ILLINOIS POLLUTION CONTROL BOARD

October 18, 1973

ENVIRONMENTAL PROTECTION AGENCY, Complainant,	)	
v.	)	PCB 73-104
D. H. MAYOU ROOFING AND SUPPLY COMPANY, Respondent.	)	

Dennis Fields, Assistant Attorney General for the EPA
John A. Berry, Andrew J. O'Connor and Michael T. Reagin, Attorneys for Respondent

OPINION AND ORDER OF THE BOARD (by Mr. Henss)

Complaint was filed by the Environmental Protection Agency against D. H. Mayou Roofing and Supply Company of Ottawa, Illinois alleging that emissions from four asphalt storage tanks have caused air pollution in violation of Section 9(a) of the Environmental Protection Act and that two of the storage tanks were installed in April 1972 without Agency permit in violation of Section 9(b) of the Act and Section 3-2.110 of the Rules and Regulations Governing the Control of Air Pollution. Respondent moved to dismiss the Complaint on the ground that Section 3(b) of the Act defining "air pollution" is vague and unconstitutional; that Rules and Regulations Governing the Control of Air Pollution have not been adopted by this Board and therefore may not be enforced; that Section 9(a) and Section 3(a) of the Statute are vague and indefinite and are an unconstitutional attempt to delegate legislative or judicial functions to an administrative board.

The Motions to Dismiss the Complaint are denied. The statutory definition of air pollution is sufficient to meet the constitutional test. With regard to the delegation of functions we believe that the comment of the Court in EPA v. Ford __Ill. App. 3d___ is equally appropriate here. In Ford the Court said:

> "By reason of the increasing complexity of society and the burdens on all branches of government, courts and legislatures alike in the past 50 years have come to recognize that the delegation of functions to boards, commissions and agencies, is becoming more and more essential to efficient government."... "Although the essentially legislative and judicial powers cannot be delegated, we believe it implicit in the authorities that

> where direct or immediate judicial action is inexpedient or impractical, quasi-judicial functions may be conferred upon and exercised by an administrative agency, provided the laws conferring such powers are complete in their content; are designed to serve a general public purpose; are such as to require a consistent and immediate administration; and further provided that all administrative actions are subject to judicial review."

The delegation of powers in the Environmental Protection Act meets that test. See: Southern Illinois Asphalt Co. v. EPA__Ill. App. 3d__ (Oct. 10. 1973)

Section 49(c) of the Act states that:

> "All rules and regulations of the Air Pollution Control Board...relating to subjects embraced within this Act shall remain in full force and effect until repealed, amended, or superseded by regulation under this Act."

We hold therefore, that the Rules and Regulations Governing the Control of Air Pollution are in full force and effect and are properly the basis for an enforcement action brought before this Board.

Respondent also contends that an Agency investigator came on Respondent's property without a warrant for the purpose of obtaining evidence, and that photographs taken by the investigator should be excluded from evidence. The Motion to Exclude that evidence is denied. This is not a criminal case. The Environmental Protection Act authorizes EPA investigators to come onto property for the accumulation of evidence in civil proceedings.

Respondent's asphalt roofing business is located at 428 W. Superior Street in Ottawa. Mayou has been engaged in this business in Ottawa since 1942. Prior to April 1972, the Company heated open tar pots or kettles at this property and then hauled the kettles to the job site. Asphalt was delivered to the plant in solid bricks and was stored in a solid form in cardboard cartons until heated in the kettles.

Since April 1972 Respondent has been using gas fired heaters to keep the asphalt in a molten state in storage tanks which are located at the company's Superior Street property. About 200 to 300 tons of molten asphalt are now delivered annually by transport trucks directly to this facility. Pumps mounted on the transport trucks transfer the asphalt through flexible piping to two 10,000 gallon storage tanks. Respondent's storage tanks are equipped with gas-fired heaters, a top mounted manhole with cover hatch, and an open vent pipe which comes off the top of the storage tank and extends to within 12" of the ground. The vent pipe is 2 1/2" in diameter. Until February or March 1973 it was normal operating practice to leave the hatch cover open for the 30 - 60 minutes needed to transfer the asphalt into the storage tanks. This process occurs about every two to ten days during the asphalt

roofing season and about every two months during slower periods. Testimony indicated that the cover hatch has also been observed partly open since March 1972 (5/24/73, R. 50, 169, Complainant Exhibit 4). Respondent testified that vapors with an oil odor are released during the transfer process but insisted that the vapors are mostly "asphalt steam" (5/24/73, R. 21).

