ILLINOIS POLLUTION CONTROL BOARD June 17, 1998

PEOPLE OF THE STATE OF ILLINOIS)	
)	
Complainant,)	
)	
V.)	PCB 97-31
)	(Enforcement - Land)
JOHNNIE MAE HENDRICKS,)	
)	
Respondent.)	

CONCURRING OPINION (by C.A. Manning):

While I agree with the majority's opinion that respondent violated various provisions of the Environmental Protection Act (Act) and corresponding Board regulations and should be penalized for these violations, I disagree with the method used to calculate the penalty. Accordingly, I respectfully concur with the majority's opinion in this matter.

Having found a violation of the Act and/or Board regulations, the Board must next determine whether a penalty should be assessed and the amount of the penalty. In determining the appropriate response in the finding of a violation, the Board is required to consider the factors set forth in Section 33(c) of the Act upon which the parties have introduced evidence and as known to the Board through its expertise. The Board may also consider any matters of record in mitigation or aggravation of any penalty, including the respondent's financial ability to pay. See 415 ILCS 5/33(c), 42(h) (1996); see also Ford v. Environmental Protection Agency, 9 Ill. App. 3d 711, 720-21, 292 N.E.2d 540, 546 (3rd Dist. 1973); People v. Kershaw (April 20, 1994), PCB 92-164, slip op. at 14; IEPA v. Barry (May 10, 1990), PCB 88-71, slip op. at 62-63.

Based on the information produced at hearing and consideration of the Section 33(c) and 42(h) factors, I believe that the Board could determine the appropriate penalty amount for the violations without having to look outside the record. Consequently, I believe that the majority's reference to information which was not introduced at hearing, specifically the amount of money expended to remove the tires in People v. Cyber America Corp. (March 5 1998), PCB 97-8, is not warranted.

Moreover, I believe that the majority erred in assessing an "additional penalty" of "two dollars for every dollar saved by noncompliance." The penalty imposed should be sufficient to deter future violations and to cancel any economic benefit respondent may have enjoyed. Moreover, the penalty amount should be based on consideration of all the factors set forth in the Act. See People v. Watts (May 4, 1995), PCB 94-127. Rather than consider all the factors set forth in the Act, the majority relies primarily on two factors and determines that a "multiplier" of two dollars for each dollar saved by noncompliance is appropriate under the facts of this case. I do not believe that the Board should adopt such a "multiplier." Rather,

the Board should simply consider the factors set forth in the Act and based on those factors arrive at an appropriate penalty amount.

For these reasons, I respectfully concur with the majority's opinion in this matter.

C.A. Manning Chairman

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above concurring opinion was submitted on the 22nd day of June 1998.

Dorothy M. Gunn, Clerk Illinois Pollution Control Board

Claire A. hunning