ILLINOIS POLLUTION CONTROL BOARD
February 4, 1988

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Petitioner,	)	
v.	)	PCB 85-136
NAVEM PATEL, ERIC OTTEN, CLARENCE MITCHELL and J.B. JOHNSON, Respondents.	)	

MR. CAREY COSENTINO AND MS. DIANE ROSENFELD LOPATA, ATTORNEYS-AT-LAW, APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY;

MR. PATRICK O'BYRNE, ATTORNEY-AT-LAW, APPEARED ON BEHALF OF RESPONDENT, NAVEM PATEL;

MR. KENNETH G. ANSPACH, ATTORNEY-AT-LAW, APPEARED ON BEHALF OF RESPONDENT, ERIC OTTEN;

MR. DOUGLAS G. SHREFFLER, ATTORNEY-AT-LAW, APPEARED ON BEHALF OF RESPONDENT, CLARENCE MITCHELL; and

MR. J.B. JOHNSON, APPEARED PRO SE.

OPINION OF THE BOARD (by B. Forcade):

This matter comes to the Board on a September 3, 1985, complaint filed by the Illinois Environmental Protection Agency ("Agency") against Navem Patel ("Patel"), Eric Otten ("Otten"), Clarence Mitchell ("Mitchell") and J.B. Johnson ("Johnson"). The respondents' conduct is alleged to be in violation of various provisions of the Illinois Environmental Protection Act ("Act") and Board regulations governing the proper disposal of solid and hazardous waste. In essence, the complaint alleges Patel was the owner/operator of an electropolishing business at 330 North Harding, Chicago, Cook County, Illinois ("Harding Site") from approximately the time Patel entered into a sales contract to purchase the land, July 9, 1980, until the time he was evicted, approximately April 8, 1982. It is alleged that Patel left behind numerous fifty-five gallon drums containing wastes which were ultimately dumped at an empty lot near Interstate 55 at 34th Street and Kedzie Avenue in Chicago, Cook County, Illinois ("Kedzie Site") by the actions of Otten, Mitchell and Johnson. Hearings were held November 26, 1986; December 23, 1986; and January 21, 1987. Complainant's brief was filed March 23, 1987.

PRELIMINARY MATTERS

I. Plaintiff's Request To Admit Facts

In addition to the facts adduced at hearing, the Board must consider the effect of plaintiff's first request for admission of facts ("RA I"), filed November 19, 1985, and plaintiff's second request for admission of facts ("RA II"), filed October 14, 1986. At 35 Ill. Adm. Code 103.162, the Board has provided for filing of requests for admission of facts. This provision allows the parties to narrow the scope of disputed factual material which must be addressed at hearing. The regulation particularly states the effect of failing to respond to a request for admission of facts at 35 Ill. Adm. Code 103.162(c):

> "c. Admission in the Absence of Denial. Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 20 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters on written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part..."

A. Patel

The Agency's first request to admit facts was filed November 19, 1985. No response was filed by Patel until December 4, 1986, over one year later and after the first hearing had been held on November 24, 1986. The Agency's second request to admit facts was filed October 14, 1986. Patel never responded. Consequently, the Board finds the facts stated in the first and second request are admitted for failure to timely reply.

The second reason for not admitting respondents' December 4, 1986, response to request to admit is the unfairness to the plaintiffs and the Board. It is inequitable to the plaintiffs to allow Patel's reply after the plaintiff had prepared its case from November, 1985, to the first hearing in November, 1986, justifiably relying on the admissions brought about by failure to reply. Allowing respondents' pleadings is also inequitable to the Board in that it disrupts the flow of cases to admit pleadings one year later than required by the procedural rules.

B. Otten, Mitchell and Johnson

These respondents never answered either of plaintiff's request to admit, hence, the Board finds that pursuant to 35 Ill. Adm. Code Section 103.162(c), the facts stated in both requests are admitted.