When the asphalt is to be applied on a job, it is transferred from the 10,000 gallon storage tank to small tank trucks which are called day tanks. About 10 minutes are required to pump enough asphalt to fill a 5 ton day tank. The day tank truck is then delivered to the job site where the asphalt is applied still in the molten state.

Thus, it appears that Respondent's main sources of emissions would be the vent pipes and manhole openings on the storage tanks and day tanks. All odorous emissions are vented to the atmosphere without use of control equipment to burn or scrub the odors.

During the first of three public hearings 16 citizens testified regarding emissions from this operation. There was agreement among complaining witnesses that the worst emissions began shortly after Respondent installed the two asphalt storage tanks and began storing the asphalt in a molten state.

Many of the witnesses claimed that they began to experience headaches and nausea only after the new equipment was installed (5/22/73, R. 26, 76, 94, 104, 111, 141, 151, 160, 171, 175). Two witnesses afflicted with emphysema testified that the odors had forced them to leave their homes on various occasions (5/22/73, R. 110, 172). The odors were described by the witnesses as a "tar smell" a "sickening tar odor", and "like creosote". Depending upon the direction of the wind, the witnesses charged that the odors were continually present in or near their homes. One witness recalled being awakened by the odor at 3:00 a.m. (5/22/73, R. 161). Another stated that she could "usually smell them all the time early in the morning" (5/22/73, R. 176).

There was also strong witness agreement that odors occurred in the area regardless of whether or not "white fumes" were observed coming from the top of the storage tanks. Some of the Agency witnesses testified that they were able to keep the odor from entering their homes while others claimed the odor entered their homes while air conditioners were operating. Three of the witnesses testified that they had been forced to halt outdoor meals because of the odor (5/22/73, R. 126, 186, 189). Other witnesses indicated that they had called the police when the odors from Respondent's property became unbearable. Marcevio Lopez testified that his daughter had suffered from breathing difficulties because of the odors (5/22/73, R. 136). Respondent's facilities were identified as the source of the odors by every Agency witness.

In rebuttal, three residents of the immediate area testified that they had detected tar like odors near their homes that were thought to

be coming from the Mayou site. However, they were not bothered by the odor. One of these witnesses said the odor from the tar kettles used a few years ago had been worse than odors experienced recently. This was probably true for that brief period of time in the morning when the solid asphalt was customarily melted in the kettles. Testimony indicated that this operation did cause a lot of smoke, both at the plant site and on the job. However, these smoke emissions from the melting of asphalt in kettles had been intermittent at the plant site.

Respondent hired a professional photographer in order to provide a series of photographs showing the nature of the neighborhood (5/24/73, R. 177). These photographs were used to show the suitability of the roofing company to the area in which it is located. There are views of areas near some railroad tracks and a less affluent residential community. A number of industries and commercial establishments are located nearby. Respondent's location is in compliance with local zoning requirements. The evidence does show that people live near Respondent's facility. About 57 homes are located within a one block radius of the plant. These residents are entitled to protection from air pollution.

Respondent also hired Arro Laboratories, Inc. to conduct quantitative odor measurements. Arro's manager of Air Resources testified that he and three other Arro employees conducted the measurements with a scentometer on the morning of the last public hearing. Results of the tests appear to be inconclusive and of little probative value in this case. One of the odor panel members was continuosly able to detect an odor at a dilution ratio of 160 to 1. The Arro manager indicated that such detection was unusual and could have been a result of cleared sinuses, possibly caused by that member's weekend diving activities.

The evidence indicates that Mayou's emissions were in compliance with Regulations. During cross examination, an Agency engineer testified that he had calculated Respondent's actual particulate emission rate to be about 15.3 lbs. per hour, substantially below the allowable rate of 33.3 lbs. per hour. Based on this evidence, Respondent asserted that a showing of "compliance with Regulations or even part of the Regulations" could be an absolute defense to a Section 9(a) violation.

