ILLINOIS POLLUTION CONTROL BOARD
February 20, 1985

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 82-144
CITY OF GALENA,	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Anderson):

On September 17, 1984, the parties filed a stipulation and proposal for settlement of this action. This stipulation is rejected. Prior to discussion of the Board's rationale for rejecting this stipulation, the Board will recapitulate the history of this enforcement action.

Procedural History

This matter comes before the Board on the December 15, 1982 Complaint brought by the Illinois Environmental Protection Agency (Agency).

Count I of the Complaint alleged that, from July 1, 1977 until December 15, 1982, the Respondent maintained and operated its municipal wastewater and sludge handling equipment contrary to the terms of its NPDES Permit No. IL 0020249, and in violation of 35 Ill. Adm. Code 309.102 and Section 12(f) of the Illinois Environmental Protection Act (Act). Count I also alleged that, from November 22, 1976 to October 23, 1977, the Respondent operated its municipal wastewater and sludge handling equipment contrary to the terms of its Illinois EPA Permit No. 1976-SC-1780,and in violation of Section 12(b) of the Act.

Count II alleged that, during the months of August, 1979 and September, 1979, the Respondent discharged effluent into the Galena River which exceeded applicable numerical limitations for both five-day biochemical oxygen demand (BOD) and total suspended solids (TSS) in violation of its NPDES permit, 35 Ill. Adm. Code 304.120, 35 Ill. Adm. Code 309.101 and Sections 12(a) and 12(f) of the Act.

Count III alleged that the Respondent discharged effluent into the Galena River which exceeded five times the numerical standard prescribed in 35 Ill. Adm. Code 304.120(a) with respect to BOD during the months of June, 1979; October, 1979 and January, 1980; and discharged effluent which exceeded five times

the appropriate numerical standard for suspended solids during the months of June, 1979; August, 1979; October,1979; January, 1980; April, 1980; June, 1980; December,1980; November, 1981; and October, 1982 in violation of 35 Ill. Adm. Code 304.120(a) and Section 12(a) of the Act.

Count IV alleged that, from July 1,1979 to December 15, 1982, the Respondent failed to meet the reporting requirements prescribed in the terms and conditions of its NPDES Permit by failing to submit the requisite quarterly Industrial Users Reports to the Agency in violation of its NPDES Permit and 35 Ill. Adm. Code 305.102(b); 35 Ill. Adm. Code 309.102, and Section 12(f) of the Act.

Count V alleged that, on January 16, 1980, February 21, 1980, and February 22, 1980, respondent caused or allowed a bypass of discharge and failed to notify the Agency, and failed to submit a plan to prevent recurrences in violation of its NPDES permit and reporting requirements of 35 Ill. Adm. Code 305.102.

Count VI alleged that, since at least August, 1976, the Respondent failed to chlorinate the water in its public water supply system (which Respondent operates in addition to its wastewater treatment system) so as to assure that the water is clean and safe in quality for ordinary domestic consumption in violation of 35 Ill. Adm. Code 604.401 and Section 18 of the Act.

On June 14, 1984, the Board entered an Order which noted that there was no activity in this case since March 1, 1983 and expedited matters by mandating that a hearing be held within 60 days. On July 17, 1984, the Agency filed a Motion to Postpone the Hearing and Affidavit which indicated that settlement negotiations were in progress and nearing resolution. OnJuly 19, 1984, the Board entered an Order which ordered the hearing to be rescheduled and held no later than September 28, 1984.

A stipulation and proposal for settlement was presented at a hearing held on September 7, 1984,and filed on September 17, 1984. At hearing, Galena's Mayor Einsweiler made a statement.

