

ILLINOIS POLLUTION CONTROL BOARD
July 11, 1991

PEOPLE OF THE STATE)	
STATE OF ILLINOIS,)	
)	
Petitioner,)	
)	
v.)	PCB 89-157
)	(Enforcement)
)	
CLYBOURN METAL)	
FINISHING COMPANY,)	
)	
Respondent.)	

DISSENTING OPINION (by J. Anderson):

I respectfully dissent from the majority's opinion because I believe that the imposition of costs and fees is unwarranted on the merits and because, in this case, such action undercuts the Board's foundation for the penalty, if not the foundation for the finding of violation.

First though, I wish to note that I do not disagree with the majority's findings of violation. Moreover, I do not believe that the size of the penalty is excessive when one considers the fundamental importance of the permit process in the environmental oversight arena. It is the duty of the person being regulated, not the Agency, to see to it that the requirement to have a permit is complied with. Although there can be extenuating circumstances, they are not persuasive here. It is at best irresponsible that Clybourn operated with a lapsed permit for two years and apparently maintained no oversight whatsoever, including not even making an inquiry of the Agency as to why it had not received a permit renewal form.

However, I believe that we need to recognize that some appellate court decisions reflect a more tolerant view than ours regarding penalties for operating without a permit. This is true especially where, as here, arguments have been raised asserting reliance on the Agency or where, as here, a company is not beyond the Agency's regulatory awareness. See e.g. Modine Manufacturing Company v. PCB and EPA, 193 Ill. App. 3d 643, 549 N.E.2d 1379 (2nd Dist. 1990); City of East Moline v. PCB, 136 Ill. App. 3d 687, 483 N.E.2d 642 (3d Dist. 1985). Also, it should be noted that Clybourn has operated for many years without citizen complaints or allegations of noncompliance with operating standards.


If this case is appealed, the appellate court could very well take the view that the Board's imposition of costs and fees constitutes a second penalty "hit". Underlying the penalty issue was whether the Clybourn was fully responsible for knowing when its permit renewals came due or, as Clybourn asserted, whether it

could rely, as it had done before, on the Agency's practice of timely sending out permit renewal forms. The imposition of costs and fees was essentially based on the same argument; Clybourn was in knowing violation because the Board held that it was responsible for knowing. At the very least, the majority, by reaching out without any precedent or any record whatsoever on the appropriateness of imposing costs and fees, appears punitive and thus risks the loss of the persuasive value of the Board's whole penalty rationale.

Given that appellate courts already appear to take a more tolerant view regarding penalties than the Board, it should be no surprise if, on appeal, a court were to decide that reliance on Agency practice should control. This would be a most unfortunate result, not only in terms of our concerns about the permit process, but also in terms of the potential chilling effect on the Agency's voluntary and commendable practice of sending out the renewal application forms.

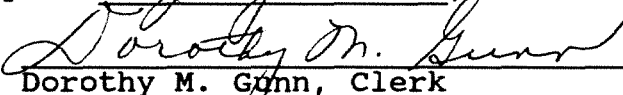
As to the merits of the imposition of costs and fees, I agree with the concurring opinions of Dr. Flemal and Dr. Marlin. I would add that, since the Attorney General did not pursue the issue, Clybourn has been deprived of an opportunity to argue against the imposition of (as opposed to the amount of) the costs and fees. I believe that the Board's independent analysis of the record in support of its "knowing" conclusion has suffered accordingly, even apart from any fairness issue that might be raised.

For the foregoing reasons, I respectfully dissent.



 Joan G. Anderson
 Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 30th day of July, 1991.



 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board