

ILLINOIS POLLUTION CONTROL BOARD
May 18, 1984

ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 81-132
	)	
BORDEN CHEMICAL, a Division	)	
of Borden Inc., a New Jersey	)	
corporation,	)	
	)	
Respondent.	)	

MR. GREIG R. SIEDOR, ASSISTANT ATTORNEY GENERAL, APPEARED ON
BEHALF OF THE COMPLAINANT.

SIDLEY & AUSTIN (MR. SHELL J. BLEIWEISS, OF COUNSEL) APPEARED ON
BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by W. J. Nega):

This matter comes before the Board on the August 21, 1981
Complaint of the Illinois Environmental Protection Agency (Agency).
On November 17, 1981, the Agency filed a Motion for Leave to File
on Amended Complaint and its Amended Complaint. On December 16,
1981, the Hearing Officer granted the Agency's motion to amend
its Complaint.

Counts I through VII of the 13-count Amended Complaint
alleged that the Respondent's chemical plant in Illiopolis,
Sangamon County, Illinois operated six polyvinyl chloride produc-
tion lines without an Operating Permit from the Agency in violation
of Rule 103(b)(2) of Chapter 2: Air Pollution Regulations (35
Ill. Adm. Code 201.144) and Section 9(b) of the Illinois Environ-
mental Protection Act (Act).

Count VIII alleged that the Respondent, Borden Chemical,
constructed two holding lagoons (i.e., a settling lagoon and a
sludge storage lagoon) and consequently modified its treatment
works without Agency authorization to construct and discharge
pollutants into Illinois waters from a point source in violation
of Rule 901 of Chapter 3: Water Pollution Regulations (35 Ill.
Adm. Code 309.102); Rules 910(n)(1) and 910(n)(2) of Chapter 3
(35 Ill. Adm. Code 309.154); and Sections 12(a), 12(b), and 12(f)
of the Act.

Count IX alleged that, during various specified months between August, 1979 and September, 1981, the Respondent discharged effluent containing excessive concentrations of BOD₅ and total suspended solids (TSS) from its plant and from a point source into Long Point Slough via an unnamed ditch in violation of Rule 410(a) of Chapter 3 (35 Ill. Adm. Code 304.141) and Rule 901 of Chapter 3 (35 Ill. Adm. Code 309.102) and Sections 12(a) and 12(f) of the Act.

Count X alleged that the Respondent caused or allowed the discharge of effluent from a point source at its chemical plant: (1) in excess of the "daily average" weight of 23 kilograms BOD₅ set by its NPDES Permit during 3 specified months in 1979 and two specified months in 1981; (2) in excess of the "daily maximum" of 58 kilograms BOD₅ during 4 specified months in 1979 and 3 specified months in 1981; (3) in excess of the "daily average" of 28 kilograms of TSS during 4 specified months in 1979, 5 specified months in 1980, and 7 specified months in 1981; and (4) in excess of the "daily maximum" of 70 kilograms TSS during 4 specified months in 1979, 4 specified months in 1980; and 3 specified months in 1981 in violation of Rule 410(a) of Chapter 3 (35 Ill. Adm. Code 304.141) and Rule 901 of Chapter 3 (35 Ill. Adm. Code 304.102) and Sections 12(a) and 12(f) of the Act.

Count XI alleged that Borden Chemical discharged effluents from its facility into Long Point Slough which contained concentrations of BOD₅ in excess of 10 mg/l and concentrations of TSS in excess of 12 mg/l during various months between August, 1979 and March, 1981 in violation of Rule 404(c) of Chapter 3 (35 Ill. Adm. Code 304.120(c)) and Section 12(a) of the Act.

Count XII alleged that, on at least 4 specified dates between June 10, 1981 and November 17, 1981, the Respondent discharged effluent from its plant into an unnamed ditch so as to cause the ammonia nitrogen concentration in the receiving stream to exceed the 1.5 mg/l maximum concentration allowed under Rule 203(f) of Chapter 3 (35 Ill. Adm. Code 302.212) in violation of Rules 203(f) and 402 (35 Ill. Adm. Code 304.105) of Chapter 3 and Section 12(a) of the Act.