The Respondent, the City of Galena (City), owns and operates a municipal wastewater treatment facility (WWTP), located in Galena, Jo Daviess County. The WWTP discharges wastewater into the Galena River, a navigable water of the State, pursuant to an NPDES Permit issued on July 1, 1977. (Stip. 2). One portion of the Respondent's facility includes sludge handling equipment which is used to remove and handle the sludge which is generated at the WWTP. The Respondent also operates a public water supply system which includes drilled wells,fluoride treatment equipment, an elevated water storage facility, a standpipe, and a distribution system to serve about 4,000 persons. (Stip. 7).

In reference to its WWTP, sludge handling equipment and operations are conducted pursuant to an Illinois EPA Permit

issued on November 22, 1976, and a supplemental Illinois EPA Permit issued on July 19, 1978 (See: Exhibits B and C which are attached to the Stipulation.)

In the settlement agreement, the parties stipulated to a statement of facts, only insofar as they represent a summary of evidence which would be introduced "if a contested hearing were held." (Stip. 1). The statement includes allegations that the City of Galena has failed to meet the requirements of all three of its permits pertaining to both the operation and maintenance of its municipal wastewater and sludge handling equipment; by failing to: (1) perform routine preventative maintenance on its operating equipment; (2) promptly repair inoperative equipment within a reasonable time; (3) buy new operating equipment to replace worn-out equipment; (4) install new equipment after such equipment has been purchased; (5) maintain a sufficiently adequate operating staff for its WWTP; (6) remove solids collected on bar screens at regular intervals; (7) remove sludge from drying beds at regular intervals; (8) develop and adhere to any type of coordinated sludge management program adequate to allow the City' WWTP to meet the appropriate standards delineated in the permits governing its operation; and (9) equip its WWT with adequate backup or emergency equipment to keep the facility in operation in case of power failures, natural disasters, or other similar emergencies. (Stip. 3-4). Additionally, it is stated that the discharge monitoring reports submitted by the Respondent indicate that the violations alleged in the Complaint did, in fact, occur (Stip. 5-6), and the City's failure to chlorinate the water in its public water supply system before the water entered the distribution system constituted a clear violation of Section 18 of the Act and 35 Ill. Adm. Code 604.401. (Stip. 7).

The City of Galena agreed to a penalty of $4,000, to be deposited into the Environmental Protection Trust Fund* and in

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*This penalty is to be made payable to the Environmental Protection Trust Fund (Trust Fund), pursuant to the authority to so order granted to the Board in Section 42(a) of the Act as amended by P.A. 83-0618, effective September 19, 1983. The legislation creating the Trust Fund and a Commission to administer it was P.A. 81-951 effective January 1, 1980 and codified as Ill. Rev. Stat. 1983, ch. 111 1/2 ¶1061. That legislation provides in pertinent part that

> "The Commission may accept, receive and administer . . . any grants, gifts, loans, or other funds*** provided that such monies shall be used only for the purposes for which they are contributed and any balance remaining shall be returned to the contributor . . . . "

The Board wishes to emphasize that it does not construe the quoted portions of the Trust Fund Act as giving a potential right (continued)

addition agreed to comply with the Act, the Board's regulations and its NPDES Permit in accordance with various detailed operating, maintenance and reporting conditions. (Stip. 8-13).

However, the City stated that the agreed-upon statement of facts is for "the purpose of settlement only" and that "nothing herein contained shall be construed as an admission by Respondent as to any violations of the Illinois Environmental Protection Act or the Pollution Control Board's Rules and Regulations . . . ." (Stip. 1-2). In addition, the Stipulation and Proposal for Settlement is expressly conditioned upon approval by the Board "in all respects." (Stip. 8).

Rejection of the Stipulation

The basis for rejection of this stipulation is the Board's conclusion that it lacks statutory authority to accept settlements requiring payment of stipulated penalties and imposing compliance conditions but which preclude the Board from making a finding of violation, based either on admissions or evidence contained in the record. The legislatively-created Board derives its enforcement powers and duties from the Act and the Administrative Procedure Act (APA), Ill. Rev. Stat. ch. 127 §1001 et seq. Section 33(a) of Title VIII: "Enforcement" of the Act empowers and requires the Board, after hearing, to "issue and enter such final order, . . . as it shall deem appropriate . . . [and shall] file and publish a written opinion stating the facts and reasons leading to its decision." The "written opinion" requirement of Section 33(a) has a counterpart in Section 14 of the APA, requiring in contested cases "findings of fact and conclusions of law".

