ILLINOIS POLLUTION CONTROL BOARD
March 27, 1986

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	PCB 80-151
v.	)	
ARCHER DANIELS MIDLAND,	)	
Respondent.	)	

MR. VINCENT MORETH, SPECIAL ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF COMPLAINANT.

MR. WAYNE BICKES, ROSENBERG, ROSENBERG, BICKES, JOHNSON & RICHARDSON, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Theodore Meyer):

This matter comes before the Board on remand from the Fourth District Appellate Court of a $40,000 penalty imposed by the Board against Archer Daniels Midland ("ADM"). Archer Daniels Midland v. Illinois Pollution Control Board, 456 N.E.2d 914 (Ill. App. Ct. 1983). The court sustained the Board's findings of violation against ADM but vacated and remanded the penalty as being based on an inadequate foundation. In an attempt to settle the issue, the parties filed a Stipulation of Penalty on September 23, 1985 which contemplated a penalty of $15,000. By order of November 7, 1985, the Board rejected the penalty stipulation as being inadequate to aid in the enforcement of the Act and ordered the penalty issue back to hearing. Hearing was held on January 9, 1986 and the Agency filed its Second Brief in Support of Penalty on January 22, 1986. The Respondent's brief was filed on February 18, 1986 and the Agency's reply on March 3, 1986. The Agency recommends a penalty in the amount of $32,500 along with a payment of $1008.04 representing the value of fish killed by ADM. (Compl. Sec. Brief at 14). ADM, on the other hand, urges the Board to find that no penalty is appropriate or in the alternative to reverse the prior order of November 7, 1985 and accept the stipulation of the parties. (Resp. Brief at 6).

Briefly, the circumstances giving rise to the Agency's seven count complaint against ADM are as follows: ADM owns and operates a soybean extraction plant, corn germ extraction plant, and a vegetable oil refinery located in Decatur, Illinois. During rainfall events, stormwater becomes contaminated when rain flushes spilled grain and grain products into the stormwater

collection system. ADM retains as much of the initial stormwater as capacity will allow which is subsequently discharged to a wastewater treatment system. However, on various occasions overflows and bypasses of the retention system have occurred which resulted in contamined discharges to a small stream. This stream has been dammed to create the Homewood Fishing Club Lake around which approximately 16 residences have been erected. From the fishing club lake, the water eventually flows into Lake Decatur, a municipal reservoir. The stormwater bypasses were found to violate the Act and the Board's rules and a $40,000 fine was imposed.

On appeal, the Fourth District upheld the Board's findings of violation but vacated and remanded the penalty because it was arrived at based on an unexplained and unsubstantiated formula. Accordingly, the matter was remanded to the Board for "another determination as to whether under all the circumstances present any penalty is justified; and if so, to calculate it in conformity with the views expressed [by the court]." 456 N.E.2nd at 920. ADM now argues that this language "broadly insinuate[s] to the Board that this may be a case where no penalty is warranted" and thus contends that no penalty should be imposed. (Resp. Brief at 6). The Board rejects ADM's somewhat tortured construction of the court's language. First of all, if the court had felt that any penalty was clearly improper it could have simply vacated the $40,000 penalty without any remandment. Secondly, contrary to ADM's conclusion that the court is insinuating a desired result, the court clearly stated elsewhere in the opinion that "[w]e will not be understood as saying that a penalty is, or is not, justified under the circumstances here present. That is the prerogative of the Board." 456 N.E.2d at 920. It could not be more clearly stated that the court wished to give no opinion as to the advisability of a penalty in this case.

ADM argues alternatively that the Board should reverse its previous order and accept the stipulated penalty of $15,000. This argument is based on the assertion that the "Board should assume that the Agency and the Attorney General's personnel, in negotiating the penalty, would give careful consideration not only to the record in this cause and the directions of the Appellate Court . . . but would also consider the following elements:

(1) The spirit of cooperation demonstrated by ADM since the order in devising a compliance plan;

(2) The effort shown by ADM in producing and constructing a facility to eliminate the problems experienced in this area;

(3) The lack of complaints against ADM since the orders in

this case; and

(4) ADM's overall environmental compliance since the orders were entered."

(Resp. Brief at 2).

In response, the Board first would like to note that it does not assume otherwise than that careful consideration goes into the negotiation of a settlement agreement. However, the parties' assertion that a settlement is fair cannot serve to usurp the Board of its power and duty to exercise its independent discretion over settlement agreements. In its posture as a review board over settlements, the Board is obligated to ensure that all penalties will aid in the enforcement of the Act. In its November 7, 1985 order, the Board found that under the circumstances of this case, a $15,000 penalty was inadequate to do so. ADM also argues that the $15,000 stipulation should stand because it reflects a recognition by the parties of ADM's "spirit of cooperation" and efforts to achieve compliance "since the orders were entered" in this case. However, as ADM correctly notes, these "factors are not in the record." (Resp. Brief at 2). Accordingly, they cannot serve as the basis for a Board finding that the stipulated penalty would aid in the enforcement of the Act. Moreover, while compliance efforts taken prior to a finding of violation may have a mitigating effect on the penalty to be imposed, compliance efforts taken after the finding of violation are simply irrelevant.