Count XIII alleged that, from March 1980 until November 17, 1981, the Respondent caused or allowed the discharge of effluent from its water treatment facility and its chemical plant in excess of the average daily flow maximum initially established in Construction Permit #1975-EB-915-COP without obtaining a new permit from the Agency in violation of the terms and conditions of Construction Permits #1975-EB-915-COP, #1976-EB-1628-COP, and #1979-EN-4905, thereby violating Section 12(b) of the Act.

Additionally, Count XIII alleged that the Respondent caused or allowed production increases which, in turn, caused increased

discharges of pollutants without submitting a new NPDES permit application in violation of the terms and conditions of its NPDES Permit; Rule 901 of Chapter 3 (35 Ill. Adm. Code 309.102) and Sections 12(a) and 12(f) of the Act.

Hearings were held on January 18, 1983 and November 4, 1983. The parties filed a Stipulation and Proposal for Settlement on November 14, 1983.

On February 22, 1984, the Board entered an Order which requested more information as to how the amount of the proposed stipulated penalty of \$30,000 was decided upon by the parties. On March 22, 1984, the Respondent filed a Motion for Extension of Time which asked for an extension of time until April 13, 1984 to respond to the Board's Order of February 22, 1984 and the Respondent stated that the Complainant joined in this request. On April 5, 1984, the Board entered an Order granting the motion for additional time. On April 12, 1984, the Agency filed a Motion for Extension of Time and indicated that the Respondent joined in the request. On April 19, 1984, the Board granted this motion. On April 27, 1984, Borden Chemical filed its Reply to the Board's Order for Additional Information. On April 30, 1984, the Agency filed a Motion for Reconsideration and a Memorandum of Law in support of its motion.

In the Agency's Motion for Reconsideration, the Agency noted that the stipulation "was agreed upon only after lengthy and intensive negotiations which began in September 1981 and which did not conclude until Fall, 1983...While the Attorney General and the IEPA took the factors cited by the Board in its Order into account in reaching settlement with Respondent, it is impossible to weigh or quantify the relative impact of each on the agreed penalty of \$30,000..." (Complainant's Motion for Reconsideration, p. 1-2).

The Agency's Motion for Reconsideration is hereby granted. Upon reconsideration, the Board will accept in its entirety the previously filed Stipulation and Proposal for Settlement.

Parenthetically, the Board notes the Agency's claim that "the Board Order of February 22, 1984 intrudes" on the Attorney General's "prosecutorial authority". The Board appreciates the Agency's concerns that openly delineating the factors that were considered in reaching a proposed stipulated penalty may, in certain cases, potentially reveal "settlement strategies to potential Respondents". (Agency's Motion for Reconsideration, p. 2). Nevertheless, such concerns cannot supersede the Board's duty to review, or the public's right to participate in, enforcement actions. The Board has a duty to consider the facts and circumstances bearing on a proposed settlement agreement and to impose a penalty upon finding a violation. (Section 33 and Section 42 of the Act). Also, at the required public hearing on

such proposed agreements, pursuant to 35 Ill. Adm. Code 103.180(b) "all interested persons may testify" and give "their views on the proposed stipulation and settlement".

Section 103.180(c) states:

"The Board may accept, suggest revisions in, reject the proposed settlement agreement and stipulation, or direct further hearings as it appears appropriate."

Since the Board has such legal power and authority, further inquiry is well within the scope of the Board's authority.

Finally, the Board notes that, after the Board's February 22, 1984 Order in PCB 81-132, the Attorney General has, on behalf of the Agency, engaged in discussions about the ramifications of the various factors that the Board has inquired about. (See: E.P.A. v. City of Galva, PCB 84-3 and PCB 84-4 consolidated; pages four and five of the hearing transcript of April 18, 1984). The Board encourages the articulation of such factors in future cases involving proposed settlement agreements.

