ILLINOIS POLLUTION CONTROL BOARD
April 4, 1972

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
	)	
v.	)	# 71-320
	)	
	)	
CHICAGO HOUSING AUTHORITY	)	

Mr. Melvyn A. Rieff, for the Environmental Protection Agency
Mr. Robert K. Hick & Mr. Calvin H. Hall, for Chicago Housing Authority

Opinion & Order of the Board (by Mr. Currie):

On October 12, 1971, the Agency filed a complaint charging the Chicago Housing Authority (CHA) with operating incinerators at its Bridgeport Homes in Chicago in such a manner as to cause the emission of particulate matter in excess of limits set by the Rules and Regulations Governing the Control of Air Pollution, and to cause air pollution in violation of section 9(a) of the Environmental Protection Act. After a hearing we entered a preliminary order December 9, 1971, authorizing further proceedings to determine what CHA should be ordered to do in the event a violation was found. That hearing has since been held, the parties have stipulated to a solution to the problem for the future, and the case is ready for decision. We find the Agency's allegations amply sustained, order CHA to cease and desist from use of the incinerators at once in accordance with the stipulation, and impose a nominal penalty of $200,for reasons given below.

CHA moved at the hearing to exclude any evidence relating to the statutory air pollution count on the ground that the allegations were not sufficiently precise, citing as authority our decision in EPA v. Commonwealth Edison Co., # 70-4 (Feb. 17, 1971)(R. 9-14). The case is not in point. The vice in the Edison case, as the opinion stressed, was that the Agency attempted to utilize a general air pollution count as a vehicle for introducing evidence as to sulfur dioxide in a case otherwise appearing to be concerned exclusively with particulate matter, to the demonstrated surprise of the respondent and to the detriment of its ability to prepare its case:

> The natural implication of this paragraph, tucked away as it is like a boilerplate catchall provision, is that it is just another handle for establishing excessive emissions of the type already charged in the complaint, namely smoke and other particulates. . . . Nowhere in the complaint was sulfur adverted to. . . . We do not ask that the Agency plead all its evidence; we do think it is not too much to insist that the words "sulfur dioxide" be mentioned if that substance is to be brought into a case otherwise dealing with particulates alone by reference to the general prohibition against air pollution.

> . . . The third paragraph of the final complaint is hereby stricken insofar as it applies to contaminants other than smoke or particulate matter. (pp. 4-5: Emphasis supplied).

In the present case the air pollution count is just what we said in Edison was permissible: an alternative legal theory for demonstrating that particulate emissions were illegal. There was no lack of fair warning as to that, for particulate emissions from the incinerator were clearly mentioned throughout the complaint. Edison itself, as the above quotation indicates, allowed the air pollution count to stand insofar as it related to smoke and particulates. Beyond particulates, the statutory count in the present case specifically mentions odors and therefore satisfies the Edison requirement that additional contaminants intended to be brought into the case be specified. The propriety of this count is sustained by our decision in EPA v. Granite City Steel Co., #70-34 (March 17, 1971). Moreover, the motion, in essence was one to strike a portion of the complaint, and it was not timely made under the Rules. Nor was any motion made for a more definite statement, which might have clarified any uncertainty in CHA's understanding of the complaint. Moreover, the Hearing Officer specifically offered to allow additional time at the close of the hearing to rebut any testimony introduced under the challenged count if CHA was caught by surprise at its introduction (R. 23). No motion for additional time was ever made, and it is clear CHA was in no way prejudiced or taken off guard by the evidence introduced under the air pollution count. Finally, at the close of the hearing the complaint was amended, as authorized by our rules, to conform to the proof by making the allegations of this count more specific. While such an amendment could not cure any initial defect that exposed the respondent to unfair surprise, we find the original complaint entirely adequate and uphold the Hearing Officer's denial of the motion to exclude evidence. In any event a contrary ruling on this motion would make no difference in the outcome of the case in view of our decision, below, that particulate emissions in excess of regulation limits occurred and that the sanctions we impose are justified by either count alone since there was essentially a single continuing violation.

