ILLINOIS POLLUTION CONTROL BOARD
February 20, 1985

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 84-3
	)	84-4
CITY OF GALVA, an Illinois municipal corporation,	)	Consolidated
Respondent.	)	

ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on an eight-count complaint filed by the Illinois Environmental Protection Agency ("Agency") on January 6, 1984, in PCB 84-3 pertaining to the City of Galva's ("Galva") southwest wastewater treatment plant and on a seven-count complaint filed by the Agency on January 6, 1984, in PCB 84-4 regarding Galva's northeast wastewater treatment plant. Essentially, the complaints charge, for the respective facility, that since 1978 Galva has violated various provisions of the Environmental Protection Act ("Act"), Board regulations, and their NPDES permits which were intended to prevent water pollution.

On January 23, 1984, the parties filed an Agreed Motion for Consolidation which the Board granted on February 9, 1984, thus consolidating the two enforcement actions. A hearing was held April 18, 1984, in Cambridge, Illinois, at which counsel for the parties introduced a Stipulation and Proposal for Settlement. No witnesses were presented at hearing and no sworn testimony was received. On May 3, 1984, the Board entered an order requesting additional information on the current status of sewer system work; that information was supplied June 18, 1984. On October 19, 1984, the parties filed an Agreed Motion to withdraw the previously filed Stipulation and Proposal for Settlement, stating their intention to file a revised document within 60 days. On October 25, 1984, the Board granted the motion, and on December 18, 1984, the parties filed a Revised Stipulation and Proposal for Settlement ("Settlement Agreement").

The Settlement Agreement, after reciting that it shall be null and void and of no effect in the event the Board fails to accept each and every term and condition set forth, is divided into three parts. The first part, entitled "Statement of Facts," contains 29 numbered paragraphs recounting the situation respecting Galva and its facilities. Both parties agree to this part. The second part, entitled "Contentions of Law," contains

15 numbered paragraphs where the Agency contends that various previously agreed facts constitute a violation of certain provisions of the Act, Board regulations, or an NPDES permit requirement. Galva has not specifically agreed to this second part of the Settlement Agreement. The third part of the Settlement Agreement, entitled "Proposal for Settlement," contains a lengthy and detailed plan for design and construction affecting Galva's facilities, interim effluent limitations, a requirement for Galva to adopt and enforce a sewer use ordinance regulating industrial discharges to the system, a requirement that Galva adopt a user charge system to fund operation, maintenance and improvements to Galva's system, a progress report schedule, a requirement that Galva fund improvements locally, and finally, a $3,375 civil penalty. Galva has agreed to this third part of the Settlement Agreement. Finally, the parties pray that the Board accept the document "as written."

The above filings all request that the stipulation be accepted exactly as originally proposed, thus eliminating the Board's modification of the stipulation to include findings of violation against Galva and a certificate of acceptance.

The Settlement Agreement presents the Board with two fundamental problems. First, the Board is being asked to impose a $3,375 civil penalty and to order completion of a detailed twelve page program of improvements to the existing system without an admission of violation. While the Board believes the agreed facts are sufficient to support certain violations, such a finding would render the agreement null and void if the Board fails to accept it "as written." Second, the Board is concerned with paragraph V of the Settlement Agreement, regarding user charges. There are absolutely no facts in the record before the Board to support imposition of a specific mode of financing for the improvements. Consequently, the Board must reject the Settlement Agreement in its entirety.

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 completion of complex improvement programs 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 facts and conclusions of law."

Section 33(b) of the Act provides that "such (Section 32(a))

order may include a direction to cease and desist from violations of the Act or of the Board's rules and regulations or of any permit or term or condition thereof, and/or the imposition by the Board of civil penalties in accord with Section 42 of the 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, therefore, 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 violation 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 generated 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 Settlement Agreement in light of these various statutory and regulatory requirements, it is clear that the Board cannot make any requisite findings of fact and conclusions of law beyond one that "the parties wish to settle the case for $3,375 payable into the Trust Fund and a complex improvement program." 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 Settlement Agreement resists such a Board 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 stipulation must be rejected. As to the proposed

compliance plan, in the absence of findings of violation, the Board is placed in the position of ordering accomplishment of "voluntary remedial activities" to correct "non-existant" non-compliance. The compliance plan portion of the stipulation is also rejected.

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 21, 1985, addressed various policy arguments by the Attorney General in favor of accepting that stipulation in the absense of findings 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 and that a finding of violation destroys the essence of the bargain here 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 violation, 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.

Generally, the Board has no objection to parties filing stipulated facts, with or without settlement conditions, with the Board. The Board encourages such stipulations because they reduce the number of contested issues to be addressed at hearing.

On an additional note, while the Board discourages such action as poor public policy in environmental matters, the Board cannot prevent the exercise of a litigant's legal rights in a contested case to negotiate extra-judicial agreements,

contractual or otherwise, followed by a complainant's motion for voluntary dismissal.* In such circumstances, the Board should not be called upon, and as a practical matter has no power, to review the propriety or wisdom of such an agreement. IEPA v. Schlie, PCB 82-155 (December 6, 1984).

The difficulty arises when the Board is called upon to review and act upon a settlement agreement which contains a determinative order of the Board. In such circumstances, the Board must be provided with sufficient information to make a ruling on the merits of the case (did a violation occur or not) and sufficient information to determine that the remedy is appropriate to the violation.

In five other cases today, the Board has addressed the problems of a determinative order resulting from a settlement agreement where there is no admission of violation, and modification renders the agreement null and void: IEPA v. Chemetco, PCB 83-2 ($20,000 penalty, compliance plan and schedule); People v. City of Chicago, PCB 81-190 ($3,000 penalty, $9,500 "voluntary contribution," stepped-up cross-connection enforcement program); IEPA v. Arnold's Sewer and Septic Service and Jimmy McDonald, PCB 83-23 ($300 "sum," "prohibition" from violations of the Act); People v. Joslyn Mfg. and Supply Co. and Herman Zeldenrust, PCB 83-43 ($8,000 penalty, $14,000 "payment," cease and desist order). In each of these cases the Board has certified a similar question for interlocutory appeal.

Certification for Interlocutory Appeal

This "finding of violation" issue is before the Board today in six cases, and potentially has applicability to every enforcement case brought before the Board. 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 statement (also known as a Certificate of Importance) to allow for immediate interlocutory apppellate 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

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*The Board notes that certain governmental litigants may be unable to engage in contractual agreements without specific legislative authorization.

> 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 , Section 1032, 1033 and 1042, as they relate to Board acceptance of stipulations of fact and proposals for settlement in enforcement cases, to issue Orders and Opinions in which any Board findings of violation are precluded by the terms of the stipulation and proposal but which respondent is ordered to pay a stipulated penalty and adherence to a complex program of system improvements.

The Board hereby rejects the Stipulation Agreement and orders that hearing in this matter be scheduled within 60 days and held within 90 days. 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 within 35 days the appropriate pleadings.

IT IS SO ORDERED.

Board Member J. D. Dumelle concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 20th day of February, 1985, by a vote of 5-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board