

ILLINOIS POLLUTION CONTROL BOARD
October 22, 1981

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)	
)	
Complainant,)	
)	PCB 80-22
v.)	PCB 80-193
)	<u>Consolidated</u>
CATERPILLAR TRACTOR COMPANY,)	
)	
Respondent.)	

DISSENTING OPINION (by J. Anderson):

I dissent because I believe a) the Board should have granted the Agency's motion (requesting that the Board modify its original Opinion and Order of August 20, 1981) and entered separate Opinions and Orders addressing the enforcement action and the variance petition and b) the reasoning used by the Board regarding the conditions led to a refusal to modify its original Order even to rule on the variance, thus leaving Caterpillar and the Agency in a confusing limbo as to whether or not Caterpillar was granted a variance.

The Board states that, since it is ordering the same corrective action pursuant to the enforcement action as it would have in the variance petition, it "need not distinguish such a plan as a compliance order or a variance condition" as long as "the elements of proof for each proceeding is satisfied by the record".

I believe this reasoning leads to some unfortunate results.

First, the Board must distinguish between enforcement actions and variance petitions, whether or not the plans are the same, in order to act upon them. In its Order of August 20, the Board does nothing about the variance petition even though the Opinion acknowledges sufficient future hardship. Is variance now granted by operation of law?

Second, the Board should be especially careful not to appear to ignore the statutory framework under which quasi-judicial or quasi-legislative conditions are imposed, just because the conditions themselves are the same. This is especially important in light of the Board's considerable recent efforts to preserve these distinctions in the Act, distinctions that have been sustained by the Courts, and affect the administrative, appeal and review focus.

The enforcement Order does not bring Caterpillar into compliance with any Board regulations until those conditions are fulfilled. A variance grant would bring Caterpillar into compliance while the conditions are being fulfilled. I believe that Caterpillar's petition for variance reflects its appreciation, though belated, of the value of giving the conditions the status of short term "temporary regulations" in a variance, so as to be in compliance while it seeks a better solution to its problems than its prior hit and miss approach.

The Board could have made clear, through the separate grant of variance, that it did not "forgive" past non-compliance even though the "good faith" mitigating factors considered in this enforcement action resulted in a fine not being imposed.

I have expressed similar concern in an earlier dissent in IEPA v. City of Abingdon, PCB 80-105 (June 10, 1981). The Board's recent separate Opinions and Orders addressing enforcement and variance actions concerning Illinois Fruit and Produce Company PCB 80-181, PCB 81-104 (October 8, 1981) serve to avoid the uncertainty created in this case. These cases should have been handled in a similar fashion.



 Joan G. Anderson

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 28th day of October, 1981.



 Christan L. Moffett, Clerk
 Illinois Pollution Control Board