ILLINOIS POLLUTION CONTROL BOARD
April 5, 1973

ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 71-88
	)	
RALSTON PURINA COMPANY,	)	
	)	
Respondent.	)	

Mr. Larry R. Eaton, Assistant Attorney General, for the Environmental Protection Agency;

Mr. John W. Yoder, Mr. Walter A. Yoder, and Mr. August F. Ottinger, for Ralston Purina Company.

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

This case was commenced by the Environmental Protection Agency ("Agency") with the filing of a complaint against Ralston Purina Company ("Ralston") on April 26, 1971. The complaint charged Ralston with violation of the Ringlemann smoke standard of Rule 3-3.122 of the Rules and Regulations Governing the Control of Air Pollution ("Rules"), promulgated pursuant to Section 5-1.2 of the Air Pollution Control Act; with operation of its boilers in violation of Rule 3-3.112 of the Rules, effective pursuant to Section 49(c) of the Environmental Protection Act ("Act"); causing, threatening, or allowing the discharge or emission of fly ash into the environment so as to cause or tend to cause air pollution in violation of Section 9(a) of the Act; causing excessive noise in the operation of its plant on December 18, 1970, so as to cause, threaten or allow air pollution in violation of Section 9(a) of the Act; creation of odors so as to cause, threaten or allow air pollution in violation of Section 9(a) of the Act; operating its plant without a permit from the Agency in violation of Section 9(b) of the Act; failing to submit since approximately October 15, 1967, a "Letter of Intent" relating to its coal fired boilers in violation of Rule 2-2.22 of the Rules; and failing since April 15, 1968, to submit to the Air Pollution Control Board or to the Agency an air contaminant emission reduction program (ACERP) relating to its coal fired boilers in violation of Rules 2-2.31(f) and 2-2.41 of the Rules.

Ralston operates a large feed manufacturing plant near the City of Bloomington, Illinois, in McLean County. At this facility approximately 160 different feeds are manufactured. The facility also has a soy bean processing plant where soy bean oil is manufactured or extracted. There has been no soy bean extraction processes at any facility in the area other than the Ralston operation since 1969 (R. 126). The area in which the Ralston facility is located is partially industrial and partially residential, with a significant public housing development located nearby. This public housing development, Sunnyside Court, was constructed after Ralston was already operating, but the area already included houses on at least two sides of the facility (R. 609, 613-614). People who reside in Sunnyside Court do so because they are assigned there by the Housing Authority (R. 546).

Before discussing the substantive issues of this case, there are several preliminary matters which must be first resolved. Ralston moved to dismiss and strike the complaint because, Ralston asserts, the allegations of the complaint are conclusory and insufficient, thereby depriving the Respondent of his rights to be apprised with exactness and conciseness as to the respective charges. We disagree. The complaint states with adequate specificity those things which Ralston was charged with doing in violation of the law. Accordingly, we deny the motion to dismiss. Ralston also alleges that the complaint should be stricken because of the nature of the action which Ralston alleges is quasi-criminal, thereby depriving Ralston of its right to a fair trial and due process of law. These precise contentions were rejected by the Illinois Appellate Court Third District in the case of C. M. Ford v. Environmental Protection Agency ; ____ Ill. App. 2d ___ (1973); PCB71-307 and in the Fourth District in the case of Bath, Inc. v. Environmental Protection Agency; ___ Ill. App. 2d ___; PCB71-52, 71-244.

A Petition to Intervene in the enforcement proceedings was filed by the McLean County Economic Opportunity Corporation (Corporation) and Jane Stillman (Stillman). The Corporation alleged that it, representing low income individuals living in the housing project adjacent to the Ralston facilities, may be adversely affected by Board orders, and that Stillman, an individual, is a resident of the housing project and may also be adversely affected. Intervention was allowed by the Hearing Officer.

In an attempt to obtain pre-trial discovery, Ralston attempted to take a discovery deposition of Stillman. Although proper notice was given to Stillman regarding the deposition, and although the attorneys for both Ralston and Stillman and a court reporter appeared for the deposition, she did not appear. Ralston moved to dismiss the intervenors, to prohibit Stillman to testify at any hearings in the matter, and moved

further that the Board censure Stillman and charge her costs for the attempts to take her deposition. The Board has no censure powers, nor has it power to assess costs in such a situation. However, when a party has asked for leave to intervene and has been granted the privilege of intervention, that privilege ought not be abused as was done in this case. Those who intervene and are given notice of depositions should appear. The record indicates that the Corporation was represented by counsel at the hearings of September 8 and 9, 1971, and that Stillman testified at the hearing of September 19, 1972 regarding odor and ash problems related to the Ralston facility. At this later hearing, Corporation was not represented by counsel. We will grant the motion to dismiss Stillman from the case, but deny the motion as to the Corporation. Stillman's abuse of our procedures should not redound to the detriment of Corporation. We will not grant the motion to prevent Stillman from testifying. The Act requires that citizens be allowed to testify, and we will therefore allow Stillman's testimony to stay in the record.

