ILLINOIS POLLUTION CONTROL BOARD
October 3, 1972

ENVIRONMENTAL PROTECTION AGENCY	)	
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	)	
v.	)	#71-338
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	)	
CPC INTERNATIONAL, INC.	)	

Mr. Prescott E. Bloom, Special Assistant Attorney General for Environmental Protection Agency; Mr. James W. Gladden, Jr., for CPC International, Inc.

Opinion of the Board (by Mr. Currie):

The Agency's complaint charges CPC with various violations of regulations and statutes in regard to emissions of air contaminants from its corn processing plant in Pekin. We find, among other things, that during 1971 CPC by its own testimony violated applicable standards governing the emission of particulate matter from its boiler C and enter a remedial order, as more fully described below.

The complaint was in two counts: violation of particulate emission standards by coal-fired boilers and statutory air pollution (which consists of interference with the comfort, health, or property of other persons) (Environmental Protection Act, §9(a)), as a result of emissions from the boilers, from wastewater treatment facilities, and from the corn milling processes themselves. CPC denied any violations and raised several legal defenses, which we reject.

The standard arguments are made that the air pollution standard is vague and that the Board cannot constitutionally be given power to impose money penalties; we have rejected these before. EPA v. Granite City Steel Co., #70-34 (March 17, 1971); EPA v. Modern Plating Corp., #71-38 (April 14, 1971). CPC argues that because it was following an approved Air Contaminant Emission Program (ACERP) it cannot be held in violation of the law under Rule 2-2.41 of the Air Pollution Control Board rules, but the principal violation we find is not the violation the program was seeking to correct. We agree that an approved ACERP was the equivalent of a variance excusing the emissions covered by the program while the company goes about correcting them, see EPA v. Commonwealth

Edison Co., #70-4 (Feb. 17, 1971). But the existence of an ACERP cannot excuse excessive emissions from equipment that was claimed to be in compliance in 1967 and for that reason excluded from the program. It is urged that compliance with the numerical standard for corn wet milling dusts is a complete defense against an air pollution complaint concerning them. As we held in the Granite City Steel case, supra, the statute makes compliance with numerical standards only a prima facie defense, not a complete one; the regulations cannot repeal the statute by authorizing the creation of an active nuisance. See also our opinion in In the Matter of Emission Standards, #R71-23 (April 13, 1972). The suggestion that more stringent standards where required by more severe adverse effects violate the equal protection clause refutes itself; see, in addition to the opinion in #R71-23, supra, that in In the Matter of Effluent Standards, #R 70-8 (Jan. 6, 1972). We find no fault with the complaint itself; it adequately informs CPC of the charges it must defend, and it has done so with vigor. As we held in EPA v. Iowa-Illinois Gas & Electric Co., #72-216 (July 25, 1972), the statute of limitation in Ill. Rev. Stat. ch. 83, § 15 is inapplicable to complaints by government agencies. As for the 18-month limitation of ch. 38, § 3-5, that is a part of the Criminal Code applicable only to criminal prosecutions; it has been held inapplicable, in the only analogous case we have found, to a debt action for a penalty for violation of a municipal ordinance. City of Chicago v. Enright, 27 Ill. App. 589 (1889). The present proceeding is administrative, not criminal. In any case, the principal violation we find took place during the year 1971, all of which was within 18 months prior to the filing of this complaint.

The record contains no evidence as to the alleged problem with the wastewater treatment facilities. When the Agency attempted to elicit testimony as to odors in the vicinity of CPC's plant, the company's objection was sustained on the ground that the Agency had said nothing about odors in answering interrogatories seeking information as to what the Agency would seek to prove (R. 30-32). We sustain the hearing officer's ruling; CPC was entitled to adequate notice as to what it had to defend against. Cf. EPA v. Commonwealth Edison Co., supra. The only evidence as to air pollution from corn milling equipment concerned isolated incidents, conceded by CPC, in which extraordinary conditions caused nuisance deposits of corn material (gluten) on neighboring property. (R. 66-69, 154, 200, 360-61). That these incidents constituted air pollution we have no doubt, as there was uncontradicted evidence they interfered with the neighbors' comfort. See EPA v. General Iron Industries, Inc., #71-297 (March 7, 1972). We think it sufficient, given the sporadic and apparently accidental nature of these events and the rather minor harm they caused, to require the company to exercise all reasonable care to prevent such incidents in the future.

