ILLINOIS POLLUTION CONTROL BOARD
November 8, 1972

GENERAL IRON INDUSTRIES, INC. et al.	)	
v.	)	#72-308
ENVIRONMENTAL PROTECTION AGENCY	)	

Opinion & Order of the Board on Motion for Stay (by Mr. Currie):

General Iron was ordered to complete an emission control program by July 31, 1972 and given a variance until that time to do so. EPA v. General Iron Industries, Inc., ## 71-297, 71-335, 3 PCB 739 (March 7, 1972). A petition was filed to extend this variance because of allegedly excusable delivery delays. We dismissed this petition October 17, 1972, 5 PCB ___ (#72-308), and have scheduled a hearing on a further and more complete petition subsequently filed (#72-423).

General Iron now asks us to stay our order dismissing the petition in #72-308 and requesting "leave. . . to resume operations" on stated operating conditions. We deny the motion.

A stay of the dismissal of a variance petition has no significance that we can determine. Dismissal of a petition leaves the company in precisely the same position it was in prior to the dismissal: It has no variance, and it operates at its own risk. A pending petition for variance is no defense to an enforcement action, so nothing is gained by having one on file; if it were, General Iron would already be protected because it has a pending variance petition, #72-423, which presents the issues more sharply and more currently than did the petition we dismissed. The dismissal of a petition does not in itself require General Iron to do anything, certainly not to shut down, as it alleges it has done. A stay of an order that imposes no obligations on anyone is a pointless act. In order to obtain a stay a petitioner must make some showing of harm if the order is not stayed; no such showing is made here because it is not apparent that a stay would in any way improve General Iron's position.

What General Iron really seems to want is not a paper "stay" but an immediate variance to allow operation without fear of prosecution. The statute is quite explicit as to the careful procedures we must follow before granting anyone permission to do with impunity what the law forbids. We had occasion to spell this out in Incinerator, Inc. v. EPA,

#72-416, 5 PCB ___ (Nov. 8, 1972):

> There is no express authorization of interim variances in the statute. The statute requires "adequate proof" (§ 35); it requires public notice and a 21-day opportunity for public comment (§ 37); it requires the opportunity for Agency investigation and the filing of a recommendation (id.). Our procedural rules likewise make no mention of interim relief (PCB Regs., Ch. 1, Part IV). Indeed Rule 405(c) expressly forbids the granting of a petition without hearing before 21 days have elapsed, in recognition of the importance of Agency and public comment in assessing the merits of a petition. Ex parte relief is clearly not favored, and the entire statutory scheme evinces an elaborate effort to assure that the Board does not grant permission to do what the law forbids without the opportunity for public and Agency participation.

Here, as in Incinerator,

> The required time for public and Agency comment has not expired. No provision of a prior order purported to authorize interim relief without compliance with the usual statutory requirements. The period contemplated in the original order for completing the entire program has expired. We lack authority to grant the relief requested, as we are specifically forbidden by our own rule, noted above, to grant any variance without waiting 21 days for comments. To grant the same relief under some other name would undermine the purpose of the statute and rules to assure public participation. In the present case to grant interim relief would to a very large extent moot the entire case, since the new compliance date we are asked to approve is so near at hand. . . .
>
> We note that the absence of a variance does not require the incinerator to be shut down; it simply leaves the company subject to the risk of prosecution, with whatever penalties the Board or court might find appropriate if a complaint were filed and proof made. The same facts demonstrating arbitrary or unreasonable hardship in a variance proceeding would constitute a defense to a complaint under § 31(c) of the statute, and a variance if ultimately granted would wipe the slate clean. If the variance is one that ought to be granted the petitioner need have no fear of operation in the interim.
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> The issue here presented was fully litigated and decided adversely to interim relief in Lipsett Steel Products, Inc. v. EPA, #70-50, 1 PCB 345 (March 22,

1971) (see record in that case for argument and decision on motion for temporary relief, and see the description of that proceeding in EPA v. Lipsett Steel Products, Inc., #71-43, 2 PCB 81, 83 (July 8, 1971).

Insofar as the equities are concerned, even if we had power to grant a variance without following statutory procedure we would not be inclined to do so in this case. General Iron's present necessity for operating under the risk of prosecution is due to the fact that its first petitioner for extension, filed only five days before the initial variance expired, did not contain adequate allegations. Had General Iron acted promptly and carefully to protect its own rights, it would know its position better today. We cannot allow petitioners to obtain variances without the opportunity for adversary input simply by carelessness or dilatoriness in filing petitions. Cf. Incinerator, Inc. v. EPA, cited above.

It goes without saying that in denying emergency relief we do not in any way pass upon the ultimate issue of whether the variance requested in #72-423 should be granted or denied. That is an issue that we can resolve only after hearing on the merits. Consideration of whether the delay in compliance was justified, much pressed by General Iron before us, is simply not the issue on this motion.

General Iron alleges that in dismissing previous petition (#72-308) the Board relied upon an Agency recommendation not served upon the company. The relevance of this allegation to the present motion is unclear. In any case, a reading of our order will show that we based the dismissal upon the failure of the complaint itself to allege any facts which, if proved, would entitle the petitioners to a variance extending beyond the date of our order. This was done without prejudice to further proceedings, such as the new variance petition now pending.

The motion is hereby denied.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion & Order on Motion for Stay this 8th day of November, 1972, by a vote of 5-0.

Christan L. Moffett