ILLINOIS POLLUTION CONTROL BOARD
September 5, 1985

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY Complainant, v. CORN BELT FS, INC. Respondent.	)	PCB 84-11

OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

This matter comes before the Board on a six-count complaint filed January 24, 1984, by the Illinois Environmental Protection Agency ("Agency") against Corn Belt FS, Inc. ("Corn Belt"). The complaint alleges the following violations by Corn Belt:

Count 1: §12(a) of the Illinois Environmental Protection Act ("Act") (causing or threatening or allowing the discharge of contaminants into the environment so as to cause water pollution), resulting in the fish kill of an estimated 418,038 fish in the unnamed tributary of Long Point Creek, Long Point Creek, and Kickapoo Creek;

Count 2: §12(a) of the Act and 35 Ill. Adm. Code 306.102(b) (failure to take measures to prevent spillage of contaminants from causing water pollution), relating to Corn Belt's Wapella, Macon, DeWitt, Decatur, Niantic, and Clinton facilities;

Count 3: §12(a) of the Act, 35 Ill. Adm. Code 302.212 (water quality standards for ammonia nitrogen and un-ionized ammonia) and 304.105 (prohibiting any effluent, alone or in combination with other sources, from causing a violation of any applicable water quality standard);

Count 4: §12(a) of the Act, 35 Ill. Adm. Code 302.203 (requiring waters of the State to be free from unnatural sludge or other unnatural matter) and 304.105;

Count 5: §12(f) of the Act (causing, threatening, or allowing the discharge of any contaminant into the waters of the State without an NPDES permit), 35 Ill. Adm. Code 304.141(b) (prohibiting discharges subject to, or which contribute or threaten to cause a violation of, any applicable federal or state water quality standard, effluent standard, guideline or other limitation, unless limitation for such a pollutant has been set

forth in an applicable NPDES permit) and 309.102 (making the discharge of any contaminant by any person into the waters of the State from a point source unlawful, except for those discharges in compliance with the Act, Board regulations, The Clean Water Act, and the provisions and conditions of the NPDES permit issued to the discharger);

Count 6: §42(c) of the Act (allowing recovery, in addition to the other penalties provided by the Act, for the reasonable value of the fish or aquatic life destroyed through violation of the Act), §§12(a) and 12(f) of the Act.

Corn Belt owns and operates agricultural sales and service facilities in the central portion of the State, including locations in Wapella, Decatur, Niantic, Macon, Kenney, De Witt, and Clinton. Respondent stores various liquid products, including 28 percent urea-ammonium nitrate, petroleum products, alcohol and herbicides in storage tanks at various locations, including those mentioned above.

Hearing was held in Clinton, De Witt County, Illinois on June 4, 1985. One member of the general public attended the hearing. At that time, a settlement agreement signed by both parties was presented. The agreement provides a statement of facts which the parties agree represents a fair summary of the evidence which would be introduced if a full hearing were held. The stipulated facts include the following. On March 9, 1983 leaking occurred from two storage tanks at Corn Belt's Wapella facility. These tanks contained 28 percent urea-ammonium nitrate, and though the facts are somewhat vague it appears approximately 18,000 gallons of this material escaped from the tanks. This effluent eventually entered an unnamed tributary of Long Point Creek, and later Long Point Creek itself and Kickapoo Creek. The revised estimate of the fish kill resulting from this discharge is 358,957 fish with a value of $22,829.43. Corn Belt did not possess an NPDES permit for the discharges from the Wapella facility on March 9, 1983.

The terms of the settlement agreement, in toto, are reproduced for reference purposes below:

TERMS OF SETTLEMENT

A. Corn Belt admits the violations as alleged in Counts I, III, IV and V of the Complaint. In response to Count VI, Corn Belt admits that it caused the death of an estimated 358,957 fish with a reasonable value of $22,829.43.

B. Corn Belt does not acknowledge the applicability of 35 Ill. Adm. Code §306.102(b) as alleged in Count II of the Complaint but in settlement of this action has agreed to carry out the actions specified in Paragraphs C, D, E, F, and G.

