

ILLINOIS POLLUTION CONTROL BOARD
January 12, 1984

ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY,)
)
Complainant,)
)
v.) PCB 79-142
)
CITIZENS UTILITIES COMPANY OF)
ILLINOIS,)
)
Respondent.)

CONCURRING OPINION (by B. Forcade):

I agree with the majority in all aspects of the Opinion and Order save the amount of the penalty.

The primary function of a civil penalty is to encourage future compliance by the entity against whom the penalty is assessed and others who are similarly situated. To that end, a civil penalty should reflect an evaluation of the nature of the violation and the violator's efforts to expeditiously rectify or mitigate the problem. In this case a significantly higher penalty is commanded by the facts. The majority opinion concisely stated the facts:

The facts show major equipment or operational failures of every unit process at the plant. The most severe of these failures, primary tanks out of operation due to mechanical failures, lasted four months and seven months. The longest outage was due simply to operator ignorance of plant design and failure to investigate. The shorter outage was totally unexplained. (Op. p.15).

Theoretically, some portion of the majority's \$1,000 civil penalty was attributable to the pervasive nature of the O & M failures, some portion was for the seven month primary tank outage due to ignorance as well as failure to investigate, and some portion was for the unexplained four month primary tank outage.

The Environmental Protection Act (Act), in Section 42(b)(1), establishes civil penalties of not to exceed \$10,000 per day of violation. This expresses the General Assembly's intention that NPDES civil penalties be evaluated on a daily basis. In this case, assuming the entire \$1,000 civil penalty was based on the seven months of unjustified

primary tank outage, the penalty for failing to correct the easily correctable violation is less than \$4.70 per day. However, if some portion of the penalty is based on the four month unexplained outage for the other primary tank and the pervasive nature of the O & M failures, then the daily penalty would be significantly lower.

I believe it was the General Assembly's intention that the worst of all non-criminal NPDES violations receive the full \$10,000 per day penalty, with lesser violations receiving lower per day penalties. In this case, environmental calamity was neither claimed nor proven so the per day fine should be substantially below \$10,000. However, an easily correctable violation that continues exclusively due to ignorance and indifference deserves at least a modest daily fine. Since the materials to correct the violation were on hand at all times I would assess a \$50.00 per day civil penalty for primary tank number one. The violation occurred during the week of February, 18, 1979. The violation continued for seven months (about 213 days) without the slightest justification. For the 127 day outage of the other primary tank I would assess \$20.00 per day since there was no proof that replacement parts were available or should have been available. For the general pervasive nature of the O & M violations in other plant operations I would assess an additional penalty of \$1,000.

7 month primary outage		
\$50.00 per day x 213 days		\$10,650
4 month primary outage		
\$20.00 per day x 127 days		2,540
Pervasive O & M Violations		
\$1,000		1,000
TOTAL		<u>\$14,190</u>

I should note that if the Agency's evidence of downstream sludge deposits or foaming had been more closely tied to Citizen's discharge the daily penalty amount would have been higher. Reliable evidence of environmental impact demands higher civil penalties.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, do hereby certify that the above Concurring Opinion was filed on the 18th day of January, 1984.


 Christan L. Moffett, Clerk
 Illinois Pollution Control Board