However, the Statute provides that compliance with the Regulations is a "prima facie" defense, not an absolute defense. [EPA Section 49(e)]

In Dale H. Moody vs. Flintkote Company, PCB 70-36 and 71-67, we stated:

> "It is entirely clear from a reading of the Act that a person can be guilty of a violation of the basic prohibitions set forth in the Act even though he is complying with the Regulations which are applicable to his particular emission or discharge source. For the Act specifically provides that any person is prohibited from discharging contaminants into the atmosphere which cause or tend to cause air pollution...or...violate the Regulations or Standards adopted by the Board under this Act". (Emphasis supplied)

A person who is complying with the Regulations may still cause "air pollution" within the meaning of the Statute. In EPA vs. Southern Asphalt Company, Inc., PCB 71-31 we said:

> "It is manifest from the testimony that Respondent's operation, even if conducted within the emission limits of the Regulations, would constitute a severe nuisance and greatly interfere with the enjoyment of life and property of the residents in the immediate vicinity."

The Board reaffirms that position today.

We find that the emissions from Mayou's operation substantially interfered with enjoyment of life and property by some of his neighbors. According to the evidence these witnesses tolerated Respondent's previous method of operation with little complaint. The change in procedures increased the emissions of tar-like odors and caused them to occur more frequently and at times when they were no longer acceptable. We believe the evidence is manifest that Respondent's emissions constitute a nuisance and thereby cause air pollution. At the same time odors were increasing near Respondent's plant, the odorous emissions "on the job" were apparently decreasing. We appreciate Mayou's desire to improve procedures on the job, but will require that the changed operation not cause an odor nuisance for persons who live near the plant.

Mayou testified that he installed the equipment in question at the present location in April 1972 without Agency permit (5/24/73, R. 6, 7). Mayou admitted that he had altered the storage tanks after installation by installing a vent pipe and that the equipment did not include any air pollution control devices (5/24/73, R. 13, 263). He testified that he first learned of the Agency permit requirements from Agency investigator Sherman in August or September 1972 and that Sherman had promised to send permit forms but failed to do so. Mayou further testified that he requested the permit forms from the Agency's Springfield office and later received permit forms for "oil refining".

Investigator Sherman said he had instructed his secretary to mail the permit forms and a copy of the Regulation to Mayou.

Under the circumstances the penalty for failure to obtain a permit will be minimal.

The record shows that there are many pollution control systems available to control Respondent's emissions (e.g. activated carbon adsorbtion, vapor condensers, inert gas overlay, closed loop system, incineration, vapor relief valves and others). The cost

for control equipment suited to REspondent's needs could range from about $100 for a closed loop system to about $30,000 for a sophisticated activated carbon adsorbtion system. Respondent's own equipment supplier testified that several control systems for his line of equipment had been available for a number of years (5/24/73, R. 149, 157, 168).

Based on the entire record, the Board finds that Respondent has caused air pollution in violation of Section 9(a) of the Act and that Respondent did install, operate and alter equipment capable of causing air pollution in violation of Section 9(b) of the Act and 3-2.110 of the Rules.

The fact that Mayou's emissions are not in excess of our Standard greatly mitigates the penalty. For all violations a monetary penalty of $1000 seems appropriate. We shall also direct Respondent to submit a plan for the elimination of the nuisance.

ORDER

It is the Order of the Board that:

1. D. H. Mayou Roofing and Supply Company shall pay to the State of Illinois by November 20,1973 the sum of $1000 as a penalty for the violations found in this proceeding. Penalty payment by certified check or money order payable to the State of Illinois shall be made to: Fiscal Services Division, Illinois EPA, 2200 Churchill Road, Springfield, Illinois 62706.

2. Respondent shall, within 45 days submit to the Agency a compliance plan designed to reduce odors and eliminate the nuisance and Statutory violation. The plan shall be designed to achieve compliance within 90 days from the date of this Order. Respondent shall cease and desist from its violations following the compliance date.

3. Respondent shall, by November 20,1973, submit to the Agency completed permit application forms which were required for past installation of equipment.

Mr. Dumelle and Mr. Marder dissent.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order was adopted this 18th day of October, 1973 by a vote of 3 to 2.

Christan L. Moffett