ILLINOIS POLLUTION CONTROL BOARD
March 11, 1971

TEXACO, INC.	)	
v.	)	#PCB70-29
ENVIRONMENTAL PROTECTION AGENCY	)	

Concurring Opinion by Mr. Dumelle

This separate concurring opinion is submitted in this case based on public health considerations; while I am in favor of the grant of this variance I would impose additional conditions which are outlined below to be part of this "license to pollute". Let me hasten to say that I am also in favor of the general direction of this decision as expressed by Mr. Currie in his opinion and that my reservation is simply that not enough precautions, by way of conditions of the variance, are imposed on the petitioner. It is a good decision as far as it goes but it does not go far enough; the safety and welfare of the citizens in the immediate area of this high volume hydrogen sulfide source are in need of more protection than that afforded by the conditions of the variance.

Apart from the merits of the grant of this variance some few words are in order on the subject of information not in the record, that is, whether the Board in considering a case may take into consideration in arriving at its decision such information as the laws and regulations of other states and countries and the expressed basis for the various enactments' existence.

Specifically, in this case part of my consideration were data such as the following:

HYDROGEN SULFIDE AMBIENT AIR QUALITY STANDARDS

Country or State	Basic Standard		
	$\mu g/m^3$	ppm	Avg. Time
California	150	.10	1 hr.
Missouri	45	.03	30 min.
Montana	45	.03	30 min.
New York	150	.10	1 hr.
Pennsylvania	7.5	.005	24 hr.
Texas	120	.08	30 min.
Czechoslovakia	8	.005	24 hr.
Ontario, Canada	45	.03	30 min.

The question of official notice has come up in this case as the result of an incomplete record. Benchmarks by which the potential harm of the estimated emissions can be assessed are necessary. Surely the Board can rely on its own knowledge and experience as well as materials whose factual integrity is beyond question such as the enactment of ambient air quality standards by governmental authorities to illuminate some dark corners of this record.

Generally available, relevant, indisputably correct factual information cannot be ignored by this Board if it is to come to an informed decision after a fair hearing. Administrative bodies must be free to call upon their own peculiar experience and knowledge in arriving at a decision. If a decision could be made in an absolute vacuum, that is, purely from looking at the record, there would be no need for a five member Board. Logic would militate that decisions be made by a three member board or even a single member board. This Board is statutorily presumed to embody a certain expertise inasmuch as the legislature in its wisdom directed the governor to appoint "an independent Board... consisting of five technically qualified members." [S. H. A. ch. 111-1/2 § 1005 (a)] The only rational conclusion to be drawn from the statutory existence of the five member Board is that the legislature meant the Board to do some thinking of its own. The Board must be free to take notice of generally recognized technical or scientific facts within the Board's specialized knowledge and experience. It would, of course, be desirable to put all parties on record notice of the full extent of the materials officially noticed, but when this is not done it should not necessarily be a roadblock to the Board's consideration of particularly relevant public facts. Certainly if the parties are not prejudiced by consideration of extra-record scientific facts there should be no impediment to their use. See City of Ishpeming v. Michigan Public Service Comm. 121 N. W. 2d 462 (Mich., 1963); NLRB v. Johnson 310 F. 2d 550 (CA6, 1962).

In Monon R. Co. v. Public Service Comm. 161 N. E. 2d 626 (Ind. App. 1959) the public service commission, on its own motion, caused special investigations of railroad crossings to be made and may have based its order to require the railroad to install blinker lights at crossings on such information and evidence outside of the record. The court there based its decision on the admonition in U. S. et al v. Pierce Auto Freight Lines, Inc. where the court said:

> [T]he mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result.
> 66 S. Ct. 687, 695 (1946).

