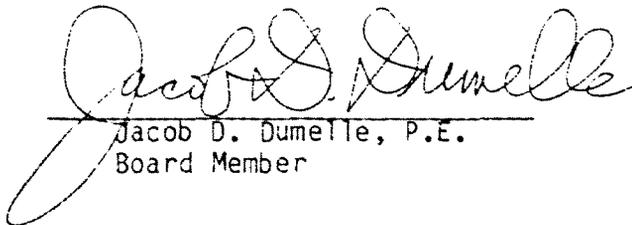
My reason for concurring is that the majority's grant of variance begins on January 5, 1989, and leaves the Eureka Company liable to an enforcement action by anyone for the period from January 1, 1988 through January 4, 1989.

The rule from which variance was granted is a part of the State Implementation Plan and when approved by the U.S. Environmental Protection Agency would presumably be enforceable under the U.S. Clean Air Act. At the very least, the "gap" in protection is now enforceable under the Illinois Environmental Protection Act.

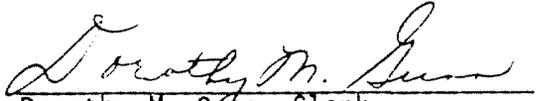
The arguments counter to this are that the Eureka Company filed late (on May 10, 1988) and amended its petition on August 17, 1988. On August 21, 1988 it waived the due date for 120 additional days (most of which had already occurred because of the amendment to the petition).

This is a company which has not often appeared before the Board. Why they filed in May of 1988 instead of in September 1987 is unknown. It may have been oversight or perhaps they were hoping for success in paint reformation.

If the Board is to grant variance I feel it should give full protection against future enforcement actions unless bad faith is shown. Bad faith was not shown here. In this case I would have granted the variance to cover the 370 calendar days for which the Eureka Company remains liable to prosecution.

  
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Jacob D. Dumelle, P.E.  
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 17<sup>th</sup> day of January, 1989.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board