

ILLINOIS POLLUTION CONTROL BOARD
March 22, 1973

ENVIRONMENTAL PROTECTION AGENCY)
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) #71-340
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ALUMINUM PROCESSING CORPORATION)

JOHN H. BICKLEY, JR., STEVEN C. BONAGUIDI AND DOUGLAS T. MORING,
ASSISTANT ATTORNEYS GENERAL, ON BEHALF OF ENVIRONMENTAL PROTECTION
AGENCY
LAMBERT M. OCHSENSCHLAGER OF REID, OCHSENSCHLAGER, MURPHY & HUPP;
JOHN O. HEIMDAL, APPEARED ON BEHALF OF RESPONDENT
RICHARD L. COOPER, APPEARED ON BEHALF OF INTERVENOR, HERBERT DE KING

OPINION AND ORDER OF THE BOARD (BY SAMUEL T. LAWTON, JR.):

Complaint was filed on October 29, 1971 by the Environmental Protection Agency against Aluminum Processing Corporation, with respect to two facilities operated by Respondent, one in Aurora and one in Batavia. The complaint alleges that Respondent operates an aluminum processing facility at Aurora and that as a result of its operation there, has, on certain specified dates, emitted contaminants into the air, creating a public nuisance and causing air pollution in violation of paragraph 240.3 and 240.2(a) and (c) of the Illinois Air Pollution Control Act and Section 9(a) of the Illinois Environmental Protection Act (Act).

The complaint further alleges that Respondent used its site at Batavia for the disposal of solid waste, particularly aluminum oxide and iron wastes, in violation of the same provisions of both Acts aforesaid, and in addition, created a water pollution hazard in violation of Section 12(d) of the Environmental Protection Act, caused water pollution in violation of Section 12(a) of said Act and caused open dumping and committed other violations contrary to the Rules and Regulations for Refuse Disposal Sites and Facilities, with respect to registration, absence of fencing sanitary facilities, posting, shelter, hours of operation and adequacies of final cover. The violations are alleged to have commenced in June of 1966 and generally continued to "the close of the record" which form of pleading we have previously held to be improper, unless specification of the events of alleged violations occurring after the commencement of hearings is made. Air pollution violations occurring before July 1, 1970 are deemed in violation of the Illinois Air Pollution Control Act and those subsequent thereto, in violation of the Illinois Environmental Protection Act.

Water pollution violations are asserted for a period subsequent to July 1, 1970 and are alleged to be in violation of the Environmental Protection Act. Solid waste disposal violations, as alleged, commenced on June 7, 1966 and continue prospectively in violation of the Rules and Regulations for Refuse Disposal Sites and Facilities, which have been in force and effect both prior and subsequent to the enactment of the Environmental Protection Act (Section 49(c), Environmental Protection Act). In addition, violation of Section 21(f) of the Environmental Protection Act subsequent to July 1, 1970 through September 25, 1970, is alleged, which provision requires compliance with relevant regulations for refuse disposal sites.

In summary, the initial complaint alleges air pollution violations relative to the Aurora site and air, water and solid waste violations with respect to the Batavia site, for a period commencing on June 7, 1966 with respect to the Batavia site and commencing May 21, 1970 with respect to the Aurora site. Offenses prior to July 1, 1970 are alleged to violate the Illinois Air Pollution Control Act, and the Refuse Rules; offenses after July 1, 1970 are alleged to violate the Environmental Protection Act with respect to air pollution, water pollution and disposal of solid waste and the Refuse Rules, which have been in force and effect during all periods of violations alleged.

An amendment to the complaint was filed on January 10, 1973, alleging that Respondent in the operation of a "Jefferey unit" used for the treatment of industrial waste generated to the Aurora site, has caused water pollution in violation of Section 12(a) of the Act since July 1, 1970, and in addition thereto, has failed to meet water quality and effluent standards set forth in SWB-11. This amendment conformed the pleadings to the proof.

The first hearing in this matter was held before Edward C. Kent, Hearing Officer, on December 27, 1971, at which time Respondent was represented by Lambert M. Ochenschlager, who moved for a jury trial. It does not appear that the Board has acted at any time on this demand and, accordingly, the motion is denied. Cf. C. M. Ford v. Environmental Protection Agency, Appellate Court of Illinois, Third District, #72-60, February 4, 1973).

