ILLINOIS POLLUTION CONTROL BOARD
March 22, 1985

PEOPLE OF THE STATE OF ILLINOIS and THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY	)	
Complainants	)	
v.	)	PCB 83-226
ARCHER DANIELS MIDLAND CORPORATION, a Delaware Corporation,	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Marlin):

This matter comes before the Board on a December 9, 1983 complaint filed by the Illinois Attorney General on behalf of the People of the state of Illinois (People) and of the Illinois Environmental Protection Agency (Agency). An amended complaint was filed on June 11, 1984 which alleged that on or about April 14, 1983, respondent discharged benzene at a concentration of approximately 300 ppm into the waters of the state so as to cause or threaten to cause water pollution in violation of §12(a) of Illinois Environmental Protection Act (Act); that allegedly respondent thereby conducted a hazardous waste disposal operation without a RCRA permit in violation of §21(f); that respondent allegedly constructed, installed, operated, or modified equipment without the necessary Agency permits in violation of §§9(a) and (b) of the Act and 35 Ill. Adm. Code 201.142 and 201.143.

A hearing was held on November 19, 1984 at which time a document entitled a "stipulation, statement of facts, and proposal for settlement" (stipulation) was summarized. The stipulation was filed with the Board on November 19, 1984.

The stipulation included a conditional statement of facts of which the parties agreed to only for the purpose of settlement and only if the Board accepted the stipulation in its entirety. The respondent, Archer Daniels Midland Company (ADM), neither admitted nor denied the allegations of the complaint.

It was stipulated that ADM uses benzene to produce anhydrous alcohol at its Peoria plant, located on the Illinois River. The Agency summarized into the stipulation its allegations from the first amended complaint, however, ADM neither admitted nor denied the allegations in the first amended complaint or the Agency representations in the stipulation. ADM has installed a microprocessor based process gas chromatograph in return for the resolution of this proceeding and has agreed to pay a penalty of $12,500 to the Illinois Environmental Trust Fund.

Rejection of the Stipulation

The basis for rejection of this stipulation is the Board's conclusion that it lacks statutory authority to accept settlements requiring payment of stipulated penalties and imposing compliance conditions without a Board finding of violation, based either on admissions or evidence contained in the record. The legislatively-created Board derives its enforcement powers and duties from the Act and the Administrative Procedure Act (APA), Ill. Rev. Stat. ch. 127 §1001 et seq. Section 33(a) of Title VIII: "Enforcement" of the Act empowers and requires the Board, after hearing, to "issue and enter such final order, . . . as it shall deem appropriate . . . [and shall] file and publish a written opinion stating the facts and reasons leading to its decision." The "written opinion" requirement of Section 33(a) has a counterpart in Section 14 of the APA, requiring in contested cases "findings of fact and conclusions of law".

Section 33(b) of the Act provides that "[s]uch [Section 32(a)] order may include a direction to cease and desist from violations of the Act or of the Board's rules, . . . and/or the imposition by the Board of civil penalties in accord with Section 42 of this Act." The pertinent subsection of the Section, Section 42(a), provides that

> "Any person that violates any provisions of this Act or any regulation adopted by the Board, or any permit or term or condition thereof, or that violates any determination or order of the Board pursuant to this Act, shall be liable to a civil penalty of not to exceed $10,000 for said violations and an additional civil penalty of not to exceed $1,000 for each day during which violation continues; such penalties may, upon order of the Board or a court of competent jurisdiction, be made payable to the Environmental Protection Trust Fund, to be used in accordance with the provisions of "An Act creating the Environmental Protection Trust Fund", approved September 22, 1979, as amended.

The Act does not specifically mention settlement procedures. However, pursuant to the authority granted under Section 26 of the Act, the Board has adopted a procedural rule, 35 Ill. Adm. Code 103.180, permitting and providing requirements for submittal of a proposed settlement or compromise. A written statement is to be filed containing, among other things a "full stipulation of all material facts pertaining to the nature, extent, and causes of the alleged violation", a proposed compliance plan, and a proposed penalty. In line with the hearing requirements of Sections 31 and 32 of the Act, the written proposal is to be presented at public hearing for citizen comment on the alleged violations and proposed settlement terms. The Board has provided that it shall "consider such

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

Viewing the ADM stipulation in light of these various statutory and regulatory requirements, it is clear that the Board cannot make any required findings of fact and conclusions of law beyond one that the parties wish to settle the case for $12,500 payable to the Trust Fund. To the extent the Act authorizes the Board to order payment of a penalty, the authority is premised on a finding of violation. As the stipulation resists a Board attempt to make such a finding, and as the Act does not authorize the Board to accept, on the part of the State, "voluntary contributions" in settlement of "nuisance suits", the penalty portion of the stipulation must be rejected. Regarding the compliance plan, it appears that the gas chromatograph has already been installed. The Board notes that in the absence of a finding of violation, the Board is placed in the position of ordering accomplishment of "voluntary remedial activities" to correct "non-existing" non-compliance.