II. Otten's Motion to Dismiss

By Order dated December 18, 1986, the Board granted Otten leave to file a motion to dismiss, but reserved its ruling until the conclusion of the proceedings. The motion's arguments are as follows.

The admission into evidence of special analysis forms, complainant's exhibits 2 through 5, and the reading of the reports by Lynn Givello are objected to as hearsay because no person that conducted the alleged tests was available for cross-examination. This Board finds the evidence is admissible pursuant to procedural rules at 35 Ill. Admin. Code Part 103 :

> Section 103.208 Admission of Business Records in Evidence
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> Any writing or record, whether in the form of any entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event. To be admissible the writing or record shall have been made in the regular course of any business, provided it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term "business", as used in this rule, includes business, profession, occupation, and calling of every kind.
>
> Section 103.204 Admissible Evidence
>
> a) The Hearing officer shall receive evidence which is admissible under the rules of evidence as applied in the Courts of Illinois pertaining to civil

> actions except as these rules otherwise provide. The Hearing Officer may receive evidence which is material, relevant, and would be relied upon by reasonably prudent persons in the conduct of serious affairs provided that the rules relating to privileged communications and privileged topics shall be observed.

These rules were applied in IEPA v. Bittle, PCB 83-163, to admit laboratory results into evidence. Moreover, the practice of characterizing Agency reports as "business records" and admitting them into the record of a Board proceeding on that basis has been upheld by the appellate court. City of Highland v. Pollution Control Board, 66 Ill.App.3d 143, 383 N.E.2d 692 (5th Dist. 1978). Therefore, the inspection reports and laboratory analyses offered by the Agency were correctly admitted into evidence by the Hearing Officer.

However, as demonstrated under the Hazardous Waste Liability portion of this opinion, the contents of the reports do not establish that any waste from the Harding site was hazardous. Thus, all allegations against Otten based on the evidence of hazardous waste are dismissed.

The motion to dismiss also asserts no competent evidence exists that any waste whatsoever was transported from the Harding site to the Kedzie site because the only evidence linking material between the two sites is Sergeant Schlossberg's police report which is inadmissible hearsay. This argument fails because the evidence is material, relevant and would be relied upon by reasonably prudent persons in the conduct of serious affairs. Therefore, the Sergeant's testimony and the report are admitted.

Judging Schlossberg's testimony, report and all other evidence in this case by the preponderance of evidence standard, there is a sufficient nexus for the Board to reasonably conclude waste which originated from the Harding site was the same waste found at the Kedzie site. Section 3 of the Act defines several pertinent words to establishing the nexus:

> (gg) "WASTE" means any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved material in

> domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the Clean Water Act or source, special nuclear, or by-product materials as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 921) or any solid or dissolved material from any facility subject to the Federal Surface Mining Control and Reclamation Act of 1977 (P.L. 95-87) or the rules and regulations thereunder or any law or rule or regulations adopted by the State of Illinois pursuant thereto.
>
> (n) "OPEN DUMPING" means the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill.
>
> (s) "REFUSE" means waste.
>
> Ill.Rev.Stat. 1985, ch. 111-1/2, par. 1003.

Based on the definition of waste, not only can the contents of the drums be defined as waste, but the drums themselves constitute waste. However, to become a waste, a substance must be discarded. In Safety-Kleen Corp. v. EPA,PCB 80-12 (July 10, 1980), the issue before the Board was whether flammable solvents distributed as part of a rental degreasing system were "waste". The Board found that the solvents, while flammable and possibly hazardous to public safety, were not a waste because they were not discarded. The Appellate Court affirmed the Board's decision without an opinion, in Environmental Protection Agency v. Pollution Control Board, 427 N.E.2d 1053 (1981). Therefore, to establish a violation of any open dumping of waste, in this case, it must only be shown by the preponderance of the evidence that one drum from the Harding site was discarded at the Kedzie site.