Respondent represented in substance that it had ceased its Aurora operation and that it would take the necessary steps to abate air and water pollution at both sites and would remove minerals from the Batavia site to bring its operation into compliance there, as well. Robert Arundale, II, President of Aluminum Processing Corporation, testified that subsequent to the shutdown of the Aurora site, the premises would be leveled and all operations would cease by January 15, 1972, with the exception of one structure which would remain standing, that a berm or parapet would be built to prevent water pollution in the Fox River, that comparable steps would be

taken at the Batavia site to prevent the flow of aluminum oxide into the Fox River, that steps would be taken to remove the aluminum oxide that was presently in the land at the Batavia site and that procedures would be employed so that such removal would not cause air pollution during the period when removal took place. (R.31-36, 12/27/71). In addition, dredging and excavation would take place at both sites to remove the aluminum oxide that had flowed from Respondent's property into the river and was located on the river bottom for a distance of approximately 100 yards beyond both premises (R. 38-42, 12/27/71). Water lines presently running from the Aurora Plant into the river would be removed.

In summary, Respondent agreed to terminate its operation and take all necessary steps at both locations to terminate air, water and solid waste pollution, to take precautionary measures during removal of solid waste from Batavia to prevent air pollution, to cover all exposed aluminum slag at both locations and to dredge the river contiguous with its facility to remove aluminum oxide that had flowed from the Respondent's land into the river.

At the December 27, 1971 hearing, it was agreed that the substance of the agreement to which Mr. Arundale testified, would be embodied in a written document and submitted to the Air, Water and Land Divisions of the Environmental Protection Agency, and possibly to the State agency having jurisdiction to authorize the dredging aforesaid. (R.43, 12/27/71).

The hearing was continued to January 14, 1972. This hearing was continued by agreement until January 31, 1972 and thereafter, continued generally, pending resolution of the settlement program. For all that appears in the record, nothing further took place until October 6, 1972 at which time Hearing Officer Kent requested that, because of illness, the case be reassigned to a new hearing officer. The case was reassigned to George A. Lane, Hearing Officer, who on October 27, 1972, reset the case for hearing on November 16, 1972. A written motion for continuance was filed, alleging the unavailability of Mr. Ochsenchlager, because of convalescence from surgery. The case was continued and reset to January 3, 1973. The motion for continuance filed by Respondent contains "Proposal of Respondent", embodying the oral agreement submitted at the December 27, 1971 hearing. The proposal is signed by Mr. Arundale on behalf of Respondent and recites that Respondent will remove all buildings from the Aurora site and level the entire area pursuant to a plan attached to the proposal, that grading would be done in a manner to prevent erosion and flow of water from the land to the river. The Fox River would be dredged in an area extending from the Old Pump House, 100 yards to the south adjacent to the subject property, two pipelines extending into the river from the subject properties would be removed, and production of aluminum oxide or aluminum ingots would cease on the site. No aluminum dross would be ordered to the site

and no aluminum oxide would be removed from the facility. No further lines would be run into the Fox River at this location without Agency approval. All existing aluminum slag or oxide piles would be covered in accordance with Board requirements, which would be completed by the spring season (1972).

With respect to the Batavia property, aluminum oxide will be removed as quickly as "the demand for the same will permit", it being Respondent's intention to sell this product as orders are placed. Steps will be taken during such removal to prevent the development of a slough. Removal will be accomplished as rapidly as possible. The area will be leveled and covered to prevent erosion and dust. In addition, Respondent will erect a berm or dike to prevent the flow of aluminum oxide into the river. The submission is dated January 14, 1972, but does not appear to have been acted upon in any way by the Agency.

On December 13, 1972, Lambert M. Ochsenschlager withdrew his and his firm's appearance as attorneys for Respondent. On January 3, 1973, John O. Heimdal, Secretary of the Respondent corporation, appeared initially as Secretary of Respondent and then entered his appearance as counsel. (R. 5, 1/3/73). He filed a plea of nolo contendere stating (R. 3, 1/3/73) that he did not intend to contest the allegations on behalf of Respondent but was not making all admissions of violation. Upon being told by the Attorney General that the Board Rules would not embody such procedure, an oral general denial was imposed and the hearing proceeded on this basis. The Agency introduced a substantial number of exhibits in support of its complaint and the amendment thereto. (Compl. Group Ex. 1 through*14). We consider the allegations in the order specified in the pleadings. We are unable, on the state of the record, to find air pollution violations at the Aurora facility as charged. No evidence has been introduced either with respect to numerical emissions or impact on surrounding property that would justify a finding of nuisance or interference with the enjoyment of life to sustain a finding of air pollution, as defined in both statutes. The mere introduction of photographs is insufficient. The same finding must be made with respect to the allegations of air pollution from the Batavia facility. The evidence is sufficient to support a finding of violation with respect to Section 12(d) of the Act in the creation of a water pollution hazard at Batavia, between September, 1970 and April, 1972. (Compl. Group Ex. 3, Laboratory reports of composition of Fox River bottom samples adjacent to the Batavia site; Compl. Group Ex. 7, photographs of aluminum dross disposal site adjacent to Fox River). For the same reasons as stated above, however, we are unable to find a demonstrable violation of the Water Pollution Provisions of the Environmental Protection Act at either location. There is no question that Respondent's Batavia operation has violated the refuse regulations during 1970, 1971 and 1972, and has violated the Environmental Protection Act in operating a Refuse Disposal Site without the necessary permits, as charged in the complaint. (Compl. Group Ex. 2, 3 and 4).

