ILLINOIS POLLUTION CONTROL BOARD
February 20, 1985

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Complainant,	)	PCB 83-23
ARNOLD'S SEWER AND SEPTIC SERVICE and JIMMY MCDONALD, Respondents.	)	

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter comes before the Board on a February 24, 1983 complaint, amended on July 27, 1984, by the Illinois Environmental Protection Agency (Agency). The Amended Complaint alleged that Respondents caused or allowed the open dumping of septic wastes upon a public highway in violation of subsections 21(a), 21(b) and 21(e) of the Illinois Environmental Protection Act (Act).

A hearing was held on January 17, 1985 at which time the parties incorporated a properly signed copy of the Stipulation and Proposal for Settlement into the record.

Under the terms of the stipulation the parties agreed that Arnold's Sewer and Septic Service is and has been conducted under an assumed name and that it is owned and operated by Jimmy McDonald. It was also agreed that Arnold's Sewer and Septic Service is and has been engaged in cleaning industrial and residential septic tanks in and around Cook County, Illinois, pursuant to a license issued by the State of Illinois Department of Public Health. On June 15, 1982 septic waste, contained in a truck owned and used by Respondents and driven by its employee, was deliberately allowed to pour onto a public road, namely Nichols and/or Schaeffer Road in the Village of Arlington Heights, Illinois. It was further stipulated that this conduct constituted "the open dumping or disposal of waste onto public property, which was not a site which met the standards required by the Environmental Protection Act or regulations thereunder." (Stip. 3).

The Agency contends that based on the stipulated statement of facts this conduct violated subsections 21(a), 21(b) and 21(e) of the Act which provide in pertinent part:

No person shall:

a. Cause or allow the open dumping of any waste;

b. Abandon, dump or deposit any waste upon the public highways or other public property, except in a sanitary landfill approved by the Agency pursuant to regulations adopted by the Board;

e. Dispose, treat, or store any waste, or transport any waste into this state for disposal, treatment, or storage except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

The Respondents do not admit the violations alleged. (Stip. 4). However, Respondent Jimmy McDonald, as owner and operator of Arnold's Sewer and Septic Service, agrees to pay a stipulated sum of $300 to the Illinois Environmental Trust Fund (Trust Fund). (Stip 5). Respondents also agree to be "hereby prohibited" from violations of subsections 21(a), 21(b) and 21(e) of the Act and that the Board shall retain jurisdiction of the case for the purpose of enabling any party to apply for further orders to construe, carry out or enforce compliance with the terms of the settlement.* It is stipulated that in the event the Board fails to accept each and every term as set forth, the statement of facts and proposal for settlement shall be null and void. Accordingly, the Board is precluded from modifying the stipulation to include findings of violation against Respondents.

The Board hereby rejects the proposed stipulation. The parties are ordered to proceed to hearing in this matter, which shall be scheduled within 30 and held within 60 days of the date of this Order. The bases for this rejection are threefold.

First, for reasons set forth in Illinois Environmental Protection Agency v. Chemetco, Inc., PCB 83-2, February 20, 1985, decided this day, the Board finds that it lacks the statutory authority to order the payment of a stipulated sum and to order acts of compliance without a concomitant finding that there has been a violation of the Act or regulations. Ill. Rev. Stat. ch. 111-1/2, Sections 1032, 1033 and 1042. In Chemetco the Board found that its authority over a respondent in an enforcement action stems from a finding that the respondent has committed a

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*The Board finds these two conditions to be superfluous. The Board may certainly order a respondent to take steps to comply with the Act and regulations, but there is no basis for ordering that a respondent is "hereby prohibited" from violating the Act. Naturally, respondents, as well as all other persons subject to the Act, are "prohibited" from violating it. Similarly, should it be necessary to compel compliance with the terms of the settlement, the parties are free to institute an enforcement action. The Board can find no reason, in this case, to retain continuing jurisdiction.

violation. Where no violation exists, the Board is powerless to issue orders against the respondent. Consequently, as Respondents do not admit the violations alleged and the stipulation precludes the Board from making this prerequisite finding from the evidence in the record, the stipulation must be rejected as outside the Board's statutory authority.

As noted in Chemetco, this "finding of violation" issue has previously been argued before the Board, and in fact, is at issue in five other cases also decided here today. IEPA v. 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); People v. Joslyn M[illegible] and Supply Co. and Herman Zeldenrust, PCB 83-83 ($8,000 pena[illegible], $14,000 "payment," cease and desist order); IEPA v. City of Galva, PCB 84-3, 84-4 (consolidated) ($3,375 penalty, complex program of system improvements). In each of these cases the Board has certified a similar question for interlocutory appeal. Because this issue is potentially applicable in every enforcement case brought before the Board, as well as the fact that a contrary result would have ended this action, the Board on its own motion will issue a statement to allow for immediate interlocutory appellate review of this Order pursuant to Supreme Court Rule (SCR) 308.

Second, t[illegible]e stipulation is deficient in that it does not require payme[illegible] of a penalty. Whether intentional or not, Respondent McD[illegible]nald agrees to pay merely the "sum" of $300 to the Trust Fund wi[illegible]out stipulating that this sum is a penalty.

Under the Act "specific penalties for injury to public health and welfare and the environment" are to be imposed. Section 2(7). Specifically, the Board is empowered to impose "civil penalties" in enforcement cases under Section 33(b), and may order that such penalties are to be paid to the Trust Fund under Section 42(a). However, no like authority is extended for the imposition and payment of "contributions." The Board suggests that this omission was deliberate. A penalty acts as a sanction for environmentally detrimental and illegal behavior. Payment of a sum not denoted as a penalty is essentially a "voluntary contribution" and such contributions have no place in a statutory regulatory scheme such as the Environmental Protection Act. To accept a payment which is entirely voluntary in settlement of an enforcement action would be tantamount to the Board's ordering payment in settlement of a nuisance suit. Such a practice would be in contravention of the Act's clear intentions.

The use of voluntary payments in settlements to be enforced by the Board raises additional concerns. Specifically, voluntary contributions paid to the Trust Fund may be recoverable if any balance thereof goes unused. Ill. Rev. Stat. 1983, ch. 111-1/2 ¶1061. The statute provides that the Trust Fund may receive "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 has addressed the question whether this language allows for the refund of penalties in Chemetco. As explained in that case, penalties are paid under compulsion and generally are unrecoverable. In providing that penalties may be payable to the Trust Fund, the legislature merely intended their use for appropriate environmental purposes. The Board rejected the construction that a penalty would be refunded if unused. However, this rationale does not extend to a voluntary payment such as the one contemplated by the settlement here. Because the statute clearly directs that gifts are required to be returned if unused, Respondent conceivably has a potential [illegible] recovery for any unused balance of his voluntary payment. Such a result is insupportable under the Environmental Protection Act.

Finally, the above objections to the stipulation aside, the Board seriously questions the adequacy of a $300 payment in view of the apparent character and degree of injury involved when raw sewage is dumped on a public highway in a suburban area. The Respondents also admit this act was deliberate. The Board notes, however, that no specific information was provided concerning the extent of actual injury, the existence of any mitigating circumstances, or the ability of the Respondent to pay.

rtification For Interlocutory Appeal

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 sum.

The Board hereby rejects the Stipulation Agreement and Proposal for Settlement and orders that hearing in this matter be scheduled within 30 and held within 60 days of the date of this Order. 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 within 35 days the appropriate pleadings.

IT IS SO ORDERED.

Board Member J. D. Dumelle concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 20th day of February, 1985, by a vote of 5-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board