ILLINOIS POLLUTION CONTROL BOARD
February 20, 1985

PEOPLE OF THE STATE OF ILLINOIS, Complainant, v. THE CITY OF CHICAGO, a Municipal corporation; and JOHN B. W. COREY, Commissioner Chicago Department of Water and INGERSOLL PRODUCT CORP., an Illinois Corporation, Respondents.	)	PCB 81-190

ORDER OF THE BOARD (by J. Marlin):

On January 4, 1985, the parties filed a stipulation and proposal for settlement of this action. This stipulation is rejected. Prior to discussion of the Board's rationale for rejection of this stipulation, the Board will recite the procedural history of this enforcement action.

Procedural History

This matter comes before the Board on the December 2, 1981 Complaint of the People of the State of Illinois by the Attorney General.

Count I of the Complaint alleged that, from at least February 1948 until November 20, 1981 the respondent Ingersoll Products, Corp. (Ingersoll) maintained a cross-connection between Ingersoll's mill furnace cooling water system and the Chicago public water supply (supply) pipe by a removable section of pipe and valves; the water supply is a water of the State; the cooling water contains oil, unnatural turbidity and other unknown contaminants and has an odor; using the removable pipe section, cooling water flows to the supply and, beginning on or before November 20, 1981, Ingersoll caused or allowed the cross-connection by installing the pipe, all in violation of Section 12(a) of the Environmental Protection Act (Act).

Count II alleges that beginning on or before November 19, 1981 and continuing until November 20, 1981, the cooling water flowed into the supply, by way of the cross-connection; on or about November 19, 1981, the supply had an obnoxious odor, was turbid, tasted offensive and/or contained oil and other unknown contaminants in an area between Halsted Street and Damen and from

116th to 124th Street, thus causing or contributing to water pollution in violation of 12(a) of the Act.

Count III alleges that, beginning on or before November 19 until November 20, 1981, the cooling water flowed into the supply in the area designated in Count II and contained the odor, turbidity, taste and oil designated in Count II caused or contributed to violations of Water Rule 203(a) (now 35 Ill. Adm. Code 302.203) regulating unnatural sludge, and Section 12(a) of the Act.

Count IV alleges that, beginning on or before November 19, 1981, Ingersoll's discharge caused or contributed to a violation of Public Water Supplies Rule 304(B)(1), (now 35 Ill. Adm. Code 604.201(a)), regulating finished water quality, and Section 12(a) of the Act.

Count V alleges that, beginning on November 22, 1974 and continuing until November 20, 1981, respondents City of Chicago (City) and Commissioner of the City Department of Water John B. W. Corey (Commissioner) allowed a pipe arrangement to exist whereby an unsafe substance can enter the supply, in violation of Public Water Supply Rule 314(B) (now 35 Ill. Adm. Code 607.104(b), regulating cross-connections.

Count VI alleges that, from at least February 1948 until November 20, 1981, there was a cross-connection from the cooling water system at 1000 W. 120th Street to the supply; a portion of the pipe between the supply and Ingersoll's cooling water system was visible; City water Department conducted inspections at the factory; from at least December 7, 1978 until November 20, 1981, the City and Commissioner by their acts and omissions failed to implement an effective cross-connection control program in violation of Public Water Supplies Rule 314(D) (now 35 Ill. Adm. Code 607.104(d)) and the Environmental Protection Agency's (Agency) Technical Policy Statement (TPS) adopted pursuant thereto, regarding a supply's responsibility to control cross-connections.

Count VII alleges that, since on or before November 19, 1981, the City and Commissioner allowed the supply to contain odor, unnatural turbidity and oil, and to have an offensive taste in violation of Public Water Supply Rule 304(B)(1) (now 35 Ill. Adm. Code 604.201(a)), regulating finished water quality.

On December 31, 1981, the City and Commissioner moved to dismiss Counts V through VII, and on January 21, 1982 the Attorney General filed a Response in Opposition. On February 17, 1982, the Board denied the motion as to Counts V and VII, and granted the motion as to Count VI. On March 4, 1982, the Attorney General moved the Board to reconsider its dimissal of Count VI, which, on April 15, 1982, the Board granted and reinstated Count VI. On April 22, 1982, the City and Commissioner moved the Board to reconsider its April 15, 1982

order. On May 13, 1982, the Board denied the Motion. On June 14, 1984 the Board ordered the case to go to hearing within 60 days or be subject to dismissal.

On January 4, 1985, the parties filed a stipulation and proposal for settlement (stipulation), which was presented at hearing on January 28, 1985.

In the stipulation's Statement of Facts, the parties stipulate in large measure to the events alleged in the complaint, adding that the cross-connection was removed on the evening of November 20, 1981.

It should be emphasized here, that the respondents *did not* stipulate to any violations. The respondents specifically did not agree to the People of the State's "contentions of fact and law based on the stipulated statement of facts." (Stip. unnumbered p.5).

The City agreed to conditions generally requiring a stepped-up cross-connection enforcement program.*

Ingersoll agreed to a compliance requiring submittal of detailed drawings, a certification that the cross-connection has been eliminated, and to comply with the "City and State plumbing codes."

Additionally, Ingersoll agreed to pay a penalty of $3,000, and a voluntary contribution of $9,500, both payable to the Environmental Trust Fund. (Stip. 11, 12).

Finally, the stipulation provides that the stipulation shall be null and void unless the Pollution Control Board accepts" each and every term and condition set forth." (Stip. 1).

<u>Rejection of the Stipulation</u>

First, the Board will address its refusal to accept a stipulation that, by its terms, precludes the Board from making findings of violation. Next, the Board will address its refusal to allow payment of contributions, as opposed to penalties, in settlement of an enforcement action.

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*The Board notes that these conditions relate, in part, to compliance with the City's ordinances. Additionally, the condition waives any City cause of action against Ingersoll for costs. (Stip. 9, 10). Insofar as these conditions order compliance with local ordinances and settlement of a monetary dispute between the respondents, they are unrelated to the allegations in the complaint and, in any event, beyond the remedies within the Board's power to order. These conditions, therefore, would also be rejected.

The first and fundamental 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 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 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 Chicago 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, $3,000 of which is a penalty, 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 respondents resist 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. 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 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 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 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 "voluntary contribution", the Board has earlier in this 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 to so order 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 voluntary 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 either be used 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.

<u>Certification For Interlocutory Appeal</u>

This "finding of violation" issue has applicability to every enforcement case brought before the Board. [In fact, the Board has today rejected several proposed stipulated settlements requiring payment of penalties or other "gifts" or "sums" and timely performance of compliance plans, in all of which cases no findings of violation could be made: <u>IEPA v. Chemetco</u>, PCB 83-2

($20,000 penalty, compliance plan and schedule); 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); and IEPA v. City of Galva, PCB 84-3, 84-4 (consolidated) ($3,375 penalty, complex program of system improvements). In each of these cases the Board has certified a similar question for interlocutory appeal.] 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 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 1/2, 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 and a 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.

J. D. Dumelle concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above 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