We also find that the evidence (Compl. Group Ex. 11 & 12) supports the allegations of the amendment to the complaint as to SWB-11, Rule 1.03(a) and (b) relative to the Aurora facility. However, we are unable to find violation of paragraph (c) thereof because no nuisance condition has been established. We also find that the operation at the Aurora site has violated Rule 1.08, paragraphs 10(a) and (b) (1), (2), (3) and (4) of SWB-11, with respect to effluent discharges in excess of applicable BOD, suspended solids and other limitations therein contained, between July 1, 1970 and the date of the last hearing. The evidence indicates that the Aurora site has been shut down and that the Batavia site has been sold since the commencement of the hearings.

Respondent has made no effort to refute the allegations, but has introduced evidence indicating a condition of insolvency which would, of course, go to the matter of ultimate penalty but not to the question of violation. Respondent's counsel has also reaffirmed the proposal previously made by Respondent and has indicated that it will perform all of the undertakings assumed by it in the proposal. We believe that no useful purpose would be served by the imposition of a substantial penalty, particularly in view of the sequence that this case has taken, the steps already taken to achieve abatement of the pollutional discharges and the insolvency of the company. We recognize further that to the extent the ownership of the Batavia site has changed, enforcement of our order may present certain difficulties. However, we can only act on the basis of what is before us and direct compliance against those who have been brought in as party-respondents.

We must leave any further implementation of the enforcement process to the Attorney General. It will be our order that a penalty in the amount of \$1,000 is assessed against Respondent for the violations of SWB-11, the creation of a water pollution hazard in violation of Section 12(d) of the Environmental Protection Act and for violation of the Rules and Regulations Governing Refuse Disposal Sites and Facilities. We will direct that Respondent cease and desist from all violations of the relevant statute and regulations with respect to the causing of air and water pollution and comply with the Rules and Regulations Governing the Control of Refuse Disposal Sites and Facilities. Lastly, we will require that Respondent take all steps that it has agreed to do in its proposal, which have been outlined above, to assure that no air or water pollution will continue from any of its operations or will result from the operations that it contemplates in the closing of its facilities.

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

IT IS THE ORDER of the Pollution Control Board:

1. Respondent shall pay to the State of Illinois the sum of \$1,000 as a penalty for the violations of SWB-11, the Rules and Regulations for Refuse Disposal Sites and Facilities and Section 12(d) and Section 21(f) of the Environmental Protection Act as found in this proceeding. Penalty payment by certified check or money order shall be made to: Fiscal Services Division, Illinois Environmental Protection Agency, 2200 Churchill Drive, Springfield, Illinois 62706, by April 27, 1973.
2. Within 60 days from receipt of this order, Respondent shall cease and desist from all violations of the Environmental Protection Act and all applicable Rules and Regulations relative to the causing of air pollution, water pollution and the conduct of a refuse disposal site and facility. Respondent shall construct a dike or berm at both its Aurora site and its Batavia site to prevent polluttional discharges from such sites into the Fox River.
3. Respondent shall dredge the Fox River in proximity with both sites to remove deposited aluminum oxide, pursuant to the provisions of paragraph 2 of the "Proposal of Respondent" with respect to the Aurora site and will take comparable steps with respect to the Batavia site, as agreed upon on page 42 of the December 27, 1971 transcript of hearing. Respondent shall remove all exposed aluminum oxide from the Batavia site and shall fill and cover said site in compliance with relevant regulations.
4. Respondent shall level and apply cover to the Aurora site to bring it into compliance with all relevant regulations.
5. Respondent shall take such further and additional steps at both its Aurora and Batavia sites as may be necessary to prevent any and all emissions of effluents or contaminants into the water and air that may cause water pollution or air pollution or the threat thereof and shall cause such steps to be taken so that all areas presently or formerly owned by it and subject to this proceeding shall be in compliance with all relevant statutory provisions and Rules and Regulations with respect to air and water pollution, the emission of contaminants both into the air and water and the relevant regulations with regard to refuse disposal sites and facilities. No excavation, removal or loading of materials shall take place at any time when wind conditions will create the likelihood of nuisance.

I, Christan Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion and Order was adopted on the day of March, 1973, by a vote of to .