Turning first to the particulate regulation count, it is conceded that CHA at the time alleged provided seven single-chamber incinerators for garbage disposal by the residents of Bridgeport Homes (R. 7). Rule 3-3.232(b) of the regulations limits emissions from new incinerators of less than 1000 pounds per hour capacity (such as those in this case, R. 154) to 0.35 grains per standard cubic foot of exhaust gas. CHA argues that this regulation is inapplicable because its incinerators are

not new within the meaning of the Rules. But Rule 2-2.11 quite explicitly makes Rule 3-3.232(b), along with numerous other Rules, applicable to existing equipment within Standard Metropolitan Statistical Areas, which include Chicago. That the complaint did not cite Rule 2-2.11 is not fatal, as CHA argued in its motion to strike evidence relating to the particulate matter (R. 190). There is no showing that this purely technical oversight in any way prejudiced CHA's ability to defend itself. CHA was clearly on notice that it was charged with a particulate violation, and the numerical limits of the standard were plainly indicated in the section referred to. CHA carefully cross-examined the EPA's witness on this issue as to the substance of his testimony and clearly was prepared to contest the merits of the particulate charge. The Rule cited in the complaint was in fact the operative Rule and its citation gave all the warning that was necessary.

The Agency proved by the use of standard emission factors that single-chamber incinerators of the size and type employed by CHA, burning refuse such as CHA's burned, could be expected to emit 1.58 grains of particulate matter per standard cubic foot, over four times the permissible level (R. 165). CHA objected to the use of standard emission factors, arguing that a stack test was necessary, citing Rule 3-3.113, which prescribes methods for stack testing. As the Agency correctly points out in its brief, that Rule merely specifies a standard method so there will be uniformity when stack testing is employed; it does not require a stack test in every case, since to do so would require an unnecessary and wasteful expenditure of resources. We have repeatedly allowed emissions to be shown prima facie on the basis of emission factors based upon testing of similar facilities. See. e.g., EPA v. Lindgren Foundry Co., # 70-1 (Sept. 25, 1970), and numerous later cases. CHA argues Lindgren is inapplicable since a variance was requested in that case and since a variance applicant concedes he is in violation. We did not find any such concession in Lindgren, and the basis for our decision there was that a violation had been shown by the use of standard emission factors just as in the present case. CHA had the opportunity to introduce stack tests of its own or other evidence to rebut the calculated emissions, see Norfolk & Western Ry. v. EPA, #70-41 (May 26, 1971), but failed to do so. The Agency's evidence, which included references to several different source materials, was clear and convincing and demonstrated estimated emissions so grossly in excess of those allowed as to leave no credible possibility that the incinerators were in compliance. CHA also attacked the qualifications of EPA's witness, largely on the irrelevant ground that he had never conducted stack tests. He was shown clearly competent to read and to interpret the relevant literature and to perform the calculations necessary to show the violation.

CHA further contends that its incinerators were exempt from the particulate limitation because of Rule 2-1.4 of the regulations, which provided that "backyard incineration is not intended to be covered by these Regulations"(R. 196-97). To begin with, this provision was repealed September 2, 1971, when this Board adopted new open burning regulations eliminating the exception for backyard incineration. Open Burning Regulations, #R 70-11. Whatever the earlier effect of this provision, a violation occurred whenever the incinerators were used after that date. Moreover, the backyard incineration provision was a part of the old open burning regulations, Section 1 of the Rules and Regulations, which were adopted in 1965. Rule 2-1.2 of that section forbade open burning of refuse "except as provided in Section 2-1.4 " the backyard provision. Thus Rule 2-1.4 was plainly intended as an exception to the open burning provision, not to the later adopted and entirely separate incinerator limitation that is invoked in this case. It allowed individuals in some cases to engage in open burning; it did not allow them to operate incinerators that did not meet the standards. If it did it would have rendered the incinerator provision meaningless as applied to domestic incinerators. Further, this is not a case of backyard incineration at all, even if open burning were at issue. The term is defined as "the burning of material originating on the premises by individuals domiciled on the premises, excluding commercial establishments" (Rules and Regulations, Section 1). CHA relies on the fact that tenants were sometimes expected to light the incinerators themselves. But the CHA's own admission that it operated the incinerators, amply supported by the evidence (R. 64), shows that this was not a case of an individual burning his trash in the back yard. It was an incinerator provided by the landlord for ths use of numerous tenants, an institutional rather than a domiciliary effort, and the arguments favoring allowance of small individual burning activities are not applicable when the landlord provides incinerators for the use of many tenants. Finally, even if CHA were correct that the particulate regulation is inapplicable despite all the foregoing arguments, nothing in the regulations could constitute a defense to a violation of the statute itself as alleged in the alternate count of the complaint, for the regulations cannot repeal the statute. See EPA v. Commonwealth Edison Co., supra.

