

ILLINOIS POLLUTION CONTROL BOARD
March 5, 1981

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)
)
Complainant,)
)
v.) PCB 79-41
)
CALVIN GEISS, d/b/a C & A DISPOSAL)
COMPANY, AND FRED D. BENNITT,)
)
Respondents.)

CONCURRING OPINION (by J. Anderson):

I generally agree that the Board's decision to approve the Stipulation and Proposal for Settlement in this case was the most acceptable option now available. However, I am concerned that such approval might be misread as approval of the flawed course this case has taken. A summary of the history of the proceedings should, in large measure, make this concern self-evident.

The Agency, after filing a formal complaint on February 28, 1979, filed the first Stipulation and Proposal for Settlement on August 7, 1979.

This first Proposal's penalty provisions, in effect, were as follows: a) No penalty if the Respondent came into compliance before October 1, 1979, b) \$2,500 if the respondent came into compliance between October 1, 1979 and November 1, 1979, and c) \$10,000 if compliance was not achieved by the November 1, 1979 deadline.

The Board, in response to an Agency Motion for Expedited Decision, on August 8, 1979 issued an Interim Order finding these "suspended" provisions unacceptable.* It was not until January 20,

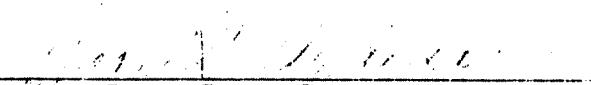
*The Act does not provide for a "reward" for compliance. It expects it. The "suspended" penalty as an enforcement tool looks good at first glance. It isn't. Had the first Proposal contained a penalty properly based upon the violations, as the Act provides, and had the Board adopted the order, failure of the Respondent to meet the agreed compliance deadlines would then have placed him in violation of a Board Order, and thus exposed him to further and more serious court action. Also, compliance before the end of the proceedings may be a mitigating factor when considering a penalty in an enforcement action; however, it does not forgive the violations. If such were the case, violators could abuse the environment with impunity until they are caught, and only then "voluntarily" comply.

1981 that a hearing was held on the second Stipulation and Proposal for Settlement, this in response to another Board order, of November 20, 1980, that noted no activity in the case and making it subject to dismissal.

On January 20, 1981, the Board received this second Proposal from the Agency. This Proposal recommended a penalty of \$1,100 as a "fair estimate of the economic benefit which accrued to Respondents by failure to comply with the law and permits as alleged herein, and to be a fair amount based upon the nature and extent of violations and upon Respondent's ability to pay" (Stip. 5-6). In addition, the Agency withdrew none of its allegations in the Proposal (although the summary list of the alleged facts and cited regulations were inconsistent with the original complaint), and the respondent made no admission of violations (Stip. ¶6, p. 4). Nevertheless, both parties agreed that this proposal settled the controversy and the Agency noted that the respondent was by then in substantial compliance (although the times when compliance was reached were not specified) (Stip. ¶5, p. 4).


This contradictory pattern neither makes sense nor is it a proper record when using the stipulation and settlement mechanism embodied in Procedural Rule 331. The Board has great difficulty in determining the violations on which the penalty was based, in evaluating the sufficiency of the penalty according to Sec. 33(c) of the Act, and evaluating the stated rationale used by the Agency when recommending the penalty.

The Board's decision, accepting the penalty and finding the respondent in violation of some of the allegations and dismissing the others, while inconsistent, at least serves as a final resolution of this complaint, and recognizes that no public purpose would be served by prolonging this action.



Joan G. Anderson
Board Member

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was filed with the Board on the 17th day of March, 1981.



Christan L. Moffett, Clerk
Illinois Pollution Control Board