After the complaint was filed, there was extensive pre-hearing negotiations between the parties. There were two days of hearings in September of 1971. On the third day, September 10, 1971, a reported settlement was reached and was subsequently transmitted to the Pollution Control Board (Board), which rejected the proposed settlement on November 23, 1971, because the Agency had not concurred in the settlement and because there was an inadequate factual foundation on which the Board could make decision. In September of 1972, a second settlement was presented to the Board, which settlement was again rejected on the basis that there was an inadequate factual foundation on which to base a decision. On November 28, 1972, a final hearing was held and upon conclusion of that hearing, all parties rested. The proposed settlement was resubmitted and the parties have asked that the Board decide the case based on the record it now has.

Certain of the substantive allegations of the complaint are easily resolved. Excessive noise does not constitute air pollution in violation of Section 9(a) of the Environmental Protection Act. Title VI of the Act contemplates by its very nature that the control of noise must be implemented by regulation or standard adopted by the Board. Accordingly, Paragraph 5 of the complaint is dismissed.

Smoke emissions in excess of that allowed by Rule 3-3.122 are alleged to have occurred on June 2, 1970. The deposition of Robert Hendricks contains pertinent evidence relating to this charge. He estimates that on the day in question, he was on the plant property for approximately 20 minutes and that for about half that time there were smoke emissions in excess of 2 on the Ringlemann Chart. Both times given by the witness were

estimated. The witness did not take his measurements in accordance with the directions on the Ringlemann Chart, but he also testified that he has taken as many as 60 Ringlemann readings during his employ with the Agency (P. 23). While it is not necessary that the readings be made with a Ringlemann Chart, or that the readings be made with mathematical exactitude as relates to the directions on the chart, the evidence must be greater than that here. Although the witness had made numerous readings in the past, there is no evidence that he was a trained smoke observer, nor was there any evidence as to any expertise the witness had to make Ringlemann evaluations. Accordingly, we find no violation of Rule 3-3.122.

The Agency also charged operation of equipment without a permit in violation of Section 9(b) of the Act. The complaint in this case was filed prior to the Board decision in Environmental Protection Agency v. Southern Illinois Asphalt, PCB71-31, in which case the Board held that there could be no operating permit violations until such time as the Board had adopted its own operating permit regulations. Consistent with our decision in Southern Illinois Asphalt, we find no violation of Section 9(b).

The Agency's allegations regarding the "Letter of Intent" (Rule 2-2.22), the Air Contaminant Emission Reduction Program (ACERP) (Rules 2-2.31(f) and 2-2.41) and coal boiler operation violations (Rule 3-3.112) all depend on whether the Ralston facility is located in a standard metropolitan statistical area (SMSA). If Ralston is located in a SMSA, its allowable emission rate is 0.6 pounds of particulates per million BTU input (Rule 3-3.112), and its estimate of 0.79 pounds of particulate per million BTU input in its "Letter of Intent" (Complainant Ex. 7) places the boilers in excess of the particulate limits. Then, the Agency contends, under the Rules Ralston would be required to file an ACERP describing how the facility would be brought into compliance. The Agency further contends that the estimated 0.79 pounds per million BTU is misleading, thereby rendering the "Letter of Intent" invalid. The Agency, continuing to construct a house of cards, claims that even if Ralston is not in an SMSA, its estimate of 0.79 is so close to the allowable standard of 0.8 pounds of particulate per million BTU input (Rule 2-2.53) that Ralston should have filed an ACERP anyway. The Agency bases this argument on the fact that Ralston estimated that its coal had a 5.3% ash content (Complainant Exhibit 7), was purchased in Illinois (Complainant Exhibit 7), and therefore would produce more particulates that Ralston so estimated. However, the Agency neglected to provide any information to rebut Ralston's 5.3% ash content estimate. Ralston's figures regarding fly ash content and particulate emissions being the only such figures in the record, we are accepting them.

The Agency contends, despite the definition of SMSA ("... county which has at least one city with a populaiton of at least 50,000, and the surrounding counties which contain the suburban areas for these cities.") contained in Table I of the Rules, that McLean County is an SMSA. It bases the contention on the inclusion of Champaign County as an SMSA in Table I, pointing out that neither Champaign nor Urbana has a population of 50,000, but that collectively, they do in fact have a population in excess of 50,000. The Agency then states that neither Bloomington nor Normal has a population of 50,000, but, again as Champaign-Urbana, the collective population exceeds 50,000. Therefore, Ralston is located in an SMSA. This apparently reasonable argument must fail for the simplest of reasons: Table I contains an exclusive list of SMSA's in Illinois, and the Ralston facility is not in an area included on Table I. The Board cannot unilaterally amend duly adopted Rules.

For the above reasons, we find no violations of Rules 2-2.22, 2-2.31(f), 2-2.41 and 3-3.112.

The record overwhelmingly demonstrated that Ralston caused air pollution due to odors. Several witnesses who either live in the Sunnyside housing development across the street of the Ralston facility or who work in the neighborhood testified at the hearing of September 19, 1972. A brief summary of their testimony regarding odor from the Ralston facility reveals the severity and duration of those odors.