Turning to the question of what penalty, if any, should be imposed in this enforcement case, the Board must consider the "reasonableness" of the discharges in light of the factors listed in Section 33(c) of the Act. The first factor, Section 33(c)(i), concerns an evaluation of the character and degree of injury or interference with the health, general welfare and physical property of the people. ADM argues simply that the violations did not pertain to discharges of product waste but only rainwater. ADM also claims as a point in its favor that no toxic substances were discharged and additionally that there is no evidence of any impact outside the immediate Homewood area. Finally, ADM asks that the Board take judicial notice that in time a lake such as Homewood Lake will eventually silt in and that this "practical consideration" must be taken into account when looking at the claimed harm.

The argument that only non-toxic "rainwater" was discharged by ADM significantly belittles the dramatic effect the discharges have had on Homewood Lake. Residents testified that while the lake had once been clear, clean and pretty, it now was "little short of a sewer condition." (R. at 510). Others testified that the lake now bubbles like a beer vat and gives off unpleasant smells. (R. at 471, 483, 1237, 1241).

While many testified that they had bought their homes, in part, because of the lake location, they feel that the location is no longer an asset. In fact, Mrs. Koontz testified that the lake impaired her property value and felt that no one would buy her house "if they knew the truth." (R. at 469). In addition to its effect on property values, the pollution has also impaired the lake for recreational purposes. Thus, the lake is no longer used for fishing, swimming and boating as it once was. (R. at 481-83, 513). Residents testified that they are even unable to use their own backyards at times because of the "stench" from the lake. (R. at 469-70, 483, 541). Mrs. Hudson testified that on two occasions in 1978, the entire lower half of her yard was coated with an oily tan film after flooding incidents. (R. at 549).

In addition to its impairment as a recreational and aesthetic resource, the lake has also been damaged as a habitat for wildlife. According to a report entitled "Report of Pollution Caused Fish Kill Investigations of Homewood Fishing Club Lake in Macon County on July 28, 1979," the pollution caused by the discharges was so great as to kill off even the hardiest species of fish, black bullheads, which can survive on one part per million or less of dissolved oxygen. (Compl. Ex. 66). The value of the fish kill on that date was established to be $1008.04. ADM presented no evidence in refutation. Residents testified that stocking Homewood Lake with fish and frogs resulted in "find[ing] them belly up after an oil bath by ADM." (R. at 471). Moreover, because the lake is no longer able to support fish, migrating waterfowl no longer stop over at the lake. Id.

This testimony demonstrates that despite the alleged silting in of Homewood Lake, the environmental harm caused by ADM's discharges is substantial. The Board finds that the discharges have caused substantial injury to the general welfare and unreasonably interfered with residents enjoyment of their property. The fact that this damage was not caused by toxics, but by bean meal, corn meal and vegetable oil, is of little consolation.

Similarly, the argument that there is no evidence of any impact outside the immediate Homewood area and that only thirty people were affected by the discharges is not persuasive as a mitigating factor. Again, the fact that the damage could have been worse in some degree is a small consolation. The fact remains that thirty people's lives were negatively affected over an extended number of years. More significantly, this argument is flawed in that it assumes that damage to the environment is necessarily mitigated whenever fewer people are involved. However, in addition to its aesthetic and recreational value, as well as its value as a property asset, the lake serves as habitat for plant and wild life. The damage to habitat caused by ADM's

discharges must also enter into the calculation of penalty.

Section 33(c)(ii) concerns the social and economic value of the pollution source. In its order of March 24, 1983 the Board found that ADM has substantial social and economic value but that value is greatly reduced by its adverse environmental impact. Similarly, the Board found in 1983 that the plant is suitably located as per Section 33(c)(iii). The Board noted that the only real problem with the location is that it discharges to a small, shallow lake, but no problem would exist if pollution standards were being met. There is no basis for contravening these findings today.

Section 33(c)(iv) concerns the technical feasibility and economic reasonableness of reducing or eliminating the pollution. As to this point, ADM contends that the plant was designed in 1923 without consideration for environmental concerns and that no technology exists to cure the problem. ADM states that it has spent $4.5 million on environmental improvements for the plant since acquiring it in 1962, and stands ready to spend an additional $1.0 million on a solution if it can find one.

The Board has previously held that the burden of proof is on the respondent to show "that compliance is not technologically practicable or economically reasonable." EPA v. Victory Memorial Hospital, PCB 81-116, February 10, 1983. Thus, ADM must demonstrate that no technology exists to solve the problem or that the technology is so expensive as to be unjustified. ADM has simply not met this burden.

First of all, it is clear that treatment technology does exist. ADM has admitted that the Decatur Sanitary District could treat the flow if ADM were allowed to direct it there thus proving that the discharge is in fact treatable. Moreover, ADM has shown that a 600,000 gallon holding tank could be built for $600,000. ADM argues, however, that the tank might not be a final solution. This lack of certainty over what the final solution might be is insufficient to establish that no technology exists. As noted by the court on appeal, ADM presented no expert testimony to show that alternate means of treating the effluent were impractical. All the record shows is that ADM was unaware of an alternative solution. There is no evidence that any other possible alternatives were even investigated. Thus, ADM has failed to meet its burden of proof as to the lack of technological solutions.