The Respondent, Borden Chemical, is a division of Borden, Inc. and is duly authorized by the Illinois Secretary of State to transact business in Illinois. The Respondent has, for a period of about 28 years, owned and operated a chemical plant in Illinois at the intersection of Cantrall Road and South Victory Drive in Sangamon County, Illinois. (Stip. 3; see: Exhibit A). Borden Chemical produces polyvinyl chloride (PVC) resins, PVC latex and acetate emulsions, and polystyrene butadiene emulsions at its chemical plant. Wastewater is discharged into an unnamed ditch tributary to Long Point Slough, a navigable Illinois water, which in turn is tributary to the Sangamon River, pursuant to the Respondent's NPDES Permit No. IL 0001350. (See: Exhibit E).

Borden Chemical's polyvinyl chloride production process presently includes six PVC production lines which are designated "PVC System No. 1; PVC System No. 1A; PVC System IIA - Monomer Handling and Storage; PVC System 4-A; PVC Paste Resin Manufacturing Line; and VCM Incinerator Scrubber". (Stip. 3). Because all production line processes are capable of emitting vinyl chloride monomer (VCM) into the atmosphere, an Operating Permit from the Agency is required for each line.

Although the Respondent has admitted that, during the time periods alleged in Counts I through VII of the Amended Complaint, it did not have the requisite permits from the Agency for these production lines, Borden Chemical has pointed out various extenuating circumstances which, in its view, mitigate the technical permit violations.

The Respondent has noted that it received NESHAPS waivers for its VCM emissions from the USEPA in 1977 and believes that

its waiver application to the USEPA was substantially identical in content to the prior applications it made to the Agency for air operating permits for its PVC production lines. (Stip. 4). Accordingly, Borden Chemical believes that the Agency should have granted the air operating permits pursuant to Section 9.1 of the Act instead of denying these applications.

On the other hand, the Agency believes that its denial was appropriate, since it had received some information outside of the applications which indicated that there was a potential for air pollution from the Respondent's production lines. (Stip. 4).

Moreover, Borden Chemical did not file any permit denial appeals, but instead submitted further applications in 1977, 1978, 1979, and 1982 until the Agency issued an Operating Permit for PVC Systems 1 A, 2 A, and 4 A on August 26, 1982. (See: Exhibit B). Borden Chemical has asserted that its 1982 application was, in content, the same as its prior applications which the Agency had denied, while the Agency maintains that it granted Borden Chemical's Operating Permit because it received information from the USEPA relating to NESHAPS compliance testing which demonstrated "no present danger" of air pollution from those production lines. (Stip. 5). The Agency has indicated that it did not have such testing data at the time that it received, and acted upon, Borden Chemical's prior air operating permit applications. (Stip. 5).

The parties have stated that a similar situation existed in relation to Borden Chemical's "polyco" production line which produces polyvinyl acetate emulsion and polystyrene butadiene emulsion and emits waste gases, principally hydrocarbons, into the atmosphere. After initially obtaining an Operating Permit from the Agency for the "polyco" production line in 1973 and having the permit subsequently renewed, the Agency denied a later permit application on July 27, 1978. On December 18, 1979, Borden Chemical submitted a second renewal application for an Operating Permit for the "polyco" production line which was denied by the Agency on January 22, 1980. (Stip. 6). However, the company's third renewal application for an Operating Permit was submitted to the Agency on November 8, 1982 and the Agency then granted Borden Chemical its Operating Permit for the "polyco" production line on February 2, 1983.

Although the company asserts that its November 8, 1982 permit application was identical in content to its previous applications on May 5, 1978 and December 19, 1979, the Agency maintains that the Respondent's third renewal application was significantly different from the two prior applications because the Agency had received compliance test data relating to the "polyco" production line emissions and the Respondent had added a second condenser to its line pursuant to a Construction Permit granted by the Agency on August 22, 1982.

