

ILLINOIS POLLUTION CONTROL BOARD
September 29, 1977

ILLINI BEEF PACKERS, INC.,)
)
 Petitioner,)
)
 v.) PCB 76-117
)
 ENVIRONMENTAL PROTECTION AGENCY,)
)
 Respondent.)

CONCURRING OPINION (by Mr. Young):

I concur in the grant of this variance from Rule 102 of Chapter 2 for the reasons set forth in the Opinion. I am much less comfortable with the grant of a variance from Section 9(a) of the Act.

David P. Currie, Professor of Law, University of Chicago, and the first Chairman of the Pollution Control Board, observed "that Section 35 (of the Act, appears to allow variances only from Board regulations and orders, not from the statute itself; ...". (1) Professor Currie suggests that it may be possible to ignore the omission as a typographical error but points out the difficulty in doing so in light of the deleted language in Section 35 of the Act as proposed which referred separately to "any provision of this Act" (Currie, Illinois Pollution Law Enforcement, (1975) 70 Northwestern L. Rev. 409, note 95).

The Board has, however, granted variances from the provisions of the Act beginning as early as Deere & Co. v. EPA, 1 PCB 129 (1970) and as recently as Illinois Brick Co. v. EPA, 16 PCB 561 (1975).

The reasoning of the First District Appellate Court in W. F. Hall Printing Company v. Environmental Protection Agency, (1974) 306 N.E.2d 595, at 598-99, might be extended to allow variance from the statute, particularly in the case of a variance from Section 9(c) of the Act given prior to adoption of Board regulations.

(1) Currie, David P., Pollution, Cases and Materials, (1975) West Publishing Company, p. 137.

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There is an unresolved question whether a variance from the provisions of the Act, for example, Section 9(a) or 12(a), would be violative of Article XI, Section 2 of the Constitution or if the constitutional right is adequately protected thereafter by application of the common law of nuisance which is not extinguished by the grant of the variance.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Concurring Opinion was submitted to me on the 19th day of October, 1977.



Christan L. Moffett, Clerk
Illinois Pollution Control Board

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