C. Corn Belt agrees to cease and desist from further violations of the Act and the Board's regulations.

D. In order to prevent future discharges of spilled or leaked materials into waters of the State, Corn Belt agrees to institute the following measures at each of its facilities:

1. Corn Belt will continue its program of regular inspections of its storage tanks, as described in Paragraph 12 of the Statement of Facts, at all of its facilities;

2. Corn Belt has installed new stainless steel fittings and valves on each of its storage tanks to guard against valve failure and where it has not already done so will install locks on all valves on all storage tanks, pumps, and transfer pipes in order to prevent discharges due to acts of vandalism; and

3. Inspections on at least a weekly basis of the integrity of spill containment structures such as dikes will be conducted.

E. Corn Belt also agrees to carry out the following measures at each facility in addition to the work already completed at the Wapella facility as described in Paragraph 12 of the Statement of Facts:

1. Wapella:

   a. Construct a berm around the loading area, in accordance with the diagram attached hereto as Exhibit D, by June 30, 1985;

   b. Obtain Agency approval prior to returning the plant's liquid storage pit to service for containing chemicals or wastewater; and

   c. If the plant's Emergency and Response Planning document has not been revised to reflect the installation of the new containment area and other modifications, these revisions should be made and filed with the Agency and appropriate local agencies including the local emergency response authority and the local fire department within 21 days from the date the Board approves the settlement agreement.

2. Decatur

   a. Renovate and enlarge the existing dike to include all fertilizer and herbicide tanks and associated pumping facilities pursuant to plans reviewed and approved by the Agency by June 30, 1985; and

b. Provide wastewater collection facilities for the loading/unloading area(s) pursuant to plans reviewed and approved by the Agency by June 30, 1985.

3. Macon:

a. Relocate all fertilizer and chemical storage tanks and associated pumping facilities within a dike at another portion of the plant pursuant to plans reviewed and approved by the Agency by September 30, 1986; and

b. Provide wastewater collection facilities for the loading/unloading area(s) pursuant to plans reviewed and approved by the Agency by September 30, 1986.

4. Niantic:

a. Enclose all fertilizer and chemical storage tanks and associated pumping facilities within a containment dike pursuant to plans reviewed and approved by the Agency by September 30, 1987; and

b. Provide wastewater collection facilities for the loading/unloading area(s) pursuant to plans reviewed and approved by the Agency by September 30, 1987.

Kenney:

a. Construct a two-foot berm to the north of the existing fertilizer tanks to prevent spills from reaching the adjacent farmland pursuant to plans reviewed and approved by the Agency by June 30, 1988.

F. In the event a spill does occur or in the event water collected inside a containment area must be removed, it will be applied to agricultural land at rates not to exceed agrinomic rates for fertilizer materials or labeled rates for registered pesticides so as to avoid water pollution or discharges to waters of the State.

G. No fertilizer or chemical storage tanks are to be added at any site unless the tanks are placed within Agency-approved containment diking and addition of the tanks would not reduce the capacity of such diking below the point where it could contain the volume of the largest tank plus 10% of the volume of the remaining tanks.

H. Corn Belt agrees to pay a penalty in the amount of Six Thousand Dollars ($6,000.00) to the Environmental Protection Trust Fund in three installments of Two Thousand Dollars ($2,000.00). The first installment will be paid within six months of the issuance of the Board's Order accepting this settlement, the second installment within twelve months thereof,

and the final installment within eighteen months thereof. The parties agree that the payment Six Thousand Dollars ($6,000.00) into the Environmental Protection Trust Fund will aid in the enforcement of the Act.

I. In settlement of Count VI Corn Belt agrees to pay the sum of $22,829.43 into the Wildlife and Fish Fund of the State Treasury for causing the death of fish and aquatic life. The parties agree that the sum of $22,829.43, as calculated in the revised fish kill survey (Exhibit A), represents the reasonable value of the fish and aquatic life killed by the spill of 28%(N) by Corn Belt. Corn Belt will pay this amount within 30 days of issuance of the Board's Order accepting this settlement.

Acceptance of the Stipulation

The Board has statutory authority to accept settlement agreements which require payment of penalties and impose compliance conditions if such agreements contain admissions of violations of the Act and/or Board rules. In some recent Orders, the Board in divided decisions has rejected settlements in which the payment of penalties and imposition of compliance conditions were stipulated, but in which no violations of either the Act or Board rules was admitted. See Illinois Environmental Protection Agency v. Chemetco, Inc., PCB 83-2, interlocutory appeal docketed, No. 5-85-0143 (Illinois Appellate Court, Fifth District, February 20, 1985) and People v. Archer Daniels Midland Corporation, PCB83-226, interlocutory appeal docketed, Nos. 3-85-0222 and 3-85-0224 (Illinois Appellate Court, Third District, June 21, 1985).