In reference to Count VIII of the Amended Complaint, the parties have indicated that the two lagoons in question are integral parts of the Respondent's wastewater treatment system for the treatment of "production process" wastewaters. (Stip. 7; see: IEPA v. Borden Chemical, PCB 79-1, July 12, 1979; Exhibits C and D). On January 20, 1982, Borden Chemical applied to the Agency for a combined Construction-Operating Permit for its Pond No. 3 and the Agency issued the requisite combined permit on February 22, 1982. However, the company had operated Pond No. 8 from June, 1978 until February 22, 1982 without the appropriate authorization from the Agency. Similarly, Borden Chemical applied to the Agency for a combined Construction-Operating Permit for its sludge storage lagoon on June 29, 1982. Although its initial application was denied, the Respondent reapplied and the Agency granted the company the requisite permit on October 4, 1982. Nonetheless, Borden Chemical had operated its sludge storage lagoon from 1976 until October 5, 1982 without the necessary Agency authorization.

The alleged violations in Counts IX, X, and XI of the Amended Complaint relate to discharges of wastewaters into Long Point Slough. According to the Illinois State Water Survey, Long Point Slough has a 7-day, 10-year low flow of zero. The parties have stated that the BOD₅ and TSS limits delineated in Borden Chemical's NPDES Permit No. IL001350 were established in expectation of an average daily flow of 600,000 gallons per day (gpd). (See: Exhibit E). However, during the time period between 1979 and 1983, Borden Chemical's daily flow has averaged 671,000 gpd, while its daily maximum flow has averaged 821,000 gpd. (Stip. 10). Accordingly, Borden Chemical anticipates that "its forthcoming renewal NPDES permit will contain new quantity limits reflecting an expected average daily flow of 1,000,000 gpd and a daily maximum of 1,200,000 gpd." (Stip. 10). It is stipulated that, on various occasions, Borden Chemical allowed the discharge of effluents containing excessive concentrations and quantities of BOD₅ and TSS as indicated in discharge monitoring reports submitted to the Agency. (Stip. 10-11).

As alleged in Count XII of the Amended Complaint, the Respondent discharged effluent from its plant into the unnamed ditch to cause the ammonia nitrogen levels in the receiving stream to exceed the 1.5 mg/l standard. Agency water samples taken on 5 specified dates between June 10, 1981 and July 22, 1981 indicated ammonia nitrogen levels in the Respondent's effluent varying between 2 mg/l and 25 mg/l, while ammonia nitrogen levels in the unnamed ditch were between 2.3 mg/l and 8.0 mg/l. (Stip. 12).

The parties have stated that the Respondent has taken positive steps in good faith to correct the violations alleged in the Amended Complaint. Borden Chemical has now obtained the necessary permits from the Agency for each of the PVC production lines referred to in Counts I through VII of the Amended Complaint.

The Respondent has also obtained the requisite Construction and Operating Permits for the sludge storage lagoon and Pond No. 8 referred to in Count VIII of the Amended Complaint. Additionally, since March 1, 1982, Borden Chemical has been in compliance with all applicable BOD₅ and TSS concentration limits as mentioned in Counts IX through XI of the Amended Complaint. (Stip. 13; see: Exhibits F & G). Moreover, Borden Chemical had, by October 1, 1982, made several important modifications and additions to its wastewater treatment system to improve the control of the Respondent's BOD₅, TSS, and ammonia nitrogen discharges (as referred to in Count XII of the Amended Complaint). As part of its proposed settlement agreement, the Agency has withdrawn Count XIII of the Amended Complaint. (Stip. 12).

The wastewater treatment facility improvements, completed by October 1, 1982, which were intended to prevent possible environmental problems, include the: (1) construction of a final polishing "serpentine stream" which is designed to enhance the BOD and TSS reduction capability of the entire system while increasing the concentration of dissolved oxygen in the wastewater; (2) conversion of Pond No. 8 into a primary settling lagoon (from a sludge storage lagoon) to enhance the treatment of waste stream No. 1; (3) modification of the specialized "Oxygest" unit to increase the total activated sludge contact with waste stream No. 1; (4) installation of chemical feeders to Clarifier No. 1 in order to enhance the treatment of waste stream No. 2; (5) diversion to the "serpentine stream" of boiler plant regeneration, wash, and rinse waters from Pond No. 5 to improve the treatment of waste stream No. 3; (6) construction of a new laboratory building; and (7) installation of new monitoring instrumentation to improve water quality control. (Stip. 13; see: Exhibits F & G).