The important question in this case concerns boiler emissions. CPC has three boilers; the evidence is clear that boilers A and B have been brought into compliance in conformance with the company's ACERP and that there is no cause for imposing any penalties on their account (R. 126-27, 214-15; CPC Exs. 10, 12). It is Boiler C that is in serious dispute.

Boiler C is and has been since the 1950's equipped with mechanical particulate collection devices of the multiclone variety (R. 313). The company submitted emission estimates in connection with its compliance program indicating that it believed Boiler C already met the applicable standard of 0.6 pounds of particulates for each million btu of heat input (CPC Exs. 6, 8, 10). The Agency questioned the company's assumption that the cyclones removed 90.8% of the particulate matter (CPC Ex. 15); CPC responded by determining the particle size distribution of the boiler emissions and referring to a manufacturer's graph that predicted collection efficiencies of 92.5% with the size distribution it had measured (CPC Ex. 16). Computing probable emissions on the basis of the ash content and heating value of the coal used at the time and using the 90.8% collection figure, CPC concluded that Boiler C's emissions were just about what the standard required (0.6056 lb/mbtu) and therefore that it need not take further action to achieve compliance with the boiler (CPC Ex. 10).

EPA's case is based upon citizen evidence that CPC's boilers are or have been causing annoying dust or soot deposits on neighboring property (R. 29, 72-73, 88-90, 154-56, 166-68, 177), which we find to be the case, and upon the Agency's own estimates of Boiler C's emissions. The Agency rejects the 92.5% estimate of efficiency on the basis of standard publications and long-standing EPA guidelines suggesting an upper limit in installations such as this one of 83% (R. 111, 122-25). Using a 75% efficiency factor, EPA calculated estimated emissions of 2.08 lb/mbtu when burning coal such as was consumed in 1971 (CPC Exs. 2, 3). Since on EPA's assumption as to efficiency 25% of the particulate is uncollected and on CPC's only 7.5%, the reason for the great discrepancy in estimates is apparent.

As we have held from the beginning, estimates of emissions based upon standard emission and efficiency factors determined from experience with similar facilities are acceptable, in the absence of more specific information, to prove compliance or violation. EPA v. Lindgren Foundry Co., #70-1 (Sept. 25, 1970). We have also made clear that such estimates are subject to rebuttal on the basis of more specific information. EPA v. Norfolk & Western Ry., #70-41 (May 26, 1971). In the present case EPA's generalized efficiency estimate, drawn from recognized authorities, was sought to be rebutted by a particle size test and its application to a performance chart supplied by the equipment manufacturer (CPC Exs. 16, 39; R. 293-97). There is nothing in the record

to substantiate the manufacturer's chart; what it is based upon we do not know. If this were the only rebuttal information in the record, we should be hesitant to find it adequate. Cf. Commonwealth Edison Co. v. EPA, #72-150 (Aug. 8, 1972). We should be inclined to ask for proof that the chart represented actual experience rather than mere expectations or manufacturer's claims.

The best evidence as to actual emissions is an actual stack test, and one was taken very recently, showing emissions of 0.55 lb/mbtu under present operating conditions (R. 277-89). Working backward from the test result and from the ash and heating values of the coal used in the test (see CPC Ex. 40. R. 292-93), we conclude that the test tends to confirm a cyclone efficiency, now, in the range of 90%. More importantly, since the Agency did not significantly shake the accuracy of the test on cross-examination, the test establishes to our satisfaction that Boiler C was in compliance with the emission standard on the date of the test. CPC acknowledged that possible turbulence at the point where the sample was taken could distort the sample and testified that standard precautions were taken, by increasing the number of samples taken, to compensate by obtaining a complete cross section (R. 319-22, 337).

That Boiler C complied as of the date of the test does not excuse any past violations that may have occurred. CPC acknowledges that in the fall of 1971 it inspected the cyclones, found holes in several of them, and repaired them (R. 353-54; CPC Ex. 44). No evidence is given to enable us to determine that nothing could have been done earlier to correct this condition. It is thus clear from CPC's own evidence that during at least part of 1971 the collector was not operating at the efficiency concededly necessary to assure compliance, which the test and CPC's original estimates both show was barely acheived at optimal efficiency. We must therefore direct CPC to take every precaution in the future to inspect the cyclones and to maintain them at a maximum efficiency. We do not rely on the deterioration of the cyclones in assessing penalties, because the evidence as to fault in this regard is unclear, and because there is another and much more unmistakable reason for penalties which we deem sufficient in itself.

