

ILLINOIS POLLUTION CONTROL BOARD

MINUTES OF MEETING, SEPTEMBER 25, 1970
Field Museum, Chicago

Mr. Aldrich was detained by transportation difficulties.

The Board approved 4-0 publication of a revised draft of the proposed procedural rules, #R70-4, and left the record open for additional public comments until October 6, 1970, announcing its intention to adopt the final rules October 8.

The Board received a revised variance request from Olin Corp., #70-11, respecting the extension of permission to deposit of explosive wastes by open burning at East Alton, Illinois. Because of the limited time remaining before expiration of the existing variance, and because Olin had submitted a request for extension under the old statute some time before, the Board, by a vote of 4-0, with the consent of both Olin and the EPA scheduled a hearing for October 15, with Mr. Lawton to serve as hearing officer, and prompt Board action on the request was assured.

The Board, by a vote of 3-0, asked Mr. Kissel, hearing officer in #70-7, League of Women Voters v. North Shore Sanitary District, to hear testimony on the questions of duplicitousness and frivolousness in #70-12,13, and 14, Facktor, Winston, and Brown v. NSSD, which are citizen complaints regarding air and water pollution from the Clavey Road sewage treatment plant. Mr. Lawton took no part in this action.

The Board, by a vote of 4-0, dismissed #70-3, EPA v. Alton Box Board Co., at the request of both parties, the EPA having confessed error in that it could not prove a violation on the date in question.

The Board next took up the case of EPA v. Lindgren Foundry Co., #70-1. A verbatim report of the Board's oral deliberations follows:

Mr. Currie:

The next order is the Board's decision in the Lindgren Foundry case, #70-1. I have prepared a proposed opinion for the Board, which I would like to summarize. Then I will ask for comments from other Board Members and finally for a vote. This case is before us on a complaint by the Environmental Protection Agency charging air pollution from a foundry in Batavia. The company has made a variance request seeking permission to continue in violation of the particulate regulations while installing control equipment. The plant is not now in operation.

My opinion would find that if the cupola is operated without control equipment it will emit particulate matter nearly seven times that permitted by regulations; that the proposed scrubber, once installed, will bring the cupola into compliance with the present regulations; and that the principal issue therefore is whether or not to allow Lindgren to pollute during the nine months it will take to install the scrubber.

In order to resolve that question we must determine whether or not it would impose an arbitrary or unreasonable hardship on the Company if we deny the variance. The evidence of hardship is as follows:

The owners maintain that they will go out of business entirely if they cannot operate while installing the scrubber. We haven't enough information on anticipated profits to be able to evaluate that claim. If the owners do go out of business, according to the undisputed evidence they will lose somewhere between \$30,000 and \$35,000 which they have invested in the business and in addition the value of unpaid working time for the two owners for several months. In addition, if they go out of business, unsecured creditors will lose the opportunity for a settlement worth approximately \$75,000. In addition, if they go out of business, an unspecified number of former employees, two whom have testified that they cannot find work, will lose the chance of re-employment by Lindgren.

On the other hand, if the Foundry does operate without controls it will cause a severe nuisance by covering the whole surrounding residential neighborhood with soot, and cause significant increases in painting costs as well as discomfort to the residents.

Now a variance may be granted only if the hardship of complying with the regulations is wholly disproportionate to the benefit of compliance to the community. We cannot re-examine in every case whether compliance would be a good thing. If we did we might as well throw out the regulations. Every case would become a simple nuisance case.

In terms of the owners' loss this is essentially a new business. The owners invested money with full reason to know they would have to comply with the regulations, gambling that we would give them a variance. Their hardship is self-inflicted, and I do not think we should give it much weight. Insofar as the hardship imposed on the creditors and the employees is concerned, if someone must make sacrifices in order to create a viable business that will benefit the entire community, it seems to me that sacrifices should be made, not by innocent neighbors, but by those who will most benefit, namely the owners. The viable business that all of us would all like to see going without causing air pollution, nine months from now, could be assured if the Foundry first were to install the scrubber and then go into operation.

I do not therefore think that Lindgren has shown that it would be unreasonable to require to install the pollution control equipment before beginning operation. The injury that a variance would inflict on the community is too great, in my view, to be justified by the facts in this record. I'd like to read a little bit of the testimony on which I base this conclusion to show the magnitude of the harm that operations without controls can inflict upon the community.

"There is an accumulation of sooty dirt. It is gritty. It is greasy, I am sure it is all over the outside of our house... Whenever I see this cloud of blue smoke coming, I run upstairs to close the windows....

"It tracks in on my carpet. It is all over the window sills. It is the type dirt that you cannot clean unless you get a cleaner on a cloth to take it off. It has affected our schrubberies outside....

"I washed out a white blouse and hung it out on the line...., and when I went out to get it, it was completely covered. I had to rewash it before I could wear it.

"I could not sit out in my back lawn when this smoke would come across...You would be sitting there, and all of a sudden, you would look down, and you are covered with soot..."

This, in my view, is no technical violation of the regulations. This is a substantial nuisance.

Consequently, I think the variance should be denied and an order entered forbidding Lindgren to operate the cupola until adequate controls are installed. On the other hand, there is no justification for imposing a money penalty upon the present owners, who have never operated the foundry in violation of the regulations.

We are asked to decide whether the emissions from the cupola violate the general nuisance provision of the statute as well as the regulations. Since I have decided that in my view they violate the regulations, I need not face the further question.