The settlement proposal includes various provisions pertaining to ammonia nitrogen levels; off-site disposal of chemical sludge; and on-site disposal of chemical sludge and biological sludge.

In reference to compliance with the recently amended ammonia nitrogen water quality rule of 35 Ill. Adm. Code 302.212, the Agency and Borden Chemical agreed in September of 1982 that "further study" of the effectiveness of the wastewater treatment plant modifications was advisable. Accordingly, on October 1, 1982, Borden Chemical commenced a 12-month compliance program which included: (1) collection of weekly grab samples of effluent at specified discharge and sampling points; (2) analysis of these samples for ammonia nitrogen concentration, pH, and temperature; (3) submission of the analyses on a monthly basis to the Agency; (4) prompt reporting of any excursions and the expeditious correction of any problems leading to such excursions; (5) prompt submission of information pertaining to the details involving any upset or breakdown of the wastewater treatment plant (including

detailing of corrective measures to be taken); and (6) submission of a report to the Agency by December 1, 1983 which summarizes the performance of the wastewater treatment plant in meeting the amended ammonia nitrogen water quality rule (35 Ill. Adm. Code 302.212) along with specific plans to correct the causes of any excursions occurring between October 1, 1982 and September 31, 1983 and to prevent any future excursions. (Stip. 14-15).

Although Borden Chemical has been disposing of some chemical sludge on-site for a number of years and believes that such disposal is exempt from regulation under Section 21(d) of the Act, the Respondent has agreed that, within 90 days of the date of the Stipulation and Proposal for Settlement, it will submit to an Agency-approved disposal site operator sufficient information to allow that operator to file permit applications with the Agency for the hauling and off-site disposal of all chemical sludge which may subsequently be generated by Borden Chemical's wastewater treatment plant. Moreover, the Respondent has agreed that, within 30 days after the proper permits are issued, it will begin its off-site disposal of all such chemical sludge. (Stip. 15-16).

The proposed settlement agreement also provides that Borden Chemical submit a detailed "Plan of Action" to the Agency pertaining to an assessment of previous on-site chemical sludge disposal practices and prior (and continuing) biological sludge disposal practices at the Respondent's facilities, including a timetable for the completion of each task element and plans for any necessary corrective action. (Stip. 16-18). The parties have noted that Special Condition No. 4 of the Construction and Operating Permit for Borden Chemical's sludge storage lagoon, issued October 5, 1982, mandated that the Respondent apply for an Agency permit for on-site disposal of biological sludge. Although Borden Chemical subsequently applied for this permit, the Agency denied the permit on the grounds that insufficient information was provided by the company. (Stip. 17). The Agency has asserted that the Respondent must obtain the necessary permit in order to dispose of biological sludge on-site and must meet all established conditions, such as a groundwater monitoring program, before proceeding with any further on-site disposal of biological sludge. (Stip. 18).

Furthermore, the Agency has agreed to issue a draft renewal of the Respondent's NPDES Permit within 30 days of the date of the Stipulation and Proposal for Settlement. It is intended that the draft renewal of the NPDES Permit will go through the appropriate review and comment process mandated by Federal and Illinois law. (Stip. 18).

Additionally, the parties have agreed to a stipulated penalty of \$30,000 which will be deposited into the Environmental Protection Trust Fund for the purposes of environmental protection and related enforcement programs. (Stip. 18).

In evaluating this enforcement action and proposed settlement agreement, the Board has taken into consideration all the facts and circumstances in light of the specific criteria delineated in Section 33(c) of the Act and finds the settlement agreement acceptable under 35 Ill. Adm. Code 103.180.