Sergeant Schlossberg testified that "E-M" drum and a "Rin" drum found at the Kedzie site came from Harding Electropolishing (T.1, p. 179).The fact that either of these two drums may have been empty is not a bar to establishing a nexus between the drums of the two sites because the drums themselves are waste. Sergeant Schlossberg's testimony plus all the unrefuted logical inferences that can be made from the evidence leads the Board to conclude the drums found at the Harding site were the same drums found at the Kedzie site, thus, establishing a violation of the sections of the Act in question.

Hazardous Waste Liability

All the defendants are charged with violating Section 21(f) of the Act. Section 21(f) of the Act provides, in pertinent part, that:

> No person shall:
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> Conduct any hazardous waste-storage, hazardous waste-treatment or hazardous waste-disposal operation:
>
> 1. Without a RCRA permit for the site issued by the Agency under subsection (d) of Section 39 of this Act, or in violation of any condition imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder; or
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> 2. In violation of any regulations or standards adopted by the Board under this Act; or
>
> 3. In violation of any RCRA permit filing requirement established under standards adopted by the Board under this Act;
>
> 4. In violation of any order adopted by the Board under this Act.
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> Notwithstanding the above, no RCRA permit shall be required under this subsection or subsection (d) of Section 39 of this Act for any person engaged in agricultural activity who is disposing of a substance which has been identified as a hazardous waste, and which has been designated by Board regulations as being subject to this exception, if the substance was acquired for use by that person on his own property and the substance is disposed of on his own property in accordance with regulations or standards adopted by the Board

Section 3.15 of the Act states:

> "HAZARDOUS WASTE" means a waste, or combination of wastes, which because of its quantity,

> concentration, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible, illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed, and which has been identified, by characteristics or listing, as hazardous pursuant to Section 3001 of the Resource Conservation and Recovery Act of 1976, P.L. 94-580, or pursuant to Board regulations.

Board regulations provide, in part, a waste is hazardous if a representative sample is corrosive. A waste is corrosive if it is aqueous and has a pH less than or equal to 2, or greater than or equal to 12.5. 35 Ill. Adm. Code 721.122(a)(1).

Here, a total of seven 8 oz. samples were taken from the Kedzie site (T.1, p. 108). One system used to determine which drum to sample was looking for a drum which represented a type of waste to be in many drums, such as a green solid and green liquids (T. 1, pp. 82-84). All the samples, although taken on three separate dates, were processed in the same manner. The samples were marked and transported immediately to an IEPA lab in Chicago to be analyzed. The results of the March 10, 1983, samples showed that three-fourths of the samples were hazardous according to their pH (T. 1, p. 55, 59-61).

However, the record is insufficient to support a finding that Patel was the source of any of the hazardous waste. Of the two drums positively identified at the Kedzie site to have originated from the Harding Electropolishing Company, one drum was tested. The sample number for that drum was xlll, which had a pH of 4.8. This was the only one of the four samples tested March 10, 1986 that did not have a "hazardous" pH (T.1, pp. 180-184). Nor was it shown hazardous by its cadmium content of .4 parts per million, barium content of 0 parts per million, lead content of .1 part per million nor chrome content of .13 according to 35 Ill. Adm. Code 721 (T.1, p. 60). Therefore, the only tested drum positively identified at the Kedzie site as coming from the Harding Electropolishing Company was not a hazardous waste. No link has been shown between the drums which contained hazardous waste and the Harding site. Consequently, every charge of violating Section 21(l) of the Act by any defendant must be dismissed.

Count II alleges respondents, Otten, Mitchell and Johnson, violated Section 21(g) of the Act (Ill.Rev.Stat. 1985, ch. 111-1/2, par. 1021(g)). It provides in part:

No person shall:

g. Conduct any hazardous waste transportation operation.