The parties have not addressed the Board's statutory authority to accept this stipulation. However, the Board, in IEPA v. Chemetco, PCB 83-2, February 20, 1985, addressed various policy arguments by the Attorney General in favor of accepting that stipulation in the absence of findings of violation. Since the Board presumes that the Attorney General would make similar assertions here, the Board will again address them here. In Chemetco, the Attorney General asserted that the law favors settlements, that a finding of violation destroys the essence of the bargain and protracts litigation, and that the Board has in a few cases imposed fines without a finding of violation. While not articulated in Chemetco, it might also be argued that the effect of the Board's decision interferes with the Attorney General's otherwise broad powers of prosecutorial discretion.

While these policy arguments might support a legislative change, they run counter to the Board's plain reading of the Act. The Board recognizes that the courts have accepted settlements between two parties without admissions. The courts, however, have inherent common law powers the Board does not possess. Additionally, the Act inherently recognizes that pollution issues affect the interest of other persons, above and beyond the parties, as Section 2 of the Act makes clear. The Board suggests that the Act was deliberately framed to require the Board to make findings of violations, so as to assure that compliance and payment of a penalty is a compulsory, not a voluntary act. Existence or lack of findings of violation may also be important in the event of subsequent filing of enforcement actions against the same source: previous findings of violation may properly be considered as aggravating circumstances affecting penalty deliberations in later cases. The Board also notes, pursuant to Section 31, that complaints may

be filed, and settlements reached, by citizens who take on the status of "private attorneys general", and questions whether wide prosecutorial discretion also accrues to such persons concerning stipulated penalties and compliance conditions.

Regarding the $12,500 designated by the parties as a "penalty", the Board has earlier in the Opinion found that the Act does not authorize it to order voluntary contributions to the Trust Fund. This is true even apart from the "findings of violation" issue. Specifically regarding the Trust Fund, the Board is authorized to order payments only of unrecoverable penalties into that Fund pursuant to the authority granted to the Board in Section 42(a) of the Act as amended by P.A. 83-0618, effective September 19, 1983. Penalties do not encompass volunary contributions. 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. 111 1/2 ¶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 be used either 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 penalties 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.

Certification For Interlocutory Appeal

This "finding of violation" issue has applicability to every enforcement case brought before the Board. In fact, the Board on February 20, 1985 rejected several proposed stipulated settlements requiring payment of penalties or other "gifts" or "sums" and timely performance of compliance plans, in five cases where no findings of violation could be made: IEPA v. Chemetco, PCB 83-2 ($20,000 penalty, compliance plan and schedule), Docket No. 5-85-143 (Fifth District); IEPA v. Arnold's Sewer and Septic Service & Jimmy McDonald, PCB 83-23 ($300 "sum", "prohibition" from violations of the Act); People v. Joslyn Mfg. & Supply Co. and Herman Zeldenrust, PCB 83-83 ($8,000 penalty, $14,000 "payment", ceast and desist order); People v. City of Chicago, et al., PCB 81-190 ($3,000 penalty, $9,500 "voluntary contribution" stepped-up cross connection enforcement program); and IEPA v. City of Galva, PCB 84-3, 84-4 (consolidated) ($3,375 penalty, complex program of system improvements). For these reasons, as well as the fact that a contrary result would have ended this action, the Board on its own motion hereby issues a statment (also known as a Certificate of Importance) to allow for immediate interlocutory appellate review of the Board's Order pursuant to Supreme Court Rule (SCR) 308. SCR 308(a) provides, in pertinent part that

> "When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. The Appellate Court may thereupon in its discretion allow an appeal from the order."

The Board has authority to issue such a statement (see Getty Synthetic Fuel v. PCB, 104 Ill. App. 3d 285 (1st Dist. 1982).

Pursuant to SCR 308, the Board finds that this Order a) "involves a question of law as to which there is substantial ground for difference of opinion", and b) immediate appeal "may materially advance the ultimate termination of [this] litigation". The question of law certified for appeal is as follows:

> Whether the Board correctly determined that it lacks statutory authority, pursuant to Ill. Rev. Stat. ch. 111 ½, Sections 1032, 1033, and 1042 as they relate to Board acceptance of stipulations of fact and proposals for settlement in enforcement cases, to issue Opinions and Orders in which any Board findings of violation are precluded by the terms of the stipulation and proposal, but in which respondent is ordered to pay a stipulated penalty or voluntary

contribution and to timely perform agreed-upon compliance activities.

Finally, in the event of an interlocutory appeal, the Board will entertain a motion to stay its Order that this action go to hearing.

Should the parties determine that they wish to file an amended settlement agreement containing sufficient admissions of violation to support the remedy, or to allow the Board to modify the agreement, they may file the appropriate pleadings within 35 days.

IT IS SO ORDERED.

Board Members J.D. Dumelle and W.N. Nega dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 22nd day of March, 1985 by a vote of 4-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board