ILLINOIS POLLUTION CONTROL BOARD
July 3, 1990

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

DISSENTING OPINION (by J.D. Dumelle):

Procedural History

The Board, on its own motion, struck from the record materials which Mr. Forcade and I submitted on June 12, 1990. The materials we submitted for consideration in this variance proceeding consisted of updated data regarding the danger - or lack thereof - of radium 226 and 228 present in drinking water. This data was sanctioned by the Agency and submitted in the City of Braidwood, a very similar case. For whatever reason, these materials were not introduced by the Agency in the instant matter. Because I thought the materials highly relevant, I jointly requested that the Clerk insert the updated materials generated by the Agency into the record with full notice to the parties.

The data being struck here by a bare majority are those materials generated by two highly reputable scientists, Dr. Toohey and Dr. Hallenbeck. Thus the materials are not frivolous or those which are of doubtful scientific and technical value. On the contrary, it is strikingly obvious that the materials are pertinent to a decision and further, that any additional information regarding the health effects of radium will only make any determination by the Board more complete and therefore more accurate. I mention this because the Board, in granting its own motion, fails to state any reason for its action. In fact, the participants in this proceeding were notified on June 12, 1990, and they have yet to articulate any objection. Accordingly, it would appear that the Board struck this material because they deemed its introduction to be procedurally improper rather than irrelevant.

Legality of Board-introduced Evidence

Section 101.106(a) states, in pertinent part:

Incorporation of Prior Proceedings

> Upon the separate written request of any person or on its own initiative, the Board or hearing officer may incorporate materials from the record of another Board docket into any proceeding. The person seeking incorporation shall file with the Board four copies of the material to be incorporated. The person seeking incorporation shall demonstrate to the Board or the hearing officer that the material to be incorporated is relevant to the proceeding. Notice of the request shall be given to all identified participants or parties by the person seeking incorporation. (Emphasis added.)

The language here is self-explanatory. And while it would be interesting to debate whether "any person" includes a Board member, such an analysis is unnecessary. The Board had before it a motion to incorporate the material on its own initiative, but instead chose to pursue its course of action today.

Lest the Board need stronger authority that its own rules, however, it need only look to the Administrative Procedure Act (APA). Section 12(c) of the APA states:

In contested cases:

> (c)Notice may be taken of matters of which the Circuit Courts of this State may take judicial notice. In addition, notice may be taken of generally recognized technical or scientific facts within the Agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise of the material noticed, including any staff memorandums or data, and they shall be afforded an opportunity to contest the material so noticed. (Emphasis added.)

First, the Hallenbeck and Toohey materials do constitute generally recognized technical or scientific facts within the Board's specialized knowledge. The study which it updates has been generally recognized by the Board for the last five years, since August 1985. Moreover, it contains unrefuted technical and scientific facts. While the two experts differ as to their conclusion, that difference accrues only as a result of their methods. In other words, the substantive data is extremely similiar, but one expert discounts a significant population source - thereby arriving at dissimiliar conclusion.

Second, given the fact that there were no hearings or preliminary reports, the question becomes whether the parties were otherwise noticed, and if so, were they afforded the opportunity to contest the material so noticed? To this, I can only say that the parties were noticed on June 12, 1990. Three weeks later neither side has objected, commented, or notified the Board of any inclination whatsoever. Had they done so I would have been happy to consider their comments. It should be noted, however, that I will not have that opportunity in that the Board struck the material on its own motion prior to any objection from either party, and did so without articulating any reason.

The aforementioned Section 12 of the the APA was interpreted by the appellate court in Ecko Glaco Corp. v. IEPA, 542 N.E.2d 174 (1st Dist. 1989). In this case Ecko Glaco Corporation contested evidence which was admitted by the Agency. Citing Section 12(c) of the APA, the Appellate Court found the evidence to be admissible in that "notice may be taken of generally recognized technical or scientific facts within the Agency's specialized knowledge". Id., at 152. Further, the court found import in the fact that Ecko Glaco never contested the truth of the information contained in the documents, despite the fact that it had the opportunity to rebut the facts contained therein. Ecko Glaco can be distinguished from the instant proceeding in that the material they objected to was submitted by the Agency. But the court in dicta, went beyond this distinction and stated:

> Further, the Act (APA) permits an administrative agency to take official notice of facts which are properly disclosed and put upon the record, and where the other party has an opportunity to be heard regarding the propriety of taking notice of such facts.
>
> Id., at 153

My interpretation of this language within the context of the court's decision leads me to two conclusions. First, the APA grants an Agency which has special, highly technical knowledge the ability to utilize that knowledge in the decision - making process. And second, more important than how that information is placed in the record is that the participants contesting the issue have the opportunity to refute, cross-examine, distinguish, etc.

Indeed, in reaching its conclusion, the court in Ecko Glaco cited Caterpillar Tractor v. Pollution Control Board 48 Ill. App. 3d 655 (3rd Dist. 1977). In this case, the Board denied a variance, and in part of its decision, relied upon an EPA report not contained within the record. The court reversed the Board stating that it was fundamental error for the Board to consider evidence which was not subject to cross-examination. The court went on to state that:

> In our view, an administrative agency may take official notice of facts known to it only when such facts are disclosed and put upon the record so as to afford a party of opportunity to be heard. 48 Ill. App. 3d at 661-662.

The point is clear: It is imperative that the Board enter that which it considers into the record as opposed to merely referring to documents in one case as being applicable to another matter being considered. In this way, every party has the opportunity to comment and due process is satisfied.

Accordingly, I disagree with the Board 's decision today. Both parties have had notice of the Hallenbeck and Toohey materials being placed in the record for three weeks. In addition, the Board is clearly a specialized agency. If we were the Circuit Court, then we would not be aware of this updated study, let alone the original. Yet we are not . And the APA, recognizing this fact, makes provisions whereby we can utilize our highly technical experience.

And because the relevance of this information is so abundantly clear, it remains my conclusion that the Board voted to strike this material because it was thought to be procedurally improper. I strongly disagree. Not only does the APA indicate that such a move is justified, but the rules of the Board clearly demonstrate that the admissibility of evidence is relaxed relative to that which is employed in civil practice.

In my mind, the clear language of Section 101.106(a) of the Board's procedural rules in conjunction with Section 12(c) of the APA render the Board's decision today ill-informed. Administrative proceedings hearings which are quasi-judicial in nature are unique proceedings which often demand a certain flexibility relative to the formal rules of evidence. Such is definitely the case here. Rather than relying on a five-year old study when the topic at hand is the health and well-being of our citizens, the Board should take advantage of its expertise and properly utilize its liberal rules as opposed to being overly literal, thereby excluding vital data.

For the reasons stated herein, I would have admitted these materials for consideration as part of the record. Accordingly, I respectfully dissent.

J.D. Dumelle
Board Member

I, Dorothy M. Gunn, hereby certify that the above Dissenting Opinion was filed on the 10th day of July, 1990.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board