ILLINOIS POLLUTION CONTROL BOARD
September 5, 1985

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY	)	
Complainant,	)	
v.	)	PCB 84-1
CORN BELT FS, INC.	)	
Respondent.	)	

DISSENTING OPINION (by J. Marlin and J. Anderson):

This six count complaint arises from a March 9, 1983 spill of 28% (N) urea ammonium nitrate fertilizer solution from Corn Belt's Wapella facility, causing the death of about 359,000 fish with a value of about $23,000. Corn Belt admitted to the violations alleged in Counts I, III, IV, and V. In response to Count VI, re-alleging the previous violations and requesting payment for the value of the killed fish, Corn Belt admitted that it had caused the above-described fish kill, as well as admitting the value of the fish. Corn Belt did not admit to Count II, charging failure to take reasonable measures to prevent spills at not only the Wapella facility, but at five other facilities, in violation of Section 12(a) of the Act and 35 Ill. Adm. Code 306.102(b). The proposed settlement, accepted by the majority in its September 5, 1985 Order, included a $6,000 penalty, a payment for the fish killed, and remedial measures to be taken not only at the Wapella facility, but at the other five facilities.

The Board has rejected settlement agreements requesting the Board to impose penalties and to order compliance actions absent a Board finding of violation. IEPA v. Chemetco, Inc., PCB 83-2, February 20, 1985, interloc. appeal, No. 5-85-143 (5th District); People et al. v. Archer Daniels Midland Corp., PCB 83-226, March 22, 1985, interlock. appeal, No. 3-85-222 (3rd District). While the majority distinguished this decision from recent holdings in Chemetco and Archer Daniels Midland, we believe it offered no logical basis for the distinction.

Count II, the only one mentioning Corn Belt's other five facilities, is the Count to which Corn Belt would make no admissions. The Board fashioned the missing admissions by using an "intent of the parties" approach -- that Corn Belt must have impliedly meant to admit to the violations. The majority ignores the fact that, by its terms, the stipulation is void ab initio unless the Board approves the terms of the agreement as written. For the Board to approve an agreement ordering a compliance plan, there must be admissions or findings of

violations for the section of the Act or regulations alleged in any Count from which the conditions comprising the compliance plan flow. The majority's circuitous logic missed or ignored that point completely. To say that the parties "intended" to admit to such violations, when by the terms of the agreement it is plain that they did not so intend, is simply incorrect.

The majority's Order has the same effect as a judgment by consent of the parties. Such an order does not represent the judgment of the Board on the rights of the parties but merely records the agreement of the parties. Bergman v. Rhodes, 334 Ill. 137, 165 N.E. 598 (1929). The majority has gone outside the terms of the agreement to look at the "intent" of the parties. By so doing, it is inserting a judgment as to what the parties meant, which is outside the scope of the Board's authority in considering settlement agreements.

It should also be noted that, even if the stipulation did not preclude the Board from making independent findings, there is insufficient evidence in the record for the Board to find a violation of the section of the Act and regulation alleged in Count II. Page one of the agreement precludes the use of any stipulated facts as evidence. In the absence of an admission, facts would be necessary for the Board to rule on Count II. Had the Board found no violation of Count II, the agreement of Corn Belt to implement certain control measures would still place the Board in the awkward position of ordering a compliance plan without the necessary statutory findings of violation pursuant to Sections 33(b) and 42(a) of the Act.

As a matter of procedure, we would like to point out that Count VI is an unneeded count. It does not state an independent cause of action, as do each of the other Counts, but instead requests a new remedy, the Section 42(c) fish kill reimbursement. The fish kill damages should be requested in each count where applicable. This is consistent with pleadings in prior cases. IEPA v. North Shore Sanitary District, 46 PCB 167 (PCB 78-50, April 29, 1982); aff'd No. 82-425 (Rule 23 Order, 2nd Dist., 1983).

Rather than try to reformulate the stipulation, the Board should have rejected the settlement and sent it back to the parties for further consideration. It may have been possible for the parties to detach the remedial measures in Paragraph B (Agreement at 8) if the admission of the applicability of 35 Ill. Adm. Code 306.102(b) is the only allegation in Count II that is at issue. A new agreement might also have clarified the basis for the $6,000 penalty. In any event, this agreement underscores the problems created by attempts to place the Board in the position of ordering accomplishment of 'voluntary remedial activities' to correct 'non-existing' non-compliance." (Archer Daniels at 3).

Therefore, the Board should have rejected the stipulation and proposal for settlement in its present form and ordered that hearing in this matter be scheduled. This would not have precluded the parties from amending the settlement agreement to cure the above-noted problems.

John C. Marlin

Joan G. Anderson

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 25th day of September, 1985.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control
Board