

ILLINOIS POLLUTION CONTROL BOARD  
January 26, 1984

ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Complainant, )  
 )  
v. ) PCB 82-122  
 )  
BI-PETRO REFINING COMPANY, INC., )  
a Delaware corporation, )  
 )  
Respondent. )

ORDER OF THE BOARD (by W. J. Nega):

On January 19, 1984, the parties in this case filed a Joint Motion for Expedited Reconsideration and for Acceptance of an Amended Clause in the Settlement Agreement and an Amended Timetable for the Compliance Plan which requested that the Board reconsider its Order of December 15, 1983.

In an attempt to respond to the concerns expressed by the Board in the Opinion and Order of December 15, 1983, the parties have asserted that some limited covenants-not-to-sue have been accepted by Federal and other courts in environmental enforcement cases and should be accepted by the Board.

In support of this contention, the parties have submitted (as Attachment I to their motion) pages 14-17 of a partial consent decree in U.S.A., People of the State of Illinois, et al.v. A & F Materials, Inc., et al., D.C. So. Ill., Civil Action No. 80-4395 which contains a detailed section entitled "covenants-not-to-sue".

Using this small portion of a Federal case in support of their viewpoint, the parties have added a single sentence to the original paragraph "J" of their proposed settlement agreement. This added sentence reads "This covenant-not-to-sue does not apply to allegations of groundwater contamination, which allegations do not appear in the Complaint".

The Board, which has statutory responsibility to see that the environment is adequately protected, does not find the arguments presented in the Joint Motion to be persuasive.

As previously stated, the Board's paramount concern is to properly safeguard and protect the environment for the People of the State of Illinois. Thus, this proposed amended covenant-not-to-sue, which may still leave the public vulnerable to undetected problems at the site, is totally unacceptable and, in the Board's view, against prudent public policy.

On page 4 of the Board's December 15, 1983 Opinion, it was stated that the Board found the proposed settlement agreement generally acceptable:

"However, the Board feels that paragraph "J" on page 13 of the Stipulation is inappropriate and should be entirely deleted from the settlement agreement. Paragraph "J" includes somewhat ambiguous language in a covenant-not-to-sue which purports to estop the Agency from doing anything for further cleanup beyond the compliance plan. The Board believes that this provision may leave the public vulnerable to undetected problems at the site (such as contamination of groundwater which might be subsequently detected, etc.) and is therefore against prudent public policy. Accordingly, the Board will modify the settlement agreement by deleting paragraph "J". (Emphasis supplied).

A certificate of acceptance and agreement to be bound by the modified Stipulation has been included as paragraph 6 of the Board's Order. If the parties do not wish to sign the certificate, the Board intends to reject the Stipulation in toto and remand the case to the parties for further proceedings."

Accordingly, the parties' motion for reconsideration and an expedited ruling is hereby granted.

Upon reconsideration, the Board finds that paragraph "J" of the proposed settlement agreement is inappropriate, unacceptable, and should be entirely deleted.

As a courtesy to the parties, they will be given 30 additional days from the date of this Order to decide whether or not they wish to sign the certificate of acceptance and agreement to be bound by the modified Stipulation which has been included as paragraph 6 of the Board's Order of December 15, 1983.

If they decide to sign the certificate, the Board will look favorably on their request to amend the timetable for commencing and completing the agreed-upon compliance plan.

However, as previously stated, if the parties do not wish to sign the certificate, the Board intends to reject the Stipulation in toto and remand the case to the parties for further proceedings.

This would have the effect of making the previously proposed settlement agreement null and void and would moot the request for amending the compliance plan timetable.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 26<sup>th</sup> day of January, 1984 by a vote of 7-0.

Christan L. Moffett  
Christan L. Moffett, Clerk  
Illinois Pollution Control Board