The Board finds that the Respondent, Borden Chemical, has violated Rule 103(b)(2) of Chapter 2: Air Pollution Regulations (35 Ill. Adm. Code 201.144); Rule 203(f) of Chapter 3: Water Pollution Regulations (35 Ill. Adm. Code 302.212); Rule 402 of Chapter 3 (35 Ill. Adm. Code 304.105); Rule 404(c) of Chapter 3 (35 Ill. Adm. Code 304.120(c)); Rule 410(a) of Chapter 3 (35 Ill. Adm. Code 304.141); Rule 901 of Chapter 3 (35 Ill. Adm. Code 309.102); and Rules 910(n)(1) & 910(n)(2) of Chapter 3 (35 Ill. Adm. Code 309.154) and Sections 9(b) 12(a), 12(b), and 12(f) of the Act. The Board will dismiss Count XIII of the Amended Complaint as per the Agency's proposed settlement agreement with the Respondent. The Respondent will be ordered to follow the specified compliance plan and to pay the stipulated penalty of \$30,000.

This penalty is to be made payable to the Environmental Protection Trust Fund (Trust Fund), pursuant to the authority to so order granted to the Board in Section 42(a) of the Act as amended by P.A. 83-0618, effective September 19, 1983. The legislation creating the Trust Fund and a Commission to administer it was P.A. 81-951 effective January 1, 1980 and codified as Ill. Rev. Stat. 1983, ch. 111½ §1061. That legislation provides in pertinent part that

"The Commission may accept, receive and administer ...any grants, gifts, loans, or other funds*** provided that such monies shall be used only for the purposes for which they are contributed and any balance remaining shall be returned to the contributor..."

The Board wishes to emphasize that it does not construe the quoted portions of the Trust Fund Act as giving a potential right of recovery for penalties ordered to be paid into the Trust Fund pursuant to Section 42(a) of the Environmental Protection Act. When the Trust Fund was created, the legislature obviously envisioned that the fund was to receive voluntary gifts or contributions, to either be used for environmental purposes or to be returned so as to avoid frustration of the intention of the donor of the gift.

Payment of a penalty for violation of the Environmental Protection Act is a compulsory, and not a voluntary, act. There is no right of recovery for a penalty paid into the general revenue fund. In allowing penalty monies to be paid into the Trust Fund, the legislature has clearly implied that such penal-

ties may, in essence, be earmarked for any appropriate environmental purpose. The Board concludes that to construe the Trust Fund Act as implying a right of recovery for penalties deposited into it runs counter to the intention of the Environmental Protection Act.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

It is the Order of the Illinois Pollution Control Board that:

1. The Respondent, Borden Chemical, has violated Rule 103(b)(2) of Chapter 2: Air Pollution Regulations (35 Ill. Adm. Code 201.144); Rule 203(f) of Chapter 3: Water Pollution Regulations (35 Ill. Adm. Code 302.212); Rule 402 of Chapter 3 (35 Ill. Adm. Code 304.105); Rule 404(c) of Chapter 3 (35 Ill. Adm. Code 304.120(c)); Rule 410(a) of Chapter 3 (35 Ill. Adm. Code 304.141); Rule 901 of Chapter 3 (35 Ill. Adm. Code 309.102), and Rules 910(n)(1) & 910(n)(2) of Chapter 3 (35 Ill. Adm. Code 309.154); and Sections 9(b), 12(a), 12(b), and 12(f) of the Illinois Environmental Protection Act.

2. Count XIII of the Amended Complaint is hereby dismissed.

3. The Agency's April 30, 1984 Motion for Reconsideration is hereby granted. Upon reconsideration, the Board accepts in its entirety the Stipulation and Proposal for Settlement filed on November 14, 1983.

4. Within 30 days of the date of the Order, the Respondent shall, by certified check or money order payable to the State of Illinois and designated for deposit into the Environmental Protection Trust Fund, pay the stipulated penalty of \$30,000 which is to be sent to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
Springfield, Illinois 62706

5. The Respondent shall comply with all the terms and conditions of the Stipulation and Proposal for Settlement filed on November 14, 1983, which is incorporated by reference as if fully set forth herein.

IT IS SO ORDERED.

J. Theodore Meyer concurred.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 18 day of May, 1984 by a vote of 6-5.



Christan L. Moffett, Clerk
Illinois Pollution Control Board