Dorothy J. Stewart, an official of the Bloomington Housing Authority, testified that the odor is serious as far as two blocks away, and during hot weather the odor is unbearable and smells like spoiled food (R. 498). Ms. Stewart is in the area nearly every day (R. 497).

Mr. John L. Brown, Director of the Sunnyside project, simply described the odor as "undescribable bad" (R. 501).

Mr. James Herbert, an employment counselor who is in the Sunnyside area frequently described the odor as "worse than dog food" (R. 570).

Ms. Sharon Hamilton, a resident of the project, described the odor as making both her and her children nauseous (R. 514, 516).

Ms. Jane Stillman, a resident of Sunnyside and also a Director of the project, described the odor as follows: "terrible. There's no describing it" (R. 532).

Ms. Patricia Wannemacher, who worked in an office in the area, described the odor as "pretty bad" (R. 536) and "very offensive" (R. 540).

Mr. John H. Porter, Jr. testified that odor, noticeable on an occasional basis, was "a kind of heavy opressive kind of smell that would tend to make me gag" (R. 560)..

Mr. Earl Johnson testified that he had been a resident of Sunnyside Court but obtained a doctors certificate allowing him to move from the public housing development. The odor when he lived at Sunnyside, stated Mr. Johnson, "smelled like...a bunch of old bones" (R. 580).

Ms. Marian Jones testified that the odor was "like somebody cooking huge amounts of garbage or something" (R. 595).

Ralston attempted to rebut the above testimony with evidence that other facilities in the area, namely a sewage treatment plant, was the cause of many of the odors. However, the other witnesses were able to distinguish between Ralston's odors and other odors in the area (R. 504, 520, 540). Ralston also asserted that their facility was located in the area prior to the Sunnyside Court housing project (See testimony of Mr. Robert A. Hopkins, R. 608-614), but while priority of location is a factor to be considered by the Board pursuant to Section 33(c)(1) of the Act, operating a industrial facility in a mixed residential, agricultural and industrial area is not an excuse to cause residents of that area to bear the unconscionable burdens that they were forced to bear for so long.

The odor and dust nuisances had in fact remained unabated for approximately 20 years (R. 552). Hopefully, the proposed and by now partially implemented compliance program set forth in the settlement will in fact have abated the odor and dust nuisances.

The evidence supporting the Agency's allegation of excessive fly-ash from the Ralston facility causing air pollution in violation of Section 9(a) of the Act is also well supported by the evidence in the record. There is overwhelming evidence that there was much dust in the area, and that the dust did create a serious cleaning problem and an often serious health hazard, and that the dust in fact was attributable to the Ralston facility described by residents and workers in the area at the September 19, 1972 hearing.

The compliance program, set forth in Paragraphs 3-8 of the Stipulation for Settlement, is as follows: Respondent's boilers have been converted from coal to oil, and certain control equipment has been installed pursuant to Agency permit, thereby eliminating any particulate emissions problems (Paragraph 3); certain noise abatement practices have already been instituted (Paragraph 4); fish processing, a significant odor producing activity, has ceased and will not resume in the future (Para-

graph 5); internal housekeeping practices designed to improve odor problems have been submitted to the Agency for the Agency's approval or modification (Paragraph 6); the vent stacks from the soy bean flake dryer operation will be modified to eliminate odor nuisance from that source (Paragraph 7) and Respondent generally promises to comply with the Chapter 2: Air Pollution Regulations of the Pollution Control Board (Paragraph 8). No cost figures respecting the compliance program appear in the record.

However, to the extent that the compliance program as described in the Settlement is, in fact, inadequate to bring Ralston into full compliance with the Act and Rules, Ralston will be required to take whatever steps are necessary to bring itself into full compliance. Accordingly, we will accept the compliance program with the proviso that Ralston and the Agency report to the Board within 90 days of entry of this Opinion and Order in this case as to the status of Ralston's compliance so that we may enter additional orders as may be necessary.

We will further assess a penalty of $7,500 against Ralston for its continued and flagrant causing and allowing odor and dust nuisances, thereby violating the Section 9(a) prohibition against such nuisances. Considering the duration of the offense, a much higher penalty would be appropriate. However, we are limited in its assessment to the period specified in the complaint.

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

IT IS THE ORDER of the Pollution Control Board:

1. The compliance program as set forth in paragraphs 3-8 of the Stipulation for Settlement is approved by the Board and made a part of this Order, except as modified by this Opinion.

2. Ralston and the Agency shall report to the Board within 90 days of the entry of this Order regarding the status of Ralston's compliance with all relevant regulations and statutory provisions with respect to emissions into the air from its operation. The Board retains jurisdiction for such other and further orders as may be appropriate in the premises.

3. Ralston shall pay a penalty of $7,500 to the State of Illinois for violations as found in the Opinion. Payment shall be made on or before May 14, 1973 by certified check or money order, and shall be sent to: Division of Fiscal Services, Illinois Environmental Protection Agency, 2200 Churchill Drive, Springfield, Illinois 62706.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the above Opinion and Order was adopted on the 5th day of April, 1973, by a vote of 4 to 0.

Christan L. Moffett