ILLINOIS POLLUTION CONTROL BOARD November 15, 2001

PEOPLE OF THE STATE OF ILLINOIS,	
Complainant,)
·	
V) PCB 99-191
PANHANDLE EASTERN PIPE LINE	(Enforcement - Air)
COMPANY,	
Respondent.)

DISSENTING OPINION (by T.E. Johnson):

I respectfully dissent from the majority opinion. I agree with the majority's finding that Panhandle Eastern Pipe Line Company (Panhandle) violated the Environmental Protection Act (Act) (415 ILCS 5/1 *et seq.* (2000)), and I would also order that Panhandle cease and desist from further violation. However, I find that the imposed penalty is excessive.

As discussed in the majority opinion, the Board is authorized to consider the impact of any matter of record in determining an appropriate civil penalty, including, but not limited to the factors set forth in Section 42(h) of the Act. I feel that an appropriate civil penalty in this case must reflect the Illinois Environmental Protection Agency's (Agency) issuance of inspection reports finding no violation at Panhandle's facility from 1989 to 1996.

The Agency inspected Panhandle's facility annually after the permit was issued in 1988. After each inspection, the Agency issued an inspection report finding no violations. During or shortly after each inspection, Panhandle provided its records of fuel use and hours of operation to the Agency. The Agency does not dispute that it possessed the information necessary to find the violations well before it did. In addition to the data on fuel use and hours of operation, the Agency was in receipt of annual emission reports. The Agency could have identified the excess emissions problem by reviewing the reports or by calculating emissions from the provided data.

I agree that the Agency's acts did not cause the violations, nor is Panhandle absolved of the responsibility for determining its own compliance status. However, if the Agency had reviewed the available information, the violations would have been brought forward as many as seven years before they were. Although I agree with the majority that the Agency actions do not rise to the level of an affirmative defense, I feel that it would be inequitable not to consider the Agency's actions in determining a penalty.

As stated, pursuant to Section 42(h) the Board may consider the impact of any matter of record in determining a penalty. However, the Agency's actions may also be considered under specifically included factor Section 42(h)(2) which directs the Board to consider the presence or absence of due diligence on the part of the violator in attempting to comply with the

requirements of this Act. 415 ILCS 42(h)(2) (2000). Panhandle's diligence in attempting to comply with the Act was clearly impacted by the Agency's actions in this matter.

It is the responsibility of all companies doing business in Illinois to determine whether they are complying with Illinois' environmental laws. I want to stress that by dissenting I am not intending to make the Agency responsible for failing to monitor a permitees' emissions. However, for the reasons articulated in this dissent, I believe that any penalty assessed must be mitigated because the Agency's actions impacted Panhandle's belief that it was in compliance. Where there is reliance on an inspection report with a finding of no violation, a corresponding mitigation in penalty is appropriate.

For the above stated reasons, I respectfully dissent.

Thomas E. Johnson

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that I received the above dissenting opinion on November 19, 2001.

Dorothy M. Gunn

Illinois Pollution Control Board