Likewise, ADM has failed to demonstrate that it is economically unreasonable to curtail or eliminate the discharges. In fact, ADM has expressed a willingness to spend up to $1.0 million. The economic reasonableness of any alternative will depend on the environmental improvement expected to accrue after its implementation. Without more evidence as to the

possible solutions, it is not possible to reach any conclusion as to economic reasonableness Thus, ADM has failed to meet its burden of proof as to economic infeasibility.

Along with the Section 33(c) factors, the Board is also required to determine whether the imposition of a penalty will aid in the enforcement of the Act. In this regard, it is arguably inappropriate to impose a sizable penalty where the pollution events were totally unforeseeable since a penalty cannot encourage avoidance of unforeseeable events. In this regard, ADM contends that the major portion of the discharge incidents was caused by a different instrumentality each time and that after each incident ADM rectified the specific problem so that there was never a reoccurrence from the same cause.

A review of each of these incidents was made by the Board in its March 24, 1983 order. ADM contended that each incident was the result of human and mechanical errors. The Agency countered that the "multiple discharge events call into question the adequacy of operation and the degree of preventative maintenance provided." (Compl. Reply Brief at 1). The Board agreed, finding that ADM's explanations served largely to demonstrate what could have, and should have, been done sooner. As noted by the Fourth District, the errors may provide a reason for the violations "but it is not tantamount to an excuse." 456 N.E.2d at 918. The recurrence of these "accidents" demonstrates a lack of commitment on management's part to take a proactive stance to remedy the inadequacies in the system overall. As noted by the Agency, ADM had known for at least eight years prior to the filing of the complaint that contaminated discharges occurred during heavy rains. (Compl. Sec. Brief at 4). Rather than find a permanent solution, management was content to react to each flaw in its ineffective system as it manifested itself. While the Board agrees that the incidents were not intentional, failure to take appropriate preventative action when called for, as here, cannot be justified by simply calling the incidents unforeseeable.

Furthermore, the findings of violations do not concern these incidents alone. They also include violations of the limits for BOD_5, suspended solids, and oil and grease on a monthly basis from April through September, 1981 (excluding June). These violations were not negligible but ranged from approximately three to forty-seven times the permitted discharged levels. Nor were these violations related to any specific overflow events. No mitigating evidence is offered by ADM concerning these violations. Indeed, the evidence demonstrates that management let several months transpire before taking corrective action which should have been taken at once.

Accordingly, the Board finds that a penalty would serve to encourage compliance by ADM, by causing a more careful consideration of the ramifications of acting, or failing to act,

in the future so as to harm the environment. The sum must be sufficient to demonstrate that "adverse effects upon the environment [will be] fully . . . borne by those who cause them," keeping punitive considerations secondary. Ill. Rev. Stat. 1985, Ch. 111½, par. 1002(b).

By statute, a maximum penalty of $10,000 for each violation and an additional $1,000 for each day the violation continues could be imposed. The Agency, however, recommends a penalty of $32,500 with an additional $1,008.04 to be paid for fish killed.

In considering an appropriate penalty the Board notes that ADM's discharges were clearly of a serious nature impairing the lake's aesthetic and recreational value and its value as habitat for plant and animal life. Essentially, the discharges changed an environmental asset into a liability. While none of the incidents were intentional, ADM failed to take quick corrective steps concerning the monthly violations or preventative measures concerning the five "accidental" incidents. Moreover, ADM has done little to determine exactly what controls would be necessary to attain compliance and their cost. Thus, inadequate evidence to prove technical and economic infeasibility was brought before the Board. These failures reflect a lack of commitment by ADM to protect the environment of Homewood Lake. Although ADM claims to have spent $4.5 million on other environmental controls, these expenditures have done little to address the problem at hand. With these factors in mind the Board finds that a penalty of $32,500 plus $1,008.04 for fish killed is appropriate as it will encourage ADM to act to protect the environment in the future, thereby aiding in the enforcement of the Act.

Finally, the Board wishes to note that, contrary to ADM's contention, financial resources of a violator may indeed be relevant to determining whether a penalty amount will serve to aid in the enforcement of the Act. (Resp. Brief at 5-6). In a situation where a violator's resources are inadequate to pay both the penalty and take the necessary measures to achieve compliance with the Act, the imposition of a penalty may arguably not serve to aid in the enforcement of the Act. There is no evidence in this record to indicate that the penalty here imposed will in any way impair Respondent's ability to achieve compliance.

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

ORDER

1. Within 45 days of the date of this Order ADM shall pay by certified check or money order payable to the State of Illinois a penalty of $32,500 to be mailed to:

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

2. Within 45 days of the date of this Order ADM shall pay the amount of $1008.04 by certified check or money order payable to the Wildlife and Fish Fund.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 27th day of March, 1986, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board