ILLINOIS POLLUTION CONTROL BOARD
May 11, 1989

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 88-201
CITY OF MARION, a municipal corporation, and MARION PEPSI COLA BOTTLING COMPANY, INC., a Missouri corporation,	)	
Defendants.	)	

INTERIM ORDER OF THE BOARD (by J. Anderson):

On December 14, 1988, the Illinois Environmental Protection Agency (Agency) and the City of Marion (Marion) and the Marion Pepsi Cola Bottling Company (Company) filed a Stipulation and Proposal for Settlement (Stipulation).

There are a number of aspects of the Stipulation which the Board would like clarified and one part that the Board cannot accept. While the Stipulation does not contain a condition that it be accepted only in its entirety, the Board believes it is preferable to allow the parties to explain or alter the provisions prior to making a determination on the Stipulation.

Section IX of the Stipulation states that "The Board shall retain jurisdiction for the purposes of interpreting, implementing and enforcing the terms and conditions of this consent decree and for the purpose of adjudicating all matters of dispute among the parties" (Stip. p. 11).

In terms of "retaining jurisdiction" in matters of this type, the Board construes such a provision as allowing the Board to "close" the docket (after accepting the settlement agreement) in terms of handling the physical file. However, if the need should arise, the Board would grant leave to "re-open" the docket to entertain motions or other filings to resolve matters contained in the previously accepted settlement. Is such a construction consistent with the intention of the parties?

In addition, Section IX does not specify those matters over which the Board is to retain jurisdiction. The Board is, moreover, essentially required ("The Board shall retain jurisdiction ..." (emphasis added)) to retain such unlimited

jurisdiction. The Board is unwilling to approve such an open-ended obligation. The Board urges the parties to further define these matters over which it is to retain jurisdiction, and to clarify the role of the Board consistently with its position as a non-party independent adjudicator of disputes.

The Board understands that under the concept of "retaining jurisdiction" it may be involved to some degree in the implementation of the decree over a period of time. In this case, that period of time is unspecified. When, for instance, is the Company to commence and/or complete the construction of a tank and pump system pursuant to item 5 of Section V of the Stipulation (Stip, p. 8)? Is the Board expected to sit in review of Marion's enforcement effort with respect to Ordinance #905 in perpetuity, as may be inferred from item 2 of Section V of the Stipulation (Stip, p. 7)?

There is a provision which allows the Board to "extend the time for performance" under the Stipulation if the Board determines that a violation of terms of the Stipulation occurred as a result of circumstances beyond the control of either Marion or the Company. (Section VII.) However, Section V, which details certain commitments made by Marion and the Company does not provide any corresponding deadlines for keeping those commitments. The Board believes that it may be difficult to enforce those commitments, much less "extend the time for performance" of them when the Stipulation does not provide dates for completion of the committed actions. The Board would like the parties to address this point.

Section VIII, Civil Penalty, provides that part of the penalty be payable to the Environmental Protection Trust Fund, and part payable to the Hazardous Waste Fund. (Stip, p. 10.) The penalty provisions in Section 42 of the Environmental Protection Act (Act) empower the Board to order penalty payments (as an alternative to the General Revenue Fund) only into the Environmental Protection Trust Fund. This alternative was not available to the Board until the enactment of Public Act 83-618 (effective January 1, 1984), amending Section 42. Section 22.2(f) of the Act states that "costs of removal or remedial action incurred by the State as a result of a release of a hazardous substance" may be recovered by the State. In addition, any monies so received by the State "shall be deposited in the State Treasury to the credit of the Hazardous Waste Fund". Although the Stipulation asserts that the Company's release of sodium hydroxide subjected the Company to Section 22.2(f), the Stipulation does not state that the $3,000 penalty, to be deposited in the Hazardous Waste Fund, represented costs incurred by the State for removal or remedial action. Absent additional legislation amending, inter alia, Section 42, the Board cannot accept that part of the Stipulation ordering payment of a penalty into the Hazardous Waste Fund.

Also, the Stipulation in Section VIII provides that the penalty checks shall be delivered to the Environmental Control Division of the Office of the Attorney General in Springfield. The Agency has historically carried out the record keeping responsibility for the payment of penalties; in the past, penalty payments have generally been sent to the Agency. The Board also calls the attention of both the Attorney General and the Agency to the October 17, 1988 meeting of the Environmental Protection Trust Fund Commission, of which both the Agency and the Attorney General are members. At that meeting, by unanimous vote, the Agency was redesignated as coordinator for the Commission in handling receipts, among other duties. The Board requests the Agency and the Attorney General to clarify the situation. Is the Attorney General's Office the agency which will now receive all penalty payments or is this an isolated incident?

The parties shall file responses to this Order within 45 days after the date of this Order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Interim Order was adopted on the 11th day of May, 1989, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board