ILLINOIS POLLUTION CONTROL BOARD
May 10, 1990

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 38-71
	)	(Enforcement)
ALLEN BARRY, individually and ALLEN BARRY, d/b/a ALLEN BARRY LIVESTOCK,	)	
Respondent.	)	

CONCURRING OPINION (by J. Anderson):

I fully appreciate the penalty analysis, particularly insofar as its unprecedented compilation of cases and comparative data serves as a reference document. However, I do not believe that the question as to how the contents of the document will be used in future cases has been made all that clear, especially since the analysis emanates from the Board. I am particularly concerned that the conclusory phrasing of certain statements in the analysis might leave what I believe would be an incorrect impression, i.e. that the Board has prospectively committed itself to this document in all future penalty considerations. Examples of my concerns are as follows:

I do not believe that we must comport with national environmental laws, federal court decisions, and federal penalty policies per se in order to demonstrate consistency in our penalty considerations (See e.g. p. 47 and 58 of the Opinion). The Board is a creature of the State, and we must implement, and comport with, State law (including the State courts) for our penalty determinations. If there is an inconsistency that, say, would threaten federal program authorization, we must look to a correction in State law to cure the problem. Not all of our enforcement cases even involve federally authorized programs, and, in any event, penalty maximums and case specific considerations at the federal level have varied over time and between the various media.

I agree that Illinois Appellate Court decisions have tended to minimize the deterrent effect of penalties for past violations, but, for the reasons expressed above, I don't believe that we should imply that we will therefore instead consider a contrary U.S. Supreme Court decision in Gwaltney, which concerned federal law. (See p. 49 of the Opinion).

The Opinion (see p. 52,53) reasons that the penalty provisions of Section 42 of the State's Environmental Protection Act might be construed as requiring that at least some penalty be imposed for a violation. The Opinion looks to a federal court interpretation of language in federal statutory law, and relies on its similarity to language in Section 42 in order to reach this interpretation. As the Opinion notes elsewhere, our State courts do not so interpret Section 42; they have on a number of occasions reduced a Board imposed penalty to zero. And to my knowledge there is no record of any legislative intent that Section 42 requires the imposition of some penalty. The Board itself on a number of occasions has imposed no penalty for violations, and I believe it is of dubious validity to use such reasoning in our penalty considerations.

On Page 72, the Opinion states that the Board may also consider penalties for similar offenses which have been imposed in other forums, federal and other states, and by Illinois courts in similar circumstances. While we need to buttress our penalty decisions, I am truly concerned that, by newly singling this out, we are inviting complexity, delay, and potentially counterproductive results.

For example, how can be consider "similar" with regard to other states, unless we know their law and penalty policies, the actual record in a case, or whether any "similarity" stated is taken out of context. How would we consider to "similar" cases in other states, one imposing no penalty and another a high penalty? How do we assess other states' distinctive experiences as to what it takes to achieve deterrence?

Even considering cases in Illinois, I believe that we must resist getting caught in the trap of, when comparing cases, concluding that a fish kill automatically requires a more severe penalty than another case where the damage is more subtle and chronic. Also, we have attempted, appropriately so in my opinion, to raise our penalties over time. I am concerned about "dated" decisions; a penalty imposed in 1990 dollars does not have a similar deterrant effect as the same penalty imposed in, say, 1972 dollars, even if the circumstances are similar.

How far back do we go? How selective is our consideration to be? While the parties can, and do, make comparability arguments, it has been my experience that, particularly where non-Illinois cases are concerned, it is difficult to give much weight to such arguments for the purpose of penalty considerations, and risks simply giving added grounds for being overturned on appeal.

It is my firm belief that, as an administrative agency, we should be cautious about looking too far afield from our our statutes in addressing any problem with our penalty

considerations. The analysis of the Illinois court opinions alone suggests that our less-than illustrious record of being upheld on appeal will not be improved if we do otherwise.

It is for these reasons that I respectfully concur.

Joan G. Anderson

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was submitted on the 25th day of May, 1990.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board