1. Without a permit issued by the Agency in violation of any conditions imposed by such permit, including periodic reports and full access to adequate record and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations or standards adopted thereunder; or

2. In violation of any standards adopted by the Board under this Act.

The record's failure to support a finding that the waste was hazardous is fatal to establishing a violation by either Otten, Mitchell or Johnson.

LIABILITY OF NAVEM PATEL

Count I of the complaint claims that Patel's actions violated Section 21(a) of the Act, which provides:

No person shall:

a. Cause or allow the open dumping of any waste.

The Board has previously evaluated the "cause or allow" language in IEPA v. Bittle, et al. ("Bittle"), PCB 83-163 (1987) and IEPA v. James McHugh Construction Company ("McHugh"), PCB 71-291, 4 PCB 511, 513 (1972) and EPA v. Dobbekke ("Dobbekke"), PCB 72-130, 5 PCB 219.

In Bittle, two issues focused on the cause or allow language as stated in Section 12 of the Act. The Board found the respondents' actions of causing the deepening of a slurry pond and constructing a sedimentation pond and two holding ponds caused or allowed contaminants from a carbon recovery process to be discharged into a river. Specifically, the respondents were held to have caused the deepening and construction of the ponds because, pursuant to lease terms, these lessees controlled the operations to the extent that it was reasonable for them to have taken action to prevent the pollution. Also, they actually authorized the construction of, and repair work for the ponds.

In McHugh, guided by prior decisions, the Board interpreted the statutory language of "cause or allow" pollution as going beyond the common law to impose an affirmative duty on persons in a position of potential control to take action to prevent pollution. Based on this interpretation, the question was whether the respondent, the City of Chicago, was in a relationship to the transaction that it was reasonable to expect it to exercise control to prevent pollution. The transaction in question was discharging wastewater containing suspended solids, iron and lead from a city project into a river. The City's relationship to the transaction was the City contract required contractors to build a settling basin which allowed wastewater to settle before being discharged into the river. A city engineer was on the site at all times.

The Board recognized that situations exist where a person who receives economic benefits from a transaction so lacks the capacity to control whether or not pollution occurs that it would be unreasonable to hold him responsible, but the Board determined the City's relationship was different. The City was in an excellent position to oversee the operation to prevent pollution. The contract provision requiring a settling basin and action taken pursuant to it, supports the City's recognition of this position. Thus, its capacity for control put the City in a position to prevent pollution which it disregarded when it allowed polluted water to enter the river.

In Dobbekke, the Board held that "allow" includes inaction on the part of the landowner.

Illinois appellate courts have held the Act is malum prohibitum; no proof of guilty knowledge or mens rea is necessary in order to support a finding of violation. Paul Hindman v. Pollution Control Board, 42 Ill.App.3d 766, 769 (5th Dist., 1976); Meadowlark Farms, Inc. v. Pollution Control Board, 17 Ill.App.3d 851, 861 (5th Dist., 1974); Bath, Inc. v. Pollution Control Board, 10 Ill.App.3d 507 (4th Dist., 1973). These standards must be applied to the facts of the instant case.

The preceding cases demonstrate that the test to be used to see if Patel caused or allowed pollution is a test of reasonableness: a person is liable if it was reasonable for him to have exercised control to prevent pollution.

The facts pertinent to this "cause or allow" charge are as follows: in July, 1980, Patel purchased the land and, thus, owned/operated the Harding Electropolishing Company (RA II, par. C). Patel stored waste from his company in drums (T. 1, p. 259). He conducted weekly inspections of the areas where the drums were stored (T. 2, p. 263). On April 8, 1982, Patel was evicted from the Harding Site by a forcible detainer action initiated by Felbringer Realty on behalf of Ralph Gunderson (the

