

ILLINOIS POLLUTION CONTROL BOARD  
February 28, 1991

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

DISSENTING OPINION (by R.C. Flemal):

I respectively dissent from today's Order in which the majority denies the City of Batavia's ("Batavia") Motion to Amend Board Order.

I find the arguments of Batavia and the supporting arguments of the Illinois Environmental Protection Agency to have merit, and accordingly believe that the relief requested by Batavia should be granted.

Moreover, I am troubled by the very matter of variance from Restricted Status related to radium in drinking water. Indeed, this matter remains one of the most persistently vexing problems faced by the Board. In part the problem has stemmed from uncertainty as to what the appropriate standard for radium in drinking water ought to be, compounded by major part by the long-standing failure of the United States Environmental Protection Agency ("USEPA") to address the adequacy of the current radium standard. This has caused the various responsible agencies, including the USEPA itself, to regularly revise and amend their strategies for managing radium cases. Moreover, the rapid change in strategies has often caused the different agencies, including the USEPA, IEPA, and Board, to be at odds and to pursue different paths. In the last few short years alone we have seen USEPA revocation of variances from the radium standard, group variances, elimination of Restricted Status associated with radium, "enhanced enforcement", protection via compliance orders, disappearance of enforcement, etc., etc. So many themes have entered the fray in such short time that it is a wonder anyone is able to adjust to them all.

As regards the instant matter, I think that the majority fails to recognize that again much has changed since the issuance of the original Opinion and Order in this matter, in August of last year. In particular, it is now on record that the Deputy Administrator of the U.S. EPA himself recommends that the radium standard be 20 pCi/l for each of the two radium isotopes (see Motion Exhibit B). Batavia's concentration is thus less than one-third the level advocated by the highest authorities within

the USEPA. The Illinois General Assembly has also declared that the standard determined by the USEPA shall be the standard applicable in Illinois (see Section 17.6 of the Illinois Environmental Protection Act). Thus, at both the federal and State levels, the highest authorities are now on record as urging an substantial upward revision of the radium standard. Moreover, Batavia would apparently be in compliance with any such revised standard.

Why, in the face of these circumstances, force Batavia to comply now with a standard that will be changed shortly, according to the overwhelming sense? Why is it not prudent to let the standard revision procedure proceed before demanding that Batavia incur what may well be unwarranted compliance costs? Why does the majority feel that Batavia's feet need to be so held to the fire? I simply cannot find a reasonable answer to any of these questions.

The situation would be different if Batavia's circumstance constituted any remotely significant health risk. But it does not; I know of no responsible authority who believes that the concentrations encountered in Batavia's water, over the short time involved in this variance request, constitute a significant health risk.

I am also troubled by what has become of Illinois' Restricted Status provision in the context of the radium situation. I fear that Restricted Status' purpose has been distorted. Moreover, I fear that in the process the Board has assumed for itself the uncomfortable role of enforcer, which role is of questionable legitimacy and compatibility with the Board's primary adjudicatory charge.

The origins of Restricted Status predate any Board regulation authorizing or requiring it (see R81-6, September 2, 1982, 48 PCB 132). The Agency had initially adopted Restricted Status as an internal policy. The Board subsequently "saw that it was good" and adopted it as a Board policy over the objection of the Agency. The Board position was that, if the Agency was to employ a Restricted Status program, it had to have authorization of the Board so as to provide a legal basis for the program.

What is interesting is that in none of the Opinions in R81-6 is there any apparent specification of the purposes to which Restricted Status is now being applied<sup>1</sup>. Rather, the reason given is "to forewarn supplies of their deficiencies" (48 PCB

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<sup>1</sup> I.e.: (a) limiting the expansion of systems where such expansion would reasonably lead to unacceptable performance of part or all of the system, (b) limiting the duration of exposure or number of people exposed to a contaminant where the contaminant is injurious to health, (c) providing incentive to correct a problem beyond the incentive provided by the threat of enforcement.

132) and to notify "the supplies and persons serviced of the potential inadequacies and violations of the supplies" (48 PCB 133). Even now the Agency's Restricted Status list begins with the statement:

The Restricted Status List was developed to give additional notification to officials of public water supplies which are in violation of 35 Ill. Adm. Code, Subtitle F: Public Water Supplies, Chapter I or the Illinois Environmental Protection Act.

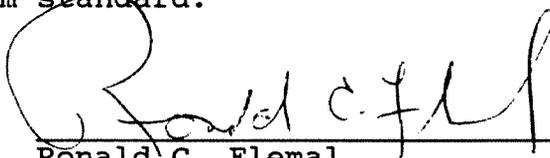
The original purpose of Restricted Status thus seemingly was to provide a notification mechanism; there is no indication that it was intended to serve as a punitive mechanism or even as a mechanism to limit public injury. Again, interestingly, it would appear that, as originally conceived, Restricted Status was not even considered to have economic consequences: DENR issued a Declaration of Negative Impact (48 PCB 129)!

As applied to Batavia, however, it is certainly the enforcement aspect of Restricted Status which is at the forefront. There has been no evidenced desire on the part of the USEPA, the IEPA, or anyone to enforce against violations of the current radium standard, be it against Batavia or any other community. In this vacuum, the Board has become the sole "enforcer" of the radium standard, and then only via the indirect route of Restricted Status. In essence, the Board is telling Batavia that unless it makes a binding commitment to come into compliance with the radium standard we refuse to lift Restricted Status (i.e., we extract the penalty of putting them on economic hold). This is an uncomfortable role for me as a Board Member, and I would hope also for my fellow Board Members; the Board is not an enforcement agency.

Moreover, I would question that our application of Restricted Status, as a penalty, is directed toward the right person. Is it not the new homeowner, business person, developer, etc., who finds that public services are denied, who is being penalized? It must be small consolation to such individuals to learn that to receive services they need only get the local utility or public works department to "shape up". In the particularly context of radium Restricted Status, it is, of course, questionable whether any "shaping up" is necessary or even desirable.

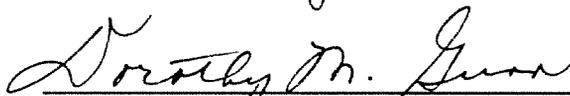
If it were for me to decide, I would adopt the following course of action as regards Batavia: (1) give Batavia full variance from radium/Restricted Status; (2) condition the variance to terminate at a given time following USEPA promulgation of the new radium standards, with such time being sufficient to allow coming into compliance with the post-promulgation standards, if that in fact remains necessary; (3) in the time between grant of variance and USEPA promulgation require Batavia to take steps such that it will be in a position to effectuate compliance shortly after USEPA promulgation.

I believe that this is the justifiable course of action. Moreover, it has the satisfying aspect of giving honest recognition to the service needs of the citizens of Batavia, to the need of the authorities of Batavia to responsibly serve their citizens, to our best understanding of the health risks associated with Batavia's water supply, and to current dynamics affecting the underlying radium standard.



Ronald C. Flemal  
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 28<sup>th</sup> day of February, 1991.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board