Official notice has often been thought to be the administrative counterpart of judicial notice. It is all of that and more. Judicial notice is usually limited to specific facts and propositions of generalized knowledge which are beyond the realm of reasonable dispute. The doctrine of official notice, the consideration of extra-record material by an administrative body, is meant to embrace something more than the traditional concept of judicial notice. Professor K. C. Davis has persuasively argued that the problem of official notice should not be one of simply drawing lines between disputable and indisputable facts in the tradition of the common law development of the concept of judicial notice. It is rather, a more expansive concept and should be governed by different strictures. [1] Professor Davis has concluded that the consideration of extra-record facts should be controlled by the consideration of three main variables, (1) how far the facts are from the center of the controversy, (2) the extent to which the facts are adjudicative facts or legislative facts of a general character, (3) the degree of certainty or doubt about the facts. [2]

The above exhortation for a fuller use of the notion of official notice is necessarily brief. That the question of official notice is both complex and a developing area of the law is obvious from Professor Davis' first words on the subject in his learned treatise:

> No other major problem of administrative law surpasses in practical importance the problem of use of extra-record information in an adjudication. Yet no other major problem of administrative law is so little understood and so much mis-understood. [3]

As a further condition of the grant of the variance I would impose a requirement to continuously monitor the ambient H_2S concentrations in the area and additionally a requirement to curtail operations and notify certain agencies when the measured concentrations exceeded certain levels such as the former proposed Illinois standard of 45 $\mu g/m^3$ (.03 ppm). There is testimony in the record of ambient concentrations of 255 $\mu g/m^3$ (.17 ppm) (EPA Group Ex. 1 p. 3). The 255 $\mu g/m^3$ recorded level is 467% over the 45 $\mu g/m^3$ standard now in effect in Missouri, Montana, and Ontario. Episodes such as the one in Terre Haute, Indiana in 1964 in which ambient H_2S concentrations of 450 $\mu g/m^3$ (0.30 ppm) caused significant community illness and discomfort are common knowledge and spread on the public record. [4]

1] See K. C. Davis, Official Notice 62 Harv. L. Rev. 537, (1949).

2] K. C. Davis, 2 Administrative Law Treatise 432 (1958).

3] Id. p. 338.

4] See Preliminary Air Pollution Survey of Hydrogen Sulfide, S. Miner, Litton Systems, Inc., DHEW, PHS, NAPCA Publication No. APTD 69-37 (1969) for references to the Terre Haute and other episodes.

Because the ambient air testing in and around the Salem field was of such relatively short duration (6 weeks) it cannot be concluded that the atmospheric condition most favorable to high ambient H_2S levels has been experienced. The danger of an episode is increased with the occurence of atmospheric stagnation; when the wind is calm and an inversion is present. It is highly probable that the maximum ambient concentration to be anticipated from the normal uncontrolled operation of the Salem field is higher than the 255 ug/m^3 measured on September 24, 1970 (EPA Group Ex. 1, p. 36). That measured concentration is already 56% or more than half of the level which caused the Terre Haute episode. The word "episode" is not an euphemism; it means that conditions exist from which people may become ill or die. (See Opinion of the Board in #R70-7 In re Air Pollution Episode Revisions, Dec. 9, 1970). This Board has a duty to impose reasonable conditions to guard against the possibility of an episode when it grants a variance such as it does in this case. As the variance now stands we can only pray that an episode will not occur before complete controls are installed.

The fact that this state presently has no air quality or emission standard to guide us in this case should be a positive stimulus to our consideration of other relevant enactments. There is no need for this Board to re-invent the wheel, we should be free to consider common scientific knowledge; such facts as the levels of hydrogen sulfide at which various health effects are experienced. Our top priority must be the protection of public health; that, in my opinion, is what we are all about.

Jacob D. Dumelle
Member
Illinois Pollution Control Board

Jacob D. Dumelle

I, Regina E. Ryan, Clerk of the Illinois Pollution Control Board, certify that Mr. Jacob D. Dumelle submitted the above Concurring Opinion on 11th day of March, 1971.

Regina E. Ryan

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Clerk of the Illinois Pollution
Control Board