Acceptance of this stipulation and settlement agreement does not involve the question of whether the Board has statutory authority to do so, however, because at least in this instance it clearly does. For every penalty and compliance condition imposed on Corn Belt by this agreement, there is a corresponding admission by the Respondent of violation of the Act and/or Board rules. Paragraph A of the "Terms of Settlement" section of the settlement agreement (p. 8) contains Corn Belt's admissions of all violations alleged in Counts I, III, IV and V of the Agency's complaint. The Board finds acceptable the stipulated payment of a $6,000 penalty to the Environmental Protection Trust Fund as a result of the commission of any or all of those violations.

The language of the agreement is not as clear regarding admissions of violations to support the compliance conditions and penalty relating to Counts II and VI, respectively. The ambiguity of the document causes the Board to look to the manifest intent of the parties as expressed by the character of the agreement itself. Through such an analysis the Board is able to find that the necessary admissions are impliedly made in the settlement agreement, and thus the Board is able to accept these portions of the settlement agreement as well.

The compliance conditions contained in the settlement agreement impose a number of preventive measures to be implemented at five of Respondent's facilities. These activities, by the terms of the agreement, are intended to prevent future discharges of spilled or leaked materials. The conditions correspond to Count II of the Agency's complaint, which alleged violations of §12(a) of the Act and 35 Ill. Adm. Code 306.102(b) at these facilities. In paragraph 3 of the "Terms of Settlement" Corn Belt specifically denies the applicability of 306.102(b) as alleged in Count II but agrees to carry out the compliance conditions. Neither paragraph 3, nor any other paragraph of the "Terms of Settlement", mentions Corn Belt's position in response to the Agency's allegations in Count II of §12(a) violations at Respondent's aforementioned sites. Corn Belt does, however, admit to violations of §12(a) by its admission of the §12(a) violations contained in Counts I, III, IV, and V. Since the compliance conditions agreed to by Corn Belt are clearly intended to alleviate §12(a) violations, the Board finds Respondent's other admissions of §12(a) violations sufficient to support the compliance conditions contained in the settlement agreement. In making such a finding the Board is in no way ruling on the applicability of 306.102(b) to Respondent's activities at issue in this case.

Count VI of the Agency's complaint asks for a $38,860 penalty pursuant to §42(c) of the Act for the value of fish killed as a result of the March 9, 1983 discharge in violation of §§12(a) and 12(f) of the Act. This sum was derived from the fish kill survey conducted by the Illinois Department of Conservation on March 12, 1983, which estimated that 418,033 fish had been killed. This figure was later revised to 358,957 fish killed with a value of $22,829.43, and this amount is the one found in the settlement agreement. The Board suspects that the revision in the estimated number of fish killed is responsible for the settlement agreement's failure to state outright that Corn Belt admits to the violations alleged in Count VI. This shortcoming notwithstanding, a plain reading of paragraph 1 of the "Terms of Settlement" shows that Corn Belt is here admitting to the applicability of §42(c). The first sentence of that paragraph reads "In settlement of Count VI Corn Belt agrees to pay the sum of $22,829.43 into the Wildlife and Fish Fund of the State Treasury for causing the death of fish and aquatic life". This is precisely the remedy provided by §42(c), which leads the Board to conclude that Respondent is in fact consenting to the application of that section to the present case. Count VI also alleged violations of §§12(a) and 12(f) of the Act; Corn Belt admitted to violations of these sections through its admissions to the violations as alleged in Counts I, III, IV and V, so these need not be discussed further.

Therefore, the Board accepts in full the Stipulation and Proposal for Settlement as submitted by the Agency and Corn Belt.

ORDER

The Illinois Pollution Control Board hereby orders that the Respondent fully comply with the Stipulation and Proposal for Settlement introduced at hearing on this matter on June 4, 1985, the terms of such agreement being reproduced on pages 2-5 herein.

IT IS SO ORDERED.

J. Theodore Meyer concurring, and Joan Anderson, Bill Forcade, and John Marlin dissenting.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 5th day of September, 1985, by a vote of 4-3.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board