ILLINOIS POLLUTION CONTROL BOARD
December 5, 2002

BRIAN FINLEY, individually, LOCAL 3315 of the AMERICAN FEDERATION OF STATE, COUNTY, & MUNICIPAL EMPLOYEES (COOK COUNTY PUBLIC DEFENDERS ASSOCIATION), and the following additional individuals: LISA A. KOSOWSKI, QUENTIN PITLUK, MARTHA C. NEIRA, JOEL TOBIN, TACYE VERSHER, SEAN VARGAS-BARLOW, ROSA FLORES, DANITA KIRK, JENNIFER BOROWITZ-GUTZKE, OPHELIA BARNER-COLEMAN, KARIN WENZEL, BARBARA A. BLAINE, VALLERIA FORNEY, JAMES BURTON, AMANDA LAMERATO, JENNIFER HOMBURGER, THOMAS GRIPPANDO, KATE HAARVEI, K. MARY FLYNN, CHRIS WILLIAMS, ALPA J. PATEL, PAMELA D. MOSS, LILIANA J. DAGO, PATRICIA CINTRON-BASTIN, TAMMY EVANS, CELESTE K. JONES, WILLIAM A. GOMEZ, KAREN MAHER, TRESA LOUISE JACKSON, MARCIA G. HAWK, MARIZOL RODRIGUEZ, MODHURI K. PATEL, JOSE A. PEREZ, NICHOLAS A. YOUNGBLOOD, CATHLEEN REYNOLDS, DAWN M. ROESENER, KIMBERLIE BOONE, AMY E. McCARTHY, QUENTIN HALL, GWENDALYN GRANT, GAIL DAILY, COREY E. MYERS, MARIA DI CRESCENZO, MARIBEL RODRIGUEZ, FELICIA BATES, DARNELL TROTTER, HATTIE MARTIN, AUGUSTUS PINCKNEY, GEORGE SANCHEZ, LIZETTE U. McBRIDE, DEBORAH BUFFKIN, RONALD JACKSON, JOANNE MORRISON, VALARIE M. COURTO-HILL, KIMBERLY TURNER, CONSTANCE L. HARRIS, STEPHANIE FLOWERS, B. YVONNE YOUNGER, DORIS J. YUFUF, LUCRETIA ROGERS, DANA N. LOCKETT, TAMARA BRASS, JAMES COLEMAN, SIDNEY TYUS, JACK L. McBRIDE,

PHYLLIS RYAN, DORIS LOPEZ, SHIRLEY A. VESSEL, MARY PEARSON, ANGELINE RECANDEZ, DELORES WASHINGTON, PATRICIA M. SALORIO, MICHELLE E. HOLMES, RY HANNAH, ADDIE HAWKINS, RONALD DOZIER, BARBARA GORDON, RALPH LEAKES, WILLIE LEAKS, JR., THEORDORE SHORTER, JR., QUDALLA WARD, MICHAEL JONES, PEARLIE MAE MOSS, SHEILA DUNN, SHARON LEE, LAVERNE BULLOCK, HELEN CHARLES, EDWARD J. POE, ANTHONY BINGHAN, RENETTA GLASS WARD, LILLIAN OWENS, FREDDIE JOHNSON, MINNIE HORTON, CARL TRIBBLE, SR., CLAY APPLETON, SAM JOHNSON, GENEVA L. CHARLES and NATHANIEL CHARLES,	)	
Complainants,	)	
v.	)	PCB 02-208
	)	(Citizens Enforcement – Air)
IFCO ICS-CHICAGO, INC.,	)	
Respondent.	)	

DISSENTING OPINION (by C.A. Manning and M.E. Tristano):

We respectfully dissent from the Board's decision today. The parties to this citizen enforcement action have reached a settlement. They ask that the Board accept it *without* holding a public hearing. The proposed settlement calls for respondent IFCO ICS-Chicago, Inc.'s (IFCO) air permits to be revoked and for IFCO to permanently close its used drum reconditioning plant in Chicago. It is not disputed that these steps would eliminate the emissions of chemicals, odors, and smoke that resulted in the alleged air pollution.

The majority holds, admittedly consistent with Board precedent, that the Board is required to hold a hearing before it can accept a proposed settlement in any citizen enforcement action. The parties challenge this position, providing, we believe, an ideal opportunity for the Board to critically review whether its approach is required and whether it works. In retrospect, we believe this Board precedent has ultimately proven misguided.

Under close scrutiny, it is evident that the Board's approach is not legally required. Given its plain meaning, nothing in the language of the Environmental Protection Act (Act) (415 ILCS 5/31(c), (d) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002) or the Board's procedural rules (35 Ill. Adm. Code 103) requires the Board to hold a hearing in every citizen

enforcement action, let alone when the parties want to settle. The Board has already acknowledged that the "Act does not address settlement of citizen enforcement actions." Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20, slip op. at 11 (Dec. 21, 2000).

The Board's position also fails to take into account the fundamentally different purposes of State and citizen enforcement actions under the Act's provisions. When the State files an enforcement action on behalf of the citizens of Illinois and a settlement is proposed, the General Assembly saw to it that the citizens have an opportunity to serve as a "watch dog" by commenting on the proposed settlement at a hearing. *See* 415 ILCS 5/31(c)(2) (2000), *amended by* P.A. 92-0574, eff. June 26, 2002. This provides an important "check" on the State prosecutor—the citizens can see that their interests are being represented by ensuring that the State is adequately enforcing the Act.

