ILLINOIS POLLUTION CONTROL BOARD
October 25, 1990

PEOPLE OF THE STATE OF ILLINOIS, Complainant,	)	
v.	)	PCB 90-84 (Enforcement)
WE-TOAST BREAD, INC. an Illinois Corporation, Respondent.	)	

DISSENTING OPINION (by J.D. Dumelle and J. Theodore Meyer):

We dissent from the Board's action today for a variety of reasons. First, we believe that the Board is under an affirmative duty to be an active participant rather than an administrative rubberstamp when it ratifies stipulated settlements. Second, we believe that the existing process for approving these settlements is deficient in that the information we are supplied prior to ratification is lacking the basic information in order to reach an informed decision. Finally, we believe that the permitting system is a significant aspect of regulatory enforcement.

This matter is an enforcement action brought against Respondent We-Toast Bread, Inc. ("We-Toast") by the State of Illinois. The two parties entered a stipulation and proposal for settlement and sought Board ratification. On August 30, 1990, the Board issued an order seeking more information regarding material facts and/or mitigating factors because the duration of the violation and the penalty amount stipulated to appeared inconsistent.

Pursuant to the Board's Order, the Attorney General and the respondent filed a supplement on October 15, 1990, outlining the reasons for the execution of the settlement agreement. This supplemental filing contained a significant amount of material information as well as a legal analysis regarding fines for permit violations. Based upon this filing, the Board approved the stipulation by a 5-2 vote.

At issue in this case was the Board's concern that the $3,000 penalty assessed might be inadequate due to the fact that We-Toast had operated eleven pieces of equipment emitting air pollution into the environment for a period of eighteen years. On its face, this seemed to be a low penalty in the absence of any mitigating factors. Of equal importance to us, however, is our belief that We-Toast represents a pattern whereby the Board accepts generic stipulated settlements which are devoid of material facts and other valid considerations.

In Chemetco v. Pollution Control Board, 140 Ill. App. 3d. 283 (5th Dist. 1986), the court held that a respondent could enter into a stipulation with a penalty and still avoid any admission of violation under the Act. In doing so, the Court analyzed the Board's settlement procedures contained in Section 103.180 of our procedural rules. The court stated:

> Thus, from the aforementioned rule, it is undeniable that settlements are of the Board's own making and comport with the purposes of the Act.

Chemetco at 287. (Emphasis added.)

This leads us to believe that the Board is under a duty to be a participant. Accordingly, it does not seem unreasonable to expect a summation of material facts in addition to what statutory factors were considered. Instead, the Board receives pages of boilerplate which outlines the factors but does not explain how the facts in the case apply to those factors.

While we do believe that a $3,000 penalty is too low for numerous violations encompassing eighteen years, we are equally unaware of the criteria considered in cases where larger fines are levied. At the very same Board meeting, for example, Crown Cork and Seal (PCB 89-159) entered into a stipulation with the state and agreed to a $16,000 fine. Based on the filings in these cases, we are unable to ascertain the differences - with the exception that the violations in We-Toast spanned a longer time period. In short, we are unable to determine the factors which lead to an assessment of a penalty/fine, and we are unable to see how other Board members can.

The case at bar also exemplifies another disconcerting point. We-Toast admitted violations spanning a time period of nearly two decades. Other recent stipulations such as Miller Fluid (PCB 90-93) and Magnaflux (PCB 90-107) have also encompassed long time periods with admitted violations. How many others are out there? Why is the Agency unaware of them?

As far as the importance of the regulatory system is concerned, the Attorney General submits that courts have taken a dismal view of permit violations alone; and that they are not apt to uphold a stiff penalty absent adverse environmental impact. Yet the cases cited are entirely distinguishable from the one at bar. Citizen's Utilities v. PCB, 127 Ill. App.3d 504 (1984) and East Moline v. PCB, 133 Ill. App.3d 431 (1985) are site-specific problems. Moreover, the circumstances involved are replete with mitigating factors. These fines were reduced because the courts believed that the imposition of penalties in their cases would not aid in enforcement of the Act in that the parties had done something affirmative in order to achieve corrective action during the period of violation.

In Trilla Steel Drum v. PCB, 180 Ill. App. 3d 1010 (1989), the court was presented with a totally different set of facts. In this case, the Board attempted to penalize the company $10,000 for operating without a permit for 15 months.[1] Yet the company had applied for a permit and it was denied by the Agency. In light of that denial, the company subsequently sought and was granted a variance by the Board. During the course of the entire period, the company was negotiating with the Agency and concurrently seeking alternative methods to comply with the regulations.

