ILLINOIS POLLUTION CONTROL BOARD
March 14, 1972

ENVIRONMENTAL PROTECTION AGENCY	)	
v.	)	
AIRTEX PRODUCTS, INC.	)	PCB 71-325
and	)	
CITY OF FAIRFIELD	)	

Dissenting Opinion by Jacob D. Dumelle

On March 14 the Board voted to vacate part of its order of February 3 by a vote of 3-1. I dissented in that vote because it was wrong for the Board to have taken an unnecessary restrictive view of its power to fashion a remedy after a finding of pollution and because it was inconsistent with the Board's prior history and decisions of taking a broad view of its authority to act. Vacated as if it was never entered was a directive compelling Airtex to cease and desist from discharging any and all cyanide compounds from one of its plants in Fairfield, Illinois.

In a post-hearing motion Airtex contended that since the Environmental Protection Agency (EPA) in its opening statement at the hearing in this matter disclaimed the entry of a prospective cease and desist order the Board was without authority to enter such an order.

I emphatically disagree with the Board's modification of its earlier order and hold to the proposition that the fashioning of a remedy is discretionary with the Board and only with the Board. The EPA and other parties may suggest or recommend Board action but they cannot set the limits of Board action. The authority for Board exercise of discretion in deciding individual cases is clearly expressed in the Environmental Protection Act and the Board is able to so structure a remedy that the accomplishment of the legislation's purpose will be thereby furthered. Unquestionably the

legislative fabric was left to be adorned by the ad hoc adjudication of particular situations. The Environmental Protection Act puts the respondent on notice, even in the face of an EPA disclaimer, as to the breadth of the remedial order which the Board may issue. The Board in making its determination based on the evidence and testimony adduced at the hearing has the power to "enter such final order...as it shall deem appropriate under the circumstances."[1] Such an order may include a directive to cease and desist from violations of the Act as well as the imposition of money penalties.[2] The Board's ambit of authority in fashioning a remedy is thus clearly drawn and cannot be circumscribed by a party to an action or even by the agreement of both parties in the action. Of the manifold responsibilities, charges, and areas of authority which the General Assembly gave to the Pollution Control Board the selection of an appropriate remedy would appear to be a power especially preserved for the exercise of administrative discretion.

I have noted before and I must reiterate that this Board is too prone to issue a tough clean-up order with a follow-up undercutting the order. The question of the propriety of the cease and desist order in this case, if not universally agreed upon, is at the very least arguable to the point of allowing the Appellate Court to decide the issue. This Board must retain its statutorily granted prerogative of exercising discretion in adapting remedy to violation.

N.L.R.B. v. Seven-Up Bottling Co. of Miami, Inc.[3] would be an excellent case for this Board to be guided by in this instance. There the U.S. Supreme Court dealt with an administrative agency's authority in drawing a remedy for violations of federal labor law. In that case the NLRB applied a formula with respect to payment of back wages for which there was no precedent. The Supreme Court upheld the agency's discretion in choice of remedy and said that "remedies must be functions of the purposes to be accomplished," and further that "in fashioning remedies to undo the effects of violations of the Act the Board must draw on enlightenment gained from experience." How simple yet important is that key phrase "functions of the purposes."

1] Ill. Rev. Stat. Ch. 111-1/2§ 1033(a).

2] Ill. Rev. Stat. Ch. 111-1/2§ 1033(b).

> Such order may include a direction to cease and desist from violations of the Act or of the Board's rules and regulations and/or the imposition by the Board of money penalties in accord with Title XII of this Act. The Board may also revoke the permit as a penalty for violation. If such order includes a reasonable delay during which to correct a violation, the Board may require the posting of sufficient performance bond or other security to assure the correction of such violation within the time prescribed.

3] 97 L.Ed. 377 (1953).

Another consideration in this case is the importance of a cease and desist order when dealing with a hazardous toxic substance like cyanide. When a discharger may be continuing a violation or, more generally, where it is desirable that a public right be affirmed in a specific factual context, the cease and desist order is not only proper but essential. One of the tests for entry of a cease and desist order is whether the Board could reasonably conclude from the evidence that it was necessary to prevent further violations. In this case there was no control or treatment of cyanide discharges and any further plating operations using any cyanide compounds would result in a violation of the cyanide ban regulation. Use of a cease and desist order in such a case is vital to protect the welfare of the public.

The Board has asserted and exercised its broad discretionary power to mould remedies suited to the practical needs of the particular individual situations in earlier cases. Without a compelling showing it should not now pause and retrench.

Jacob D. Dumelle

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Dissenting Opinion was submitted on the 20 day of March, 1972.

Christan L. Moffett, Clerk
Illinois Pollution Control Board