ILLINOIS POLLUTION CONTROL BOARD
November 14, 1972

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
v.	)	#71-348
	)	
DARLING & CO.	)	
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	)	
v.	)	#72-73
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

Mr. Nicholas G. Dozoryst II, Special Assistant Attorney General, for the Environmental Protection Agency

Mr. Joseph J. LaRocco, for Darling & Co.

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

On November 3, 1971, just over a year ago, the Agency filed a complaint (#71-348) against Darling, alleging that odors from its rendering plant on Chicago's South side caused air pollution in violation of §§ 9(a) of the Environmental Protection Act and that no compliance program had been filed as required by Rules 2-2.31 F and 2-2.41 of the Air Pollution Control Board. Darling responded by filing a variance petition (#72-73) seeking approval of a 27-month program for construction of a new plant, upon completion of which the old plant would be closed and the emissions objected to would be terminated. The cases were consolidated.

After considerable delays, some of which may have been attributable to our lack of funds for hearings during the early months of 1972, a hearing was held July 26, 1972. At that time, five months after the filing of the variance petition, the Agency had not filed the recommendation it was required to file within 21 days (PCB Regs., Ch. 1, Rule 403). The Assistant Attorney General reported at the hearing that he had received a "draft" recommendation but that he had not filed it because "there are some difficulties with that recommendation" (R. 4). As a result, the company was left in the dark as the Agency's position, which is hardly fair, and so are we, which is hardly conducive to an informed decision.

The company presented evidence in support of its petition, and the Assistant Attorney General conducted cross-examination. No evidence was adduced on behalf of the Agency. The Assistant Attorney General informed the Hearing Officer that he "had not been. . . informed" that the Agency wished to present witnesses and requested that any agency witnesses come forward. None did. (R. 137-38). The complaint against Darling was "held in abeyance" because the State had nothing to offer, leaving a date for hearing on the complaint to be set by "agreement by the parties" (R. 4, 133).

The transcript of this July proceeding we received without explanation in November. No further hearing has been held or even scheduled.

We find this entire proceeding quite incredible. The lack of communication between the Assistant Attorney General and his client is to say the least remarkable. We doubt that it is customary for an attorney to publicly request his client to come forth with evidence, or for him to prevent the client's filing papers that are required by regulation on the ground that he disagrees with their content. Cf. International Harvester Corp. v. EPA, #72-321, 5 PCB ___ (Oct. 24, 1972). We see no indication of any intention to prosecute, no explanation of the failure to do so when a hearing was finally scheduled after long delays. Another three months have passed since the hearing with no effort to bring the complaint to hearing. We shall give the State forty more days in which to bring the case to hearing, failing which the complaint will be dismissed for want of prosecution.

As for the variance request, we are concerned by the company's apparent misconception of the function of a variance. The company states that its compliance program will commence upon grant of a variance (E.g., R. 47), because "we can't sign a contract for a plant that we don't know that we will be allowed to undertake." This confuses a variance with a permit. The company is clear that the new plant will comply with the law (R. 42); all it needs to build it is a permit from the Agency. The sole purpose of the variance is to afford a shield against prosecution for violations at the old plant while the new is being constructed. The thing for a company to do in such a situation is to get its permit and start building immediately while seeking, if it wishes, a variance for continued operation in the meantime. See A. E. Staley Mfg. Co. v. EPA, #71-174, 2 PCB 521 (Sept. 30, 1972). We have held repeatedly that nobody needs a variance to stop violating the law or to build a plant that will comply. Citizens Utilities Co. v. EPA, #71-125, 2 PCB

(Aug. 13, 1971); U.S. Industrial Chemicals Co. v. EPA, #71-44, 2 PCB 591, 599 (Oct. 14, 1971); Richardson Co. v. EPA, #72-41, 4 PCB ___ (May 3, 1972); Metropolitan Sanitary Dist. v. EPA, #72-110, 4 PCB 561, 562 (May 23, 1972; Metropolitan Sanitary Dist. v. EPA, #72-111, 4 PCB 737, 741 (June 29, 1972). Construction of whatever is necessary to comply should proceed with all practicable haste upon obtaining a permit. We urge the Agency to make this point completely clear to petitioners in the future so that valuable time is not lost after filing of a petition.

The quite separate question of a variance to shield against possible enforcement as to the old plant depends upon a showing that the legitimate hardships of immediate compliance substantially outweigh the benefits to the community. EPA v. Lindgren Foundry Co., #70-1, 1 PCB 11 (Sept. 25, 1970). We cannot so hold in the absence of proof both that the pollution caused by the operations in question is tolerable and that the failure to correct the problem earlier was justifiable. See our recent opinion in International Harvester Corp. v. EPA, #72-321, 5 PCB ___ (Oct. 24, 1972), which discusses these questions in some detail. There is inadequate proof in the present record on either score. We know virtually nothing about present emissions or their effect;[1] no citizens testified as to the effect of Darling's operations on the neighborhood air; and no evidence was presented to indicate why construction of the new plant did not start some time ago. Indeed we do not know enough about present emissions to determine whether or not a variance is even necessary.

As in the International Harvester cited above, in the interest of time we shall allow Darling to present further evidence in the coming hearing on the Agency's complaint in support of its petition.

These cases are hereby remanded to the Hearing Officer for expeditious proceedings in accordance with this opinion.

1. It is alleged that improvements completed in 1966 have reduced complaints "to a very low level of incidence" (petition, p. 5). The testimony contains the rather bare conclusion that the complaint experience indicates a satisfactory odor situation (R. 34).

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Preliminary Opinion & Order this 14th day of November, 1972, by a vote of 5-0.

Christan L. Moffett