ILLINOIS POLLUTION CONTROL BOARD
May 12, 1971

ENVIRONMENTAL PROTECTION AGENCY	)	
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	)	
v.	)	# 70-49
	)	
	)	
KOPPERS CO.	)	

Frederick Hopper, Special Assistant Attorney General, for the Environmental Protection Agency

Norman J. Barry, Chicago, for Koppers Co.

Opinion of the Board (by Mr. Currie):

Koppers treats crossties and utility poles with creosote at its Carbondale plant to preserve them (R. 124). Pursuant to a permit granted in 1968 by the Sanitary Water Board, the effluent from the plant is taken to settling lagoons and is then applied to the land for irrigation (R. 119-21). The permit limits discharges of runoff water from these facilities to the "waters of the State" to 200 parts per billion phenol and 20 parts per million biochemical oxygen demand (BOD) and specifies that "if the effluent quality is consistently in violation of the above limitation, additional treatment shall be provided." Phenols in very low stream concentrations (above 1 ppb) can cause taste and odor problems in both water supplies and fish; BOD can deplete the oxygen reserves of a stream. (EPA Ex. 35).

The EPA's complaint charged that discharges from Koppers since December 9, 1969 violated not only the conditions of the permit but also sections 10 and 11 of the Sanitary Water Board Act, sections 12(a), (b), and (c) of the Environmental Protection Act, and Rules 1.03 and 1.08 of Rules and Regulations SWB-14. Except for Rule 1.08, which imposes a 30 ppm standard for BOD, the essence of these additional charges is causing pollution of the receiving stream. Moreover, Koppers was charged with depositing wastes on the land so as to create a water pollution hazard in violation of section 12(d) of the Environmental Protection Act.

The record is singularly uninformative. Were it not for the relatively lucid testimony of the company, we would know nothing whatever of the Koppers operation or of its present or proposed treatment facilities, for the Agency's entire case

consisted of sampling results and a few visual and olfactory observations, together with a painfully prolonged effort to pinpoint where each sample was taken (R. 7-14). We think it imperative that those who prosecute cases before the Board recognize it is incumbent upon them to provide the Board with evidence on which it can base an informed decision. On the present record, for reasons that will appear below, most of the Agency's evidence is useless even on the simple issue of violation. And of course we need evidence on the question of remedy as well, of which the Agency presented none whatsoever, nor even any arguments as to what we should order Koppers to do.

Despite the lengthy testimony identifying sampling points, there is a total absence of proof as to whether or not most of the samples measured discharges to "waters of the State" within the meaning of any of the relevant provisions. Most were taken at the point where water drains from the irrigation field into a stream or ditch that crosses Koppers' land from west to east. Whether this is a stream or not was never proved. The fact that it is bordered on both sides by the respondent's property does not excuse its pollution, since the statutes apply to waters "public or private." But if the discharge is to a ditch that is essentially a part of the treatment or discharge facilities, it may be unprotected; the law does not say sewage cannot be dumped into sewers. For lack of proof on this issue, therefore, we must ignore the numerous samples taken at this point or farther up the ditch.

Discharges grossly in excess of the permit limits, however, are clearly shown by a number of samples, taken on various days, at points where the ditch itself passes under a road just prior to its discharge into Glade Creek, which rather plainly is a water of the State protected by the law. On December 9, 1969, phenols at this point were 3,900 ppb (EPA Ex. 3); on January 19, 1970, BOD was 210 ppm (EPA Ex. 6); phenols were 11,000 ppb on February 2, 1970 (EPA Ex. 19) and 8000 ppb on February 9, 1970 (EPA Ex. 22). The reason for these excessive discharges was made clear by the company's own testimony that the lagoons and irrigation field were seriously overloaded: Designed to cope with 10,000 gpd of waste (E. 140), they were subjected to as much as 60,000 (R. 128). Repeated discharges in excess of permit conditions were conceded (R. 140). The permit itself, therefore, required the company to install additional equipment.

There was some testimony as to degraded stream conditions in Glade Creek itself (R. 30, 32), but the Agency made no serious effort to prove these conditions were attributable to Koppers, and we cannot find pollution of the stream itself, as contrasted with the discharge limits of the permit, on the present record.

The Agency made no attempt to prove its charge that Koppers had created a pollution hazard by depositing contaminants on the ground, and indeed it withdrew this allegation at the close of its case (R. 110-11).

Koppers testified that it is working to reduce the volume of its effluent to an acceptable 10,000 gpd or less and to employ some chemical flocculation, both by June 1 of 1971 (R. 129); that it plans to replace topsoil and plants washed from the irrigation field (estimated to take two months, R. 141) and remove sludge from the lagoons as soon as it can (R. 137-38, 141); and that it is negotiating for a grant to install an experimental activated sludge plant as well (R. 134). We think the company should be ordered to adhere to its June dates and to supply the Board and the Agency, by June 1, with a firm schedule for completing its field and lagoon improvements by no later than July 1, 1971. So far as we can determine from the record, these steps should bring Koppers into compliance (R. 138); in any case compliance will be required by July 1 of this year, and a $10,000 bond or other security required to assure performance.

The final question is whether a money penalty should be assessed. The statute provided in 1969 and 1970 for penalties of $5000 plus $200 for each additional day for violation of either the statute or a "determination or order of the Board," Smith-Hurd Ill. Ann. Stat. ch. 19, § 145.13 (Supp. 1970), and the permit was an order of the Sanitary Water Board (id., § 145.11). Discharges in excess of the permit limits, however, were not in themselves a violation of the permit; the process was described in the permit as "experimental," and the permit provided for the construction of additional facilities if consistently high discharges occurred. This implies that the company's obligation was to sample its effluent and to take action as soon as it discovered that its existing facilities were inadequate. The facilities were built in 1967 (R. 121); high discharges were found by the Agency in late 1969 and early 1970. Whether these were the first such discharges we do not know; we cannot therefore say the company should have taken corrective action in advance of those dates. It is clear, however, that the company knew or should have known no later than December, 1969 that additional facilities were required. But there was nothing in the Agency's case to show that the company failed to take the necessary action with due dispatch. The burden was on the Agency to show this violation, and it introduced no evidence on the issue. The motion to dismiss the penalty request at the end of the complainant's case is hereby granted. This we hold despite the fact that the respondent's

case showed the high discharges occurred not because of the failure of the experiment but because of a severe overload of the treatment facilities, which could not have been accidental. The Agency cannot rely on the respondent to prove its case.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. Koppers Co. shall reduce the effluent from its Carbondale plant to 10,000 gpd, and shall provide chemical flocculation as described in the record, all by June 1, 1971.

2. Koppers Co. shall submit to the Board and to the Agency, by June 1, 1971, a report showing that the requirements of paragraph 1 of this order have been met and a firm schedule for replacing topsoil, replanting the irrigation field, and removing sludge from the lagoons at its Carbondale plant, all of which shall be accomplished by July 1, 1971. A final report shall be filed July 1, 1971.

3. Koppers Co. shall bring its effluent into compliance with the Sanitary Water Board permit no later than July 1, 1971.

4. Koppers Co. shall post with the Agency, on or before June 1, 1971, a bond or other security in the amount of $10,000, which shall be forfeited to the State of Illinois in the event the conditions of this order are not met.

I, Regina E. Ryan, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion this 12 of May, 1971.

Regina E. Ryan

Mr. Dumelle will file a dissenting opinion.