CPC's original conclusion that Boiler C was in compliance was based upon the use of coal with an ash content of 8.3% (as fired)(CPC Exs. 6, 7, 8, 10). Well knowing from its own calculations that continued compliance depended upon using coal of a relatively low ash content, CPC in "early 1971" (R. 355) by its own evidence purchased and burned in Boiler C coal containing 9.9% ash (as fired)(CPC Ex. 2), almost 20% more than that on which bare compliance depended. According to standard equations accepted by both parties (EPA Ex. 20; R. 114), the amount of

particulate matter to be collected is, other factors being equal, closely proportional to the ash content of the coal. By increasing the ash content, CPC increased its emissions correspondingly; and even CPC's own calculations, based on 92.5% efficiency, which is better than the later test showed, reveal emissions in 1971 (0.626 lb/mbtu (CPC Ex. 41) in excess of the standard.

Belatedly recognizing the problem about November, 1971, CPC has switched to low-ash coal (6.6% as fired)(R. 355; CPC Exs. 40, 45-46), and the stack test indicates that Boiler C will comply so long as it is properly maintained and low-ash coal is used. We shall so order. We must also impose money penalties for the company's serious neglect of its recognized responsibilities. It is not enough to equip a boiler with adequate collection equipment; the boiler must also be operated so as to assure compliance. It was CPC's duty to burn coal sufficiently low in ash to fulfill the promise of its estimates. There can be no plea of lack of knowledge, since CPC's own ACERP revealed it knew compliance could be achieved only by burning low-ash coal.

The harm done by this violation cannot be accurately assessed. CPC's boilers have interfered with the neighbors, but we cannot say how much this was due to Boiler C when it was out of compliance, how much due to Boilers A and B before they were controlled (see R. 224), and how much due to emissions permitted by the old regulations under which this case was brought. For the future we think it adequate to warn CPC that more stringent emission standards must be met in the next couple of years under our new regulations, and that the date for filing a control program is not far off. See PCB Regs, Ch. 2. But the penalty question must be determined largely in terms of the degree of fault displayed by the company and in terms of the significant amounts of money CPC saved by burning inferior coal to the detriment of its neighbors. We think the complete inattention to this question, in light of the clear warning in CPC's own ACERP documents, is serious indeed. We note that CPC testified that low-ash coal such as is now being used is costing it an extra $12,000 per month above its former fuel costs (R. 356). Given that the violation and consequent saving extended over many months of 1971, we could easily justify a penalty of $50,000 or more to assure that the company did not profit by overlooking its obligations to the public. But because this is a first offense, because there is no suggestion it was deliberate, because no catastrophic pollution resulted, and because of the commendable attitude of CPC in correcting the problem once it recognized what was happening, we limit the penalty to $15,000.[1]

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

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1. After the hearing the Agency moved to amend its complaint by adding a charge that CPC improperly suppressed information as to the actual efficiency of the Boiler C cyclone. CPC objected on grounds of lack of opportunity to defend. Since we find the later stack test the best evidence of actual performance and impose penalties for the admitted use of high-ash coal, we think nothing significant is added by the proposed amendment and deny the motion to amend, without prejudice to the filing of such future complaints as EPA may choose to file.

ORDER

1. CPC shall take all reasonable precautions to prevent further incidents involving the deposit of gluten material on neighboring property.

2. CPC shall maintain in satisfactory operating condition the cyclone collection devices on Boiler C, shall burn in Boiler C coal of sufficiently low ash content and high heating value as to assure compliance with applicable regulations, and shall cease and desist from emissions from Boiler C in excess of 0.6 lb/mbtu.

3. Within 35 days after receipt of this order, CPC shall pay to the State of Illinois, in penalty for the violations found in the Board's opinion, the sum of $15,000. Payment shall be by check payable to 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 this 7th day of September, 1972 by a vote of 4-0.

Christan L. Moffett