Similarly, in Modine Manufacturing v. PCB, 193 Ill. App. 3d 643 (1990), the court reduced the Board's assessment of a $10,000 fine to $1,000. The court held that Modine's action did not warrant a fine of $10,000 for a variety of reasons.[2] Like Trilla, Modine had applied for a permit but was rejected by the Agency. Also like Trilla, the company had worked extensively with the Agency in order to rectify the identified deficiencies. Indeed, Modine has spent $322,000 for new technology in addition to hiring outside consultants within the course of two years. In short, the good faith demonstrated by Trilla and Modine is not readily apparent in the instant case as well as other similar cases where corporations have successfully bypassed the permitting system. If in fact it does exist, (i.e., the transgressions were inadvertent) this information is unascertainable by the information provided to the Board within the settlement agreement. In sum, where mitigating circumstances exist, the parties should include those facts in the signed stipulation.

We also believe that it is misrepresentation to broadly state that courts have dismissed the permitting process as inconsequential. In Standard Scrap v. PCB, 118 Ill. App.3d 1041 (1983), the Court found that:

> Standard Scrap's bad faith is further evidenced by the fact that it admittedly never had the required operating permits from the Agency for its furnace and incinerator, and that it failed to secure an operating permit for its boiler from February 1974 until 1983.
>
> Contrary to Standard Scrap's contention, violation of the Act's permit requirement is not a mere "paper" or "minor" violation.

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[1]This would be akin to penalizing a company $50,000 today under the current penalty structure in that $10,000 represented the maximum fine at that time.

[2]The $10,000 amount would likewise represent the maximum fine under the then existing penalty provisions.

> Rather, the violation of a permit requirement goes directly to the heart of the State's enforcement program and ability to protect against environmental damage. The permit program is a method through which the State of Illinois can control emitters on contaminants into the atmosphere, as well as emissions that may result in the presence of contaminants in the environment. (See Currie, Enforcement Under the Illinois Pollution Law 70 Nw.L. Rev. 389, 476 (1976).)

[118 Ill. App. 3d at 1045] (Emphasis added.)

Moreover, in People v. Keevin, 385 N.E.2d 804, the court held that where the state alleged that owners of an apartment complex failed to obtain a permit as required by the Agency prior to installing a wastewater device, in order to secure an injunction (the effect of which would be a shutdown) the state need only show that: (a) a permit was required, and (b) that the entity subject to that regulation failed to procure the permit. The appellate court stated that the circuit court had no discretion but must issue the injunction once these two prongs were established. That holding demonstates that the appellate courts believe that operating without a permit is indeed a serious violation of the Act and regulations. The Board also notes that if the Agency were to refer cases to the Attorney General as soon as it becomes aware of the situation rather than after compliance has been secured, the Attorney General could obtain an injunction shutting down a facility. Such an event would surely aid in enforcement of the Act.

These decisions underscore the significance of the permitting system. As in the instant case, we have witnessed a pattern of cases where companies do not possess permits for nearly two decades. The obvious regulatory dilemma remains that if one were to be caught, the penalty is so minimal that there exists no incentive to obtain the necessary permits. The message being sent is that it pays to pollute in Illinois. Yet another serious ramification exists. The purpose of the permitting system is to ascertain the amount of the particular matter being emitted and set limits accordingly. The amount a company may emit is necessarily related to overall output. If a large group of generators are bypassing the permitting system, it is those who have submitted to regulations who are paying for the scofflaw's pollution because the amount they are allowed to emit in their permits may be is based upon the overall sum of pollution that is known (i.e. from existing permits). Needless to say, such a result is both inequitable and contravenes the intent of the statute.

Finally, we are bothered by the Attorney General's

explanation as to why the earlier request for costs and fees, pursuant to Section 42(f) of the Act, was not included in the stiuplation. The Board asked the Attorney General to address this issue in the October 15 supplemental filing. The response the Board received was that the attorney time spent on this proceeding was considered when the stipulated penalty was negotiated. If indeed the $3,000 penalty includes attorney time, the actual penalty for We-Toast's 18 years of violations is even lower than we originally believed. We are concerned that these low penalties, for lengthy violations, do not even cover the costs of prosecuting the action.

For these reasons, we dissent.

Jacob D. Dumelle, P.E.
Board Member

J. Theodore Meyer
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 21st day of November, 1990.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board