ILLINOIS POLLUTION CONTROL BOARD
April 18, 1984

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 83-178
DE KALB-PFIZER GENETICS, an Illinois partnership,	)	
Respondent.	)	

MR. NEIL F. FLYNN, MARTIN, CRAIG, CHESTER & SONNENSCHEIN, APPEARED ON BEHALF OF RESPONDENT.

MR. JAMES MORGAN, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF COMPLAINANT.

INTERIM ORDER OF THE BOARD (by J. Theodore Meyer):

This matter comes before the Board on a November 28, 1983 complaint by the Illinois Environmental Protection Agency (Agency) against De Kalb-Pfizer Genetics (DPG). The complaint alleges that DPG committed open burning in violation of Sections 9(a) and 9(c) of the Illinois Environmental Protection Act (Act) and former Rule 502(a), now recodified at 35 Ill. Adm. Code 237.102(a).

A hearing was held on March 8, 1985 at which time the parties incorporated a properly signed copy of the Stipulation and Proposal for Settlement into the record.

According to the stipulated statement of facts, DPG owns and operates a seed corn conditioning plant near Illiopolis, Sangamon County, Illinois. At the plant, recently harvested "green" corn undergoes preparation for distribution as seed corn. The corn is dried, shelled, sized, treated and bagged for subsequent sale. During these conditioning processes, waste materials are accumulated consisting of corn cobs, chaff, husks and sheller dust (hereinafter the "conditioning wastes").

During every harvest season since 1966, DPG has burned the conditioning wastes in the open. The harvest season lasts for twelve to fifteen weeks each autumn and during the season approximately eight truck loads of wastes are hauled from the plant daily. Burning has taken place at several locations; the last location was approximately four miles from the village of Illiopolis and three-quarters of a mile from the nearest residence.

On September 23, 1982 an Agency inspector visited the plant to investigate a complaint about the burning registered by a nearby resident. At that time the inspector observed the burning of the conditioning wastes. The Agency notified DPG by letter of its contention that this practice violated the Act. Consequently, DPG discontinued burning its conditioning wastes and currently this refuse is spread over the cropland where generated and plowed under.

The parties agree that the statement of facts contained in the Stipulation and Proposal for Settlement represents a fair summary of the evidence and testimony which would have been introduced were a full hearing held. The parties do not agree, however, as to whether DPG's conduct constituted a violation of the Act. DPG maintains that the conditioning wastes are agricultural wastes as defined in 35 Ill. Adm. Code 237.101 and are therefore exempt from the prohibition against open burning.

"Agricultural wastes" are defined in relevant part as "any refuse, except garbage and dead animals, generated on a farm or ranch by crop and livestock production practices including such items as . . . crop residues but excluding landscape wastes." Under Section 237.120 these wastes are specifically exempt from the prohibition against open burning contained in Section 237.102.

The Agency, however, contends that the conditioning wastes are a trade waste as defined in Section 237.101. Trade wastes are not exempt from the prohibition against open burning. Trade waste is "any refuse resulting from the prosecution of any trade, business, industry, commercial venture, utility or service activity, and any government or institutional activity, whether or not for profit. The term includes landscape waste but excludes agricultural waste." Consequently, refuse which falls within the definition of an agricultural waste cannot also constitute a trade waste.

The settlement agreement sets out the parties' contentions and goes on to require that DPG cease and desist from its practice of open burning and that it pay a stipulated penalty of two thousand dollars ($2,000.00). The Board has two objections to this agreement.

First, the proposed settlement agreement contains no admission of violation. In fact, DPG expressly denies any violation based on its claim that it was burning "agricultural wastes". Furthermore the settlement agreement, taken alone, seems to preclude the Board from finding a violation since it requests that the Board adopt and accept it "as written"; otherwise, it shall be "null and void". The Respondent did state its view at hearing, however, that the settlement agreement presented sufficient stipulated facts for the Board to determine whether the burning of the conditioning wastes constituted a violation of the Act and regulations (R. at 6). The Respondent

also stated that "the parties have stipulated that should the Board make such a finding of violation that a penalty of $2,000 is the appropriate penalty for the actions complained of" (R. at 7).

The explicit terms of the settlement agreement and Respondent's statements at hearing appear to be contradictory. As decided in IEPA v. Chemetco, PCB 83-2, February 20, 1985, the Board cannot order payment of penalties and other acts of compliance unless there has been a concomitant finding of a violation. If the parties wish the Board to make this determination, based on the stipulated facts, they should amend the settlement agreement accordingly.

Second, the Stipulation and Proposal for Settlement does not present sufficient stipulated facts upon which a determination of violation can be made. The only facts before the Board are that DPG owns and operates a seed corn conditioning plant which generates a waste of disputable nature. Whether this refuse constitutes an agricultural waste entitled to an exemption turns on whether the waste itself was "generated on a farm through crop production practices". Simply put, the definition requires that the waste generator be producing a crop and that the waste at issue be directly attributable to the crop produced. Thus, waste which is the product of crops imported from outside farms for processing would not be exempt simply because the processing facility is also a farm.

This interpretation is in keeping with the terms of the exemption for agricultural wastes. Specifically, agricultural refuse may only be burned on "the premises on which such waste is generated." 35 Ill. Adm. Code 237.120(a)(1). Moreover, open burning may only take place 1) in areas one mile or more away from the boundary of a municipality having a population of 1,000 or more; 2) when atmospheric conditions will readily dissipate contaminants; 3) if such burning does not create a visibility hazard on roadways, railroad tracks or air fields; 4) more than 1,000 feet from residential or other populated areas; and 5) when it can be affirmatively demonstrated that no economically reasonable alternative method of disposal is available. When read in conjunction, the regulations clearly require a threshold demonstration by the claimant to an exemption that its refuse was 1) generated on a farm; 2) as a result of the farm's crop production practices and 3) was burned on that farm's premises.

The parties do not dispute that the conditioning wastes are generated at DPG's facilities. Unrevealed by the stipulation, however, is whether DPG's facilities constitute a farm and if so, whether all the waste burned was in fact generated on the farm premises through crop production practices. If the parties intend that the Board make the determination as to whether a violation has occurred, clarification of these issues will be necessary.

The Board hereby rejects the Stipulation Agreement and Proposal for Settlement and orders that hearing in this matter be scheduled within 30 and held within 60 days of the date of this order.

Should the parties determine that they wish to file an amended settlement agreement containing either sufficient admissions of violation to support the remedy or to allow the Board to make such a finding based on sufficient facts, they may file within 35 days the appropriate pleadings.

IT IS SO ORDERED.

Chairman J. D. Dumelle concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 18th day of April, 1985, by a vote of 5-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board