

ILLINOIS POLLUTION CONTROL BOARD  
February 4, 1988

ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Complainant, )  
 )  
v. ) PCB 86-27  
 )  
MODINE MANUFACTURING COMPANY, )  
 )  
Respondent. )

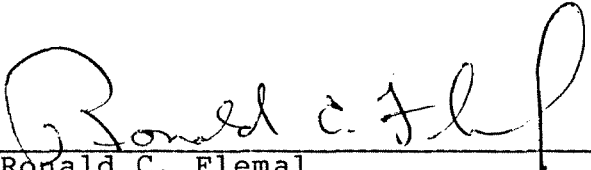
DISSENTING OPINION (by R.C. Flemal and J.D. Dumelle):

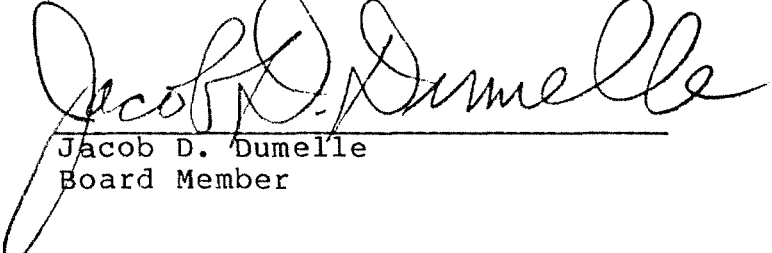
While we agree with the majority's holdings regarding violations and the applicability of estoppel, we dissent for the reason that the penalty imposed by the majority is inconsistent with the mitigating circumstances found in the instant matter.

Contrary to the Agency's allegations, the record shows that Modine has exhibited good faith in its attempts at achieving compliance and in its communication with the Agency; communications between Modine and the Agency were certainly ongoing during the time of the noncompliant readings and the permit applications, and themselves arguably were the cause of Modine's failure to obtain the permits at issue.

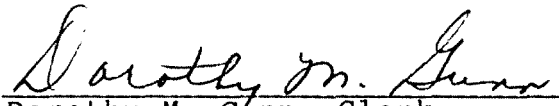
The Agency also contends that Modine should have applied for a variance during the time of its intermittent noncompliance and that Modine did not take an aggressive approach to achieving compliance during that time. However, it is un rebutted that the Agency itself lead Modine to believe that a variance would be unnecessary. Moreover, it cannot be said that Modine did not exhibit good faith because it was not aggressive enough. The Agency in making that claim, did not state what more Modine could have done; i.e., how Modine could have been more aggressive. Nor can it be said that Modine was willfully negligent in failing to apply for a permit when it initially applied in June, 1983 for a permit set to expire in October, 1983. The circumstances mitigate against anything larger than a nominal penalty.

For these reasons, we dissent.

  
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Ronald C. Flemal  
Board Member

  
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Jacob D. Dumelle  
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Statement was submitted on the 10<sup>th</sup> day of February, 1988.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control