We are also asked to decide whether various other sources of pollution within the plant violate the statute. There is evidence that there are other emission sources in the plant. However the complaint, in my view, did not give warning that other sources were to be in the case. And although there was a motion to amend the complaint to make specific that other sources were included, it came rather late and at a time when further delay would have prejudiced the case of Lindgren Foundry. Therefore, I think the motion should be denied.

Now, I'd like to ask Mr. Kissel to state his opinion in the case.

Mr. Kissel:

I agree with our Chairman on several points and money penalties. I agree that they should not be invoked, for the reasons he stated. However, I must disagree with him on the granting of a variance or denying a variance in this case. I would grant the variance. Perhaps it's a disagreement as to the weight to be given certain facts.

I do feel somewhat in agreement with Mr. Chairman that the "arbitrary or unreasonable hardship" provision in the statute does create a balancing--that is, you must balance the hardship of the individual or the community against the benefits or detriment

that the community may suffer or receive as a result of this business. While the Chairman uses the word "wholly disproportionate", I would use the words "significantly greater." In other words it's not an equal balancing, it isn't just a matter of one outweighing the other. That is, the benefits or the hardship must not merely outweigh but they must be significantly greater. In this case I find that they are.

Although the facts are as stated by the chairman, I think if you look at them you have two people who have invested \$70,000 to bring what was a dying business back. There are a number of unsecured creditors whom now Lindgren Foundry owes \$500,000 and unless this business goes back into operation they will not receive the 15% settlement which has been agreed to, of \$75,000.

There was testimony in the record that two employees present, who were employed by Lindgren Foundry, have not found jobs. Therefore, the payment of unemployment compensation affects the neighbors, in a monetary sense. Lindgren Foundry, although not a unique business, certainly there was testimony in the record that it is one of the few foundries of its kind in the area. And there is certainly a general policy or should be of this Board, and of all courts and regulatory agencies to promote competition and encourage the development of small businesses. Now there is, I agree, testimony that local residents will have to be somewhat harmed by the emission of soot from the cupola. I think that when I weigh one against the other, I feel that we have the opportunity as a Board with a very strict variance grant here to provide a community with a viable non-polluting business which will employ about 120 people in the area.

If the Board were to vote with me, I would grant the variance and send this back to the agency to work out with Lindgren Foundry a variance which would give them nine months. The variance would be along these general guidelines.

The plant will be only operated seven months out of the nine months. This was in the testimony in the record, which provided that it would take approximately one and a half (1 1/2) months to begin operations and approximately two weeks to install pollution control equipment.

Number two, the Lindgren Foundry would be required to install pollution control devices throughout the entire plant. This would obviate one of the problems with Mr. Currie's opinion, and that is we're not covering the whole source of pollution in this case.

The third point: That Lindgren would not operate or use its ductile iron process, which it had no way of controlling the pollution as of now. During this nine month period it would not operate this process.

The next guideline would be that the cupola would not be used more than four hours per day.

And the fifth and last point is that the owners would post a \$100,000 performance bond which would provide that if the installation of air pollution control equipment on Lindgren Foundry is not completed prior to the nine months after the date of issuance of the variance, the bond will be forfeited. The gentlemen in the record agreed to do that at \$50,000 apiece.

Based upon, therefore, my review of the record, I would grant the variance on the strict lines as I've outlined.

Mr. Lawton:

My view would be to deny the variance for the reason that the Chairman has set forth. Basically I do not view the alleged hardships to be of a character or of a magnitude that would allow for the imposition of the variation provisions under the statute.

I feel that there has to be a quantum and a character of hardship that is not self-imposed of a magnitude far greater than any demonstrated by the evidence in this case.

I view this operation as I would a new business, which we would not permit to build and operate for a period of nine months without compliance with the regulations or the statute. And I see no difference between the factual situation here and that of establishing a new enterprise.

I do not feel that the neighborhood and the community should bear the burden of the operation for the period of time that is requested and accordingly, I would vote to deny the variation and enter the cease and desist order.

Mr. Dumelle:

I would agree with Chairman Currie and Mr. Lawton that we ought to deny the variance. I think the fact that the business is closed down as of last April and that the employees who were put out of work have in large part, as far as the record shows, found other employment, reduces the great part of the hardship, which would be the case where an on-going business where we ask to shut it down.

One can make a case that as we're approaching the winter months, in which residents in the neighborhood would have storm windows up, and would not be using the outdoors as much, that they could endure the nuisance for the nine-month period or seven-month period after the clean-up operations are finished. But, I think in this case that I would agree with the Chairman that the weight is on the side of denying the variance.

MR. CURRIE: Mr. Kissel, your vote is nay I take it.
MR. KISSEL: Yes.
MR. CURRIE: Mr. Dumelle?
MR. DUMELLE: Aye.
MR. CURRIE: You vote aye, Mr. Lawton?
MR. LAWTON: Yes.
MR. CURRIE: Dr. Aldrich's vote and views will be recorded later.

The Board then resolved itself into a hearing panel in #R70-2, Thermal Pollution of Lake Michigan, with Mr. Kissel as Hearing Officer. A full Transcript of that hearing was taken and is in the Board files in #R70-2.

I, Regina E. Ryan, certify that the Board has approved the above minutes this day of _____, 1970.

Regina E. Ryan
Clerk of the Board