Section 33(b) of the Act provides that "[s]uch [Section 32(a)] order may include a direction to cease and desist from violations of the Act or of the Board's rules, . . . and/or the

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of recovery for penalties ordered to be paid into the Trust Fund pursuant to Section 42(a) of the Environmental Protection Act. When the Trust Fund was created, the legislature obviously envisioned that the fund was to receive voluntary gifts or contributions, to either be used for environmental purposes or to be returned so as to avoid frustration of the intention of the donor of the gift.

Payment of a penalty for violation of the Environmental Protection Act is a compulsory, and not voluntary, act. There is no right of recovery for a penalty paid into the General Revenue Fund. In allowing penalty monies to be paid into the Trust Fund, the legislature has clearly implied that such penalties may, in essence, be earmarked for any appropriate environmental purpose. The Board concludes that to construe the Trust Fund Act as implying a right of recovery for penalties deposited into it runs counter to the intention of the Environmental Protection Act.

imposition by the Board of civil penalties in accord with Section 42 of this Act.***" The pertinent subsection of the Section, Section 42(a), provides that

> "Any person that violates any provisions of this Act or any regulation adopted by the Board, or any permit or term or condition thereof, or that violates any determination or order of the Board pursuant to this Act, shall be liable to a civil penalty of not to exceed $10,000 for said violation and an additional civil penalty of not to exceed $1,000 for each day during which violation continues; such penalties may, upon order of the Board or a court of competent jurisdiction, be made payable to the Environmental Protection Trust Fund, to be used in accordance with the provisions of "An Act creating the Environmental Protection Trust Fund", approved September 22, 1979, as amended."

The Act does not specifically mention settlement procedures. However, pursuant to the authority granted under Section 26 of the Act, the Board has adopted a procedural rule, 35 Ill. Adm. Code 103.180, permitting and providing requirements for submittal of a proposed settlement or compromise. A written statement is to be filed containing, among other things a "full stipulation of all material facts pertaining to the nature, extent, and causes of the alleged violation", a proposed compliance plan and a proposed penalty. In line with the hearing requirements of Sections 31 and 32 of the Act, the written proposal is to be presented at public hearing for citizen comment on the alleged violations and proposed settlement terms. The Board has provided that it shall "consider such proposed settlement or stipulation and the hearing record" and may "accept, suggest revisions in, reject the proposed settlement or stipulation, or direct further hearings as it appears appropriate."

Viewing the Galena stipulation in light of these various statutory and regulatory requirements, it is clear that the Board cannot make any required findings of fact and conclusions of law beyond one that "the parties wish to settle the case for $4,000 payable into the Trust Fund." To the extent the Act authorizes the Board to order payment of a penalty, the authority is premised on a finding of violation. As the Galena stipulation resists a Board attempt to make such a finding, and as the Act does not authorize the Board to accept, on the part of the State, "voluntary contributions" in settlement of "nuisance suits", the penalty portion of the stipulation must be rejected. As to the proposed compliance plan, in the absence of findings of violation, the Board is placed in the position of ordering accomplishment of "voluntary remedial activities" to correct "non-existant" non-compliance. The compliance plan portion of the stipulation is also rejected.