prior owner) (RA II, par. E). When Patel vacated the building, he abandoned numerous fifty-five gallon drums of waste (RA II, par. F). Mr. Otten, an agent for Felbringer Realty, saw drums on the premises when he inspected the property (T. 2, p. 290). Otten testified he saw drums standing in greenish colored water (T.2, p. 291). It was those drums which he paid respondent Mitchell to clean up (T. 2, p. 294). Two of those drums were positively identified at the Kedzie Site as coming from the Harding plant site by an Illinois State Police sergeant (T. 1, p. 180). These two drums were among approximately sixty drums that appeared to have been dumped from the top of the hill and left to roll down (T. 1, p. 26). When discovered, some of the drums had broken open, some of them had corroded through and some remained intact (T. 1, p. 27). Some drums had leaked green substance onto the ground (T. 1, p. 117). The Board concludes that it was reasonable for Patel to have exercised control over the drums to prevent pollution and that he failed to do so, thus, he caused or allowed open dumping in violation of Section 21(a) of the Act.

Count I next claims Patel's actions violated Section 21(e) of the Act by abandoning and/or storing hazardous waste at the Harding site when that site did not meet the requirements of the Act and regulations. Section 21(e) of the Act states:

> No person shall:
>
> e. Dispose, treat, store or abandon any waste or transport any waste into this State for disposal, treatment, storage or abandonment; except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

Since this provision is not limited to hazardous waste, the record's failure to support a finding that the waste from the Harding site was hazardous is not fatal to establishing violations.

The pertinent facts to this charge are Patel operated the electropolishing company during which time he stored company wastes in drums (T.1, p. 259). After eviction, Patel vacated the building and abandoned numerous drums (RA II, par. E, F). When Mr. Otten inspected the empty building, he found drums standing in greenish-colored water (T. 2, p. 291). These facts lead the Board to logically conclude Patel abandoned the waste in violation of Section 21(e) of the Act.

LIABILITY OF ERIC OTTEN

Respondent Otten is charged with violating Section 21(a) of the Act by causing or allowing open dumping of waste. He was a

real estate broker for Felbringer Realty (T.2, p. 287). Mr. Gunderson, the owner of the Harding property, listed the property for sale with Felbringer Realty. Otten knew Patel operated an electropolishing company by seeing the operation in action (T. 2, p. 303). After Patel vacated the property, Otten observed drums there. Otten found a purchaser to buy the Harding site on the condition the site was cleaned up. Subsequently, Felbringer Realty instructed Otten to get somebody to clean up the building, which Mr. Gunderson would pay for. Otten contracted with Clarence Mitchell to clean the site for $1,800 (T.2, p. 298). There was no discussion with Mitchell specifically regarding the removal of drums (T. 1, pp. 293-297). Otten received a 10 percent commission for the sale of the building, totaling $2,800.

The Board finds Mr. Otten violated Section 21(a) because he was in the a position to take responsible precautions to prevent improper disposal by being given the authority to determine the method of disposal. His directions to Mitchell to just "clean up" the place is insufficient to satisfy his affirmative duty to take precautions to insure its proper disposal. See, IEPA v. McHugh Construction Co., PCB 71-291, 4 PCB 511, 513. Even if he did not directly cause the dumping, he, at least, allowed it, thus, violating Section 21(a) of the Act. However, Otten's lack of prior knowledge of the dumping and lack of direct physical involvement in the act does affect the amount of civil penalty the Board will assess.

LIABILITY OF CLARENCE MITCHELL

Respondent Mitchell is first charged with violating Section 21(a) of the Act. The relevant facts are Mitchell testified he contracted with Otten to "clean up" the Harding site (T. 2, p. 311). Upon inspection, he saw approximately 40-50 drums at the site and green "paint" on the floor (T. 2, 312). He went to C.I.D., the local landfill, to see if it would accept the drums and it said "no". Mitchell knew C.I.D. took drums normally and it accepted all the other refuse from disposal at the Harding site (T. 2, pp. 315-316). Before telling Otten of the problem, he contracted with respondent Johnson to dispose of them for $250 when Johnson said he knew of a place where anything could be disposed of (T. 2, p. 318). Mitchell did not know at the time of contracting where Johnson intended to dispose of the drums (T.2, p. 449). When Johnson came to pick up the drums, Mitchell had some of his men help Johnson load the drums onto Jchnson's truck. Mitchell stated that he "was kind of instructing the job..." (T. 2, p. 326).