The evidence as to air pollution is also clear and convincing. An investigator for the Attorney General's office testified without contradiction that on eight occasions since July, 1971 he had observed fly ash being emitted from the incinerator stacks; that the fly ash consisted of "loose garbage burnt, . . .partially burnt paper"; that this material "was landing on the buildings or around the ground, on the sidewalks"; that "there were odors from the Incinerators. This is the burning garbage odors"; and that perhaps 80% of the 138 homes in the development were within 50 feet of an incinerator (R. 27-36).

One resident of the Bridgeport homes testified that "when you have clothes hanging out, it is miserable; it has those great big pieces of paper and stuff that blows out on your clean clothes; and it smells. Then in the summertime you have to close the windows, the smell is so bad" (R. 52-53). On the question of where the problem came from she was unequivocal:

Q Do you ever have that smell when the garbage isn't burning?

A No. (R. 52).

Three other residents corroborated this testimony with additional graphic descriptions of the adverse effect of these emissions on persons living in the vicinity (R. 90-93, 117-18, 124-25). CHA called no witnesses and introduced no evidence to dispute any of this testimony.

The undisputed evidence therefore conclusively shows a serious interference with the enjoyment of life in the vicinity of the incinerators, as a result of incinerator emissions. Such interference is unreasonable in the absence of proof that there is no economically justifiable method of preventing it. See EPA v. General Iron Industries, Inc., # 71-297 (March 7, 1972); Moody v. Flintkote Co., # 70-36 (Sept. 16, 1971). The burden of proof is on the respondent to show that compliance would cause an unreasonable hardship, Environmental Protection Act, section 31(c). There was no such proof in this case. Indeed CHA in the first hearing endeavored to show, in mitigation of the offense, that it had made plans for an improved incinerator that would eliminate the nuisance (R. 208), and the stipulation reached after the second hearing shows the practicability of having the refuse removed to an approved disposal site. Since the evidence shows a substantial interference with the neighbors without proof that it could not practicably be avoided, air pollution in violation of the statute has been established.

The final question is that of remedy. The final stipulation recites that incineration had ceased March 6, 1972 and would not be resumed. The refuse is to be taken away for disposal elsewhere. We assume it will be properly disposed of there; if not a further proceeding can be brought against whoever is responsible. We are enabled by this stipulation to enter an immediate cease and desist order against further incineration at Bridgeport Homes.

The complaint also requested a money penalty, and we think such a penalty entirely appropriate. The violations were not mere technical ones but caused serious discomfort to the many residents of Bridgeport Homes. The offenses continued unabated for a long period, no plans for abatement having been developed, despite resident protests, until after the close of the hearing in this case, well over than a year after the state law became applicable. We recognize the undesirability of imposing steep

money penalties against municipal corporations, especially one like CHA, since every dollar taken away is one less available to provide adequate housing for those of modest means. Yet we cannot let this serious violation go totally unpunished, for to do so would encourage foot-dragging in similar cases. Government officials, like everyone else, must pay attention to the pollution laws and must exercise diligent efforts to achieve compliance as expeditiously as is practicable. After considering all relevant factors we will impose the rather nominal penalty of $200. Cf. EPA v. City of East St. Louis, # 71-26 (July 8, 1971).

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

ORDER

1. Chicago Housing Authority (CHA) shall forthwith cease and desist from the incineration of refuse at Bridgeport Homes.

2. Within 35 days after receipt of this order, CHA shall pay to the State of Illinois the sum of $200 as a penalty for the violations found in the Board's opinion. Penalty payment by certified check or money order shall be made to the Fiscal Services Division, Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62706 .

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion and Order this 4th day of April, 1972, by a vote of 4-0 .