The parties have not addressed the Board's statutory authority to accept this stipulation. However, the Board, in IEPA v. Chemetco, PCB 83-2, February 21, 1985, addressed various policy arguments by the Attorney General in favor of accepting that stipulation in the absense of findings of violation. Since the Board presumes that the Attorney General would make similar assertions here, the Board will again address them here. In Chemetco, the Attorney General asserted that the law favors settlements and that a finding of violation destroys the essence of the bargain here and protracts litigation and that the Board has in a few cases imposed fines without a finding of violation While not articulated in Chemetco, it might also be argued that the effect of the Board's decision interferes with the Attorney General's otherwise broad powers of prosecutorial discretion.

While these policy arguments might support a legislative change, they run counter to the Board's plain reading of the Act. The Board recognizes that the courts have accepted settlements between two parties without admissions. The courts, however, have inherent common law powers the Board does not possess. Additionally, the Act inherently recognizes that pollution issues affect the interest of other persons, above and beyond the parties, as Section 2 of the Act makes clear. The Board suggests that the Act was deliberately framed to require the Board to make findings of violations, so as to assure that compliance and payment of a penalty is a compulsory, not a voluntary, act. Existence or lack of findings of violation may also be important in the event of subsequent filing of enforcement actions against the same source: previous findings of violation may properly be considered as aggravating circumstances affecting penalty deliberations in later cases. The Board also notes, pursuant to Section 31, that complaints may be filed, and settlements reached, by citizens who take on the status of "private attorneys general", and questions whether wide prosecutorial discretion also accrues to such persons concerning stipulated penalties and compliance conditions.

Certification For Interlocutory Appeal

This "finding of violation" issue has here twice been argued, and potentially has applicability to every enforcement case brought before the Board. [In fact, the Board has today rejected several proposed stipulated settlements requiring payment of penalties or other "gifts" or "sums" and timely performance of compliance plans, in all of which cases no findings of violation could be made: IEPA v. City of Chemetco, PCB 83-2 ($20,000 penalty, compliance plan and schedule); People v. City of Chicago, PCB 81-190 ($3,000 penalty, $9,500 "voluntary contribution", stepped-up cross-connection enforcement program); IEPA v. Arnold's Sewer and Septic Service & Jimmy McDonald, PCB 83-23 ($300 "sum", "prohibition" from violations of the Act); People v. Joslyn Mfg. & Supply Co. and Herman Zeldenrust, PCB 83-83 ($8,000 penalty, $14,000 "payment", ceast and desist order). In each of these cases, the Board has certified a similar

question for interlocutory appeal.] For these reasons, as well as the fact that a contrary result would have ended this action, the Board on its own motion hereby issues a statement (also known as a Certificate of Importance) to allow for immediate interlocutory appellate review of the Board's Order pursuant to Supreme Court Rule (SCR) 308. SCR 308(a) provides, in pertinent part that

> "When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. The Appellate Court may thereupon in its discretion allow an appeal from the order."

The Board has authority to issue such a statement (see Getty Synthetic Fuel v.PCB, 104 Ill. App. 3d 285 (1st Dist. 1982).

Pursuant to SCR 308, the Board finds that this Order a) "involves a question of law as to which there is substantial ground for difference of opinion", and b) immediate appeal "may materially advance the ultimate termination of [this] litigation". The question of law certified for appeal is as follows:

> Whether the Board correctly determined that it lacks statutory authority, pursuant to Ill. Rev. Stat. ch. 111 1/2, Sections 1032, 1033 and 1042, as they relate to Board acceptance of stipulations of fact and proposals for settlement in enforcement cases, to issue Opinions and Orders in which any Board findings of violation are precluded by the terms of the stipulation and proposal, but in which respondent is ordered to pay a stipulated penalty and to timely perform agreed-upon compliance activities.

Finally, in the event of an interlocutory appeal, the Board will entertain a motion to stay its Order that this action go to hearing.

Should the parties determine that they wish to file an amended settlement agreement containing sufficient admissions of violation to support the remedy, or to allow the Board to modify the agreement, they may file the appropriate pleadings within 35 days.

IT IS SO ORDERED.

J. D. Dumelle dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 20th day of February, 1985 by a vote of 4-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board