ILLINOIS POLLUTION CONTROL BOARD
February 20, 1985

PEOPLE OF THE STATE OF ILLINOIS, Complainant,	)	
v.	)	PCB 83-83
JOSLYN MFG. & SUPPLY CO., an Illinois corporation, and HERMAN ZELDENRUST, Respondents.	)	

ORDER OF THE BOARD (by B. Forcade):

This matter comes to the Board on a July 11, 1983 complaint filed by the People of the State of Illinois ("People") against Joslyn Mfg. & Supply Company and Herman Zeldenrust ("Joslyn"). The three count complaint claims violations of various provisions of the Illinois Environmental Protection Act ("Act") and Board regulations as a result of emptying a drum of pure liquid polychlorinated biphenyls ("PCBs") on about June 25, 1981, in the Cook County Forest Preserve.

After various preliminary motions, which were disposed of by Board Orders of October 6, 1983, and November 18, 1983, the People filed on January 9, 1985, a Stipulation and Proposal for Settlement ("Settlement Agreement"), signed by both parties. At a January 16, 1985 hearing in Chicago, counsel summarized the Settlement Agreement; however, no witnesses were presented and no sworn testimony was received. The Settlement Agreement, after the customary recitals that it is null and void unless the Board accepts each and every term and condition, contains three parts. The first part contains fourteen numbered paragraphs stating facts to which both parties agree. The second part contains contentions by the People that the previously described facts constitute various violations of the Act and Board regulations. Joslyn does not agree to the contentions of violation. The third part of the Settlement Agreement is the proposal for settlement which includes: (1) a Board cease and desist order, (2) Joslyn will make a "payment" of $14,000 to the Environmental Protection Trust Fund, (3) Joslyn will pay an $8,000 civil penalty, (4) payments will be made only after the Board accepts the settlement and a pending case in the Circuit Court of Cook County between the parties is dismissed, (5) the People will attempt to secure dismissal with prejudice of the Circuit Court case and (6) another recital that the Settlement Agreement is null and void unless accepted by this Board. Joslyn agrees to this third part of the Settlement Agreement.

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 Joslyn and a certificate of acceptance.

The Board has several fundamental problems with the Settlement Agreement and, therefore, must reject it in its entirety. First, the Board is unable to make any finding of violation on the extremely limited facts presented; even if such a finding were possible the parties have not indicated whether this would constitute a material alteration of the Settlement Agreement rendering it null and void. Second, it is beyond the Board's statutory authority to order civil penalties, payments in the nature of a voluntary contribution, and cease and desist orders in the absence of a finding of violation. Third, the parties have failed to present evidence of factors which the Board must consider under Section 33(c) of the Act. And finally, under paragraph 16(d), all payments of civil penalty and voluntary contribution are contingent upon a specific action of the Circuit Court of Cook County which may or may not occur.

On the Board's first concern, the complaint claims essentially three types of violation: open dumping violations, special waste violations, and water pollution violations. The Board is unable to find violations regarding open dumping because the permit status of the Cook County Forest Preserve is not available. The Board is unable to find special waste violations because the material is described as "pure PCBs" (Settlement Agreement, ¶5). Without more information, the Board is unable to conclude that it was generated as a direct or indirect result of the manufacture of a product, nor that it was pollution control waste or hazardous waste. And finally, the Board is unable to make any findings regarding water pollution as each of these claims involve an element of harm or threat of harm. The record before the Board is silent on any harmful aspects of PCBs. The record before the Board is that someone dumped approximately 55 gallons of a pure liquid on the ground. Without a statutory or regulatory violation, this action hardly justifies a Board order to pay $22,000.

Under the Act "specific penalties for injury to public health and welfare and the environment" are to be imposed. Section 2(7). Specifically, the Board is empowered to impose "civil penalties" in enforcement cases under Section 33(b), and may order that such penalties are to be paid to the Trust Fund under Section 42(a). However, no like authority is extended for the imposition and payment of "contributions". Thus, while the $8,000 civil penalty might be acceptable with a finding of violation, the $14,000 "payment" is totally unacceptable. A penalty acts as a sanction for environmentally detrimental and illegal behavior. Payment of a sum not denoted as a penalty is essentially a "voluntary contribution" and such contributions have no place in a statutory regulatory scheme such as the Environmental Protection Act. To accept a payment which is entirely voluntary in settlement of an enforcement action would

be tantamount to the Board's ordering payment in settlement of a nuisance suite. Such a practice would be in contravention of the Act's clear intentions.

The Board's second concern, and the primary basis for rejection of this stipulation, is the Board's conclusion that it lacks statutory authority to accept settlements requiring payment of stipulated penalties, payment of voluntary contributions, and cease and desist orders 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 Baord, 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 required findings of fact and conclusions of law beyond one that "the parties wish to settle the case for $22,000 payable into 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 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.

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 that 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.

The Board's third concern regarding Section 33(c) factors is self-evident. The last concern can be clearly stated: What happens if the Circuit Court does not order dismissal with prejudice?

Generally, the Board has no objection to parties filing stipulated facts 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 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& Septic Service and Jimmy McDonald, PCB 83-23($300 "sum," "prohibition" from violations of the Act); IEPA v. City of Galva, PCB 84-3, 84-4 (consolidated) ($[illegible] penalty,complex program of system improvements). In each of these cases the Board has certified a

---

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

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 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 apeal from the order may materiallly 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. Ap. 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 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 cease and desist, pay a stipulated penalty, and make a voluntary contribution.

The Board hereby rejects the Stipulation Agreement and orders that hearing in this matter be scheduled within 60 days and held with 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 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