

ILLINOIS POLLUTION CONTROL BOARD  
July 11, 1991

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

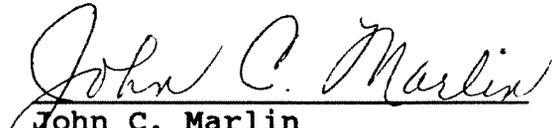
CONCURRING OPINION (by J. C. Marlin):

I agree with the majority's finding that Clybourn has violated Section 9(b) of the Illinois Environmental Protection Act and 35 Ill. Adm. Code 201.144 and with the imposition of the \$12,000 penalty. However, I do not believe that the majority has set a proper foundation for the assessment of costs and fees. For this reason, I concur.

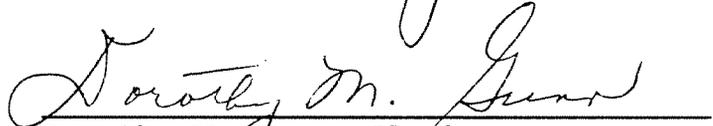
The majority has laid no foundation for its finding that costs and fees should be imposed pursuant to Section 42(f) of the Act. The Attorney General has frequently requested costs and fees in complaints and subsequently chosen to make no further mention of Section 42(f) or any attempt to directly construct an argument or present evidence to support a 42(f) finding of a wilful, knowing or repeated violation.

Historically, the Board has not assessed costs and fees in cases where the Attorney General has not presented evidence on Section 42(f). Typically, as in this case, the Attorney General broadly alleges that the violation was "wilful, knowing or repeated". In this instance, the majority independently searched the record to find a basis for a Section 42(f) finding, eventually settling upon "knowing" as the basis for its decision that fees and costs could be recovered. As Dr. Flemal's concurrence points out, this is a departure from past Board practice. The decision to pursue costs and fees falls within the discretion of the Attorney General. Where, as here, the Attorney General has chosen not to pursue the matter at hearing or in briefs, the Board should not use its resources to cobble together a finding.

Today's Opinion could also lead to confusion as it seems to hold that simple failure to renew a permit is a "knowing" violation under 42(f). Should there be sufficient grounds for making this finding, it is only through evidence of continued operation after permit denial.

  
John C. Marlin  
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 18<sup>th</sup> day of July, 1991.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board