This rationale does not apply to citizen enforcement actions. The State prosecutor is not involved. A citizen complainant does not, and cannot, represent the People of this State. The complainant *is* the "watch dog" and the *citizen action* is the means of ensuring that the Act is enforced. It is irrelevant that the General Assembly created no "hearing exception" for citizen settlements—there is no hearing requirement from which to be excepted, and no policy reason to provide the State settlement procedural safeguard.

Manifest in the Board's position is that the Board lacks the authority to accept a proposed citizen settlement without hearing. Twice before the Board has held it was without power to accept proposed settlements only to be reversed on appeal. *See* People v. Archer Daniels Midland, 140 Ill. App. 3d 823, 489 N.E.2d 887 (3d Dist. 1986); Chemetco, Inc. v. IPCB, 140 Ill. App. 3d 283, 488 N.E.2d 639 (5th Dist. 1986). In each case, based on an unduly narrow reading of the Act, the Board perceived that it lacked the necessary authority to accept a proposed settlement. For example, in Archer Daniels Midland, the parties before the Board argued that "the Board's role in approving settlement agreements is to determine whether the goals of the Act are met." Archer Daniels Midland, 140 Ill. App. 3d at 824, 488 N.E.2d at 888. In reversing the Board, the court held:

> We find that, under the Act, the Board is empowered to resolve enforcement actions brought before it under the Act. As an administrative agency, the Board has the inherent authority to do all that is reasonably necessary to execute its specifically conferred statutory power.
>
> * * *
>
> [T]he public interest is better served by a procedure which encourages respondents to enter into settlement discussions and negotiations by which respondents may avoid the stigma of finding a violation and assist the State in effectuating the goals of the Act . . . . [T]he result will conserve resources which would otherwise be expended in litigation. Archer Daniels Midland, 140 Ill. App. 3d at 825, 488 N.E.2d at 888-89; *see also* Freedom Oil v. IPCB, 275 Ill. App. 3d 508, 514, 655 N.E.2d 1184, 1189 (4th Dist. 1995) ("In performing its specific duties, an administrative agency has wide latitude to accomplish its responsibilities."); Chemetco, 140 Ill. App. 3d at 286-87, 488 N.E.2d at 642

> ("[W]here there is an express grant of authority, there is likewise the clear and express grant of power to do all that is reasonably necessary to execute the power or perform the duty specifically conferred.").

Far from encouraging settlements, the Board's approach raises hurdles to settlement, contrary to the law's preference for litigating parties to settle. *See* Chemetco, 140 Ill. App. 3d at 288, 488 N.E.2d at 643. Practically speaking, when faced with the prospect of having to go to hearing on their proposed settlements, citizen parties have simply moved to voluntarily dismiss the case, potentially depriving the matter of any State scrutiny. This is borne out time and again in the Board's dockets. Those citizens who do not have the means to go to hearing are therefore denied a Board order codifying the settlement. A Board order, unlike a private settlement agreement, is enforceable by the *State* or *any* person, not solely by the parties. In short, the Board's approach is not working.

This result runs counter to the Board's statutory role to ensure environmental protection. The Board has viewed its role under the Act as follows:

> [T]he Board was designed to be the final interpreter, subject to judicial review, of what is required to effectuate the policies of the Environmental Protection Act; not merely a disinterested arbiter, the Board is entrusted with affirmative responsibility to see to it, through appropriate orders in matters brought before it, that the policies of the Act are carried out. GAF Corp. v. IEPA, PCB 71-11, slip op at 3 (Oct. 3, 1972).

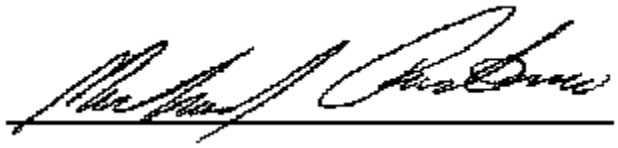
The Board missed an important opportunity today to renew that commitment by changing a position that has not aged well. Rare are the circumstances when an administrative agency should reach a holding that is inconsistent with its past precedent, but this principle does not condemn an agency to propagate a broken process.

Of course, the Board, in its discretion, can order a hearing on any proposed settlement if it is unclear whether it furthers the purposes of the Act. The complainants here have reached an agreement with IFCO that serves the purposes of the Act by *eliminating* alleged air pollution through facility shutdown. It is difficult to conceive how holding a public hearing could improve on this, but easy to see that ordering a hearing will impose numerous additional costs on both the parties and the Board, assuming the parties do not move to dismiss. The context of this case makes clear that the Board's myopic view of its own authority has led to unintended, negative ramifications. Holding a hearing on this proposed settlement seems especially superfluous in these difficult economic times.

We believe that time has revealed the Board's position, requiring a hearing before being able to accept a settlement in a citizen enforcement action, is both legally unwarranted and so ineffective from a practical perspective as to interfere with the Board's duty to effectuate the policies of the Act. The Board should have availed itself of this excellent opportunity to establish new precedent that would make the Act work and better protect the environment.

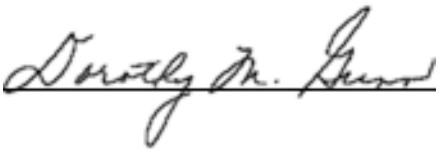
For these reasons, the Board erred today by not using its authority to accept the proposed settlement without hearing. Therefore, we respectfully dissent.

Claire A. Manning
Chairman



Michael E. Tristano
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the above dissenting opinion was submitted on December 9, 2002.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board