The Board finds Mitchell violated Section 21(a) of the Act by causing or allowing the open dumping of wastes. Specifically, he was given general directions to clean up the drums, thus, he could determine the method of disposal. He had reason to know the drums contained something unusual by C.I.D.'s refusal to

accept them. However, even if he did not have reason to know of the contents, there is still a violation of the Act because the Act is malum prohibitum. Hindman v. Pollution Control Board, 42 Ill.App.3d 766, 769 (1976). He then subcontracted for another to dispose of the drums despite the fact Johnson might possibly do the disposal in an irresponsible manner. Finally, Mitchell assisted Johnson by directing his employees to help Johnson load the truck.

Respondent Mitchell is also charged with violating Section 21(e) of the Act by abandoning the drums at the Kedzie site. As discussed, Mitchell did not personally transport the drums to the Kedzie site, rather he subcontracted with Johnson to complete the work. He was in such a position to the transaction to control whether or not Johnson abandoned the waste, it is logical to conclude Mitchell violated Section 21(e). The Board bases this conclusion on the policy considerations stated in Section 33(c) of the Act.

LIABILITY OF J.B. JOHNSON

Johnson is first charged with violating Section 21(a) of the Act by causing or allowing the open dumping of waste. As determined in the preliminary matters of this opinion, the unanswered second request for admissions admits the facts stated therein as true. 35 Ill. Adm. Code 103.162. The admission proves that J.B. Johnson subcontracted with Mitchell to remove drums from the Harding site. Johnson removed the drums from the Harding site and dumped the drums at the Kedzie site. In addition, testimony shows Johnson knew Mitchell could not dispose of the drums at the landfill and then offered to take the drums to a place where "anything can be dumped" (T.2, pp. 318 & 447). He then transported the drums from the Harding site to the Kedzie site. Johnson never disputed these facts.

The Board concludes Johnson violated Section 21(a). Mr. Johnson was in a position to take responsible precautions to prevent any pollution from improper disposal by being given the contractual authority to dispose of the drums.

Johnson is also charged with violating Section 21(e) of the Act for abandoning waste. The evidence above demonstrates Johnson transported the waste from the Harding site to the Kedzie site and left the drums there. This is sufficient to demonstrate Johnson abandoned the drums within the meaning of the Section because he discarded the drums without retaining control. EPA v. Pollution Control Board, 427 N.E.2d 1053 (1981). Therefore, Johnson violated Section 21(e) of the Act.

The Board's has considered the criteria set forth at Section 33(c) of the Act. Specifically, the Board finds that the open dumping and abandonment of waste from an electropolishing process

presents a threat of injury to, or interference with the protection of the health, general welfare and physical property of the people. The Board also finds the social and economic value of an electropolishing business is non-existant where that business illegally discards its waste at an unpermitted facility. The Board finds there are technically practical and economically reasonable methods of reducing discharges resulting from the process, by transporting them to approved treatment or disposal facilities..

The Agency requests this Board Order each respondent to pay a civil penalty up to ten thousand dollars ($10,000) for each violation of the Act and issue an order requiring the respondents to pay for the clean-up costs at the Kedzie site pursuant to Section 22.2(f) of the Act. Since the Board has not found a hazardous waste violation, the cost recovery provisions of Section 22.2(f) are not operable. This Opinion constitutes the Board's findings of fact and conclusions of law. The Board has today adopted separate Orders governing the individual respondents.

IT IS SO ORDERED.

Chairman J.D. Dumelle and Board Member J. Anderson concurred in part and dissented in part. Board Member J. Theodore Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 4th day of February, 1988 by a vote of 5-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board