

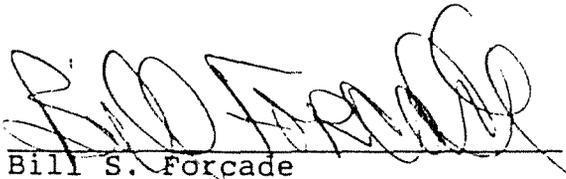
ILLINOIS POLLUTION CONTROL BOARD
August 30, 1990

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Complainant,)
)
v.) AC 89-227
) (IEPA No. 9957-AC)
JACK WRIGHT) (Administrative Citation)
)
Respondent.)

CONCURRING OPINION (by B. Forcade):

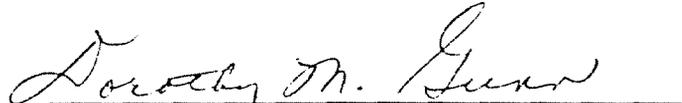
I respectfully concur. I agree with the majority that Modine Manufacturing Co. v. Pollution Control Board, 193 Ill. App. 3d 643, 549 N.E.2d 1379 (1990), is controlling and requires us to conclude that the Illinois Environmental Protection Agency ("Agency") is estopped from prosecuting this action. In all other respects, I disagree with the majority opinion. The majority finds that "simultaneous pursuit of both pre-enforcement and administrative citation processes" is improper. This statement has no basis in law or the facts of this case. The Environmental Protection Act does not limit the Agency to either administrative citation or "pre-enforcement" processes. The Act does not even mention "pre-enforcement." The Agency has no pending enforcement proceeding against Mr. Wright. At most, the Agency is guilty of the "threat" of enforcement. If the Agency should choose to file BOTH an administrative citation and a regular enforcement proceeding before this Board, then the exclusionary language of Section 31(a) of the Act might come into play; but those are not the facts of this case.

In my opinion, today's case represents another example of this Board attempting to improperly entangle the Agency's administrative citation process. There is a growing trend by the majority to find some method of absolving a respondent of the administrative citation penalty where there is an allegation at hearing that the site has been cleaned up. I disagree. No subsequent cleanup can obviate that fact that on day X the site was in violation. Additionally, the Agency must now carry the burden of inspecting the property just before hearing to adequately respond to such allegations. I find no such burden imposed by the Act. Sections 21 (p) and (q) are not intended to give respondents the choice of EITHER paying the civil penalty of \$500 OR cleaning up the site. Second, this Board seems overly inclined to find that the Agency field inspectors (or the associated paperwork) created a bar to prosecution, either by confusing the respondent or committing the Agency to a course of conduct. I must conclude that the majority simply dislikes the administrative citation process.



Bill S. Forcade
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 5th day of September, 1990.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board