

ILLINOIS POLLUTION CONTROL BOARD
February 8, 1990

PETER AREDOVICH)
PATRICIA LISTERMANN)
)
Petitioner,)
)
v.) PCB 88-127
) (Enforcement)
KOPPERS COMPANY, INC.,)
)
Respondent.)

MR. PETER AREDOVICH AND MS. PATRICIA LISTERMANN, APPEARED PRO SE;
AND

MR. CHESTER R. BABST III AND MR. JOSEPH K. REINHART, ATTORNEYS AT
LAW, APPEARED ON BEHALF OF RESPONDENT.

INTERIM OPINION AND ORDER OF THE BOARD BY (J. C. Marlin):

This matter comes before the Board on complaints filed on August 15, 1988 by Peter Arendovich and Patricia Listermann (Complainants) alleging a violation of Section 9(a) (air pollution) of the Environmental Protection Act (Act) by the respondent, Koppers Company, Inc. (Koppers). Both complaints were assigned the same docket number and on October 6, 1988 a single amended complaint was filed by the complainants.

Hearings were held at the Cicero Town Hall on February 15, 1989 and March 15, 1989. The town collector and senior trustee of Cicero appeared and submitted a statement supporting the complainants' position. All parties filed post-hearing briefs.

Facts

The complainants live to the west of the Koppers facility. Peter Arendovich has lived at 3725 South 57th Avenue, Cicero, for 6 years and Patricia Listermann has lived at 3811 South 57th Avenue, Cicero, for 14 years. The amended complaint alleges that respondent Koppers violates section 9(a) of the Act by emitting strong and irritating odors of tar, creosote, and moth balls which interfere with complainants' enjoyment of home and property.

The complainants' residential area of Cicero is adjacent to an area of Stickney zoned for heavy industrial use. Within three miles of complainants' homes are a number of industrial facilities mostly located in Stickney. To the east are two oil companies, several trucking terminals, and a garbage transfer station. Directly to the south of complainants is the Stickney sewage

treatment plant of the Metropolitan Water Reclamation District Greater Chicago, a chemical and coke refining plant, and a trucking terminal. Southeast of complainants is the Koppers manufacturing facility and three more oil companies.

The Koppers manufacturing facility is located at 3900 Laramie Avenue, Cicero. It was built in 1921 and started in 1922. The plant consists of three facilities; a tar plant, a phthalic anhydride production unit, and a polyester resin production unit. The oldest unit is the tar plant which distills coal tar into carbon pitch and creosote. The second plant produces phthalic anhydride from processes involving naphthalene which is shipped to the Koppers plant. The polyester resin production unit is the newest unit at Koppers and was closed in the first half of 1989. Koppers asserts that all of the units at the Stickney facility are permitted and in compliance with Illinois environmental standards.

Odor

The amended complaint alleges a violation of Section 9(a) of the Act which states:

9. No person shall: (a) cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act;

Clarification of the terms used in Section 9 is provided in Section 3 of the Act. A contaminant is defined in section 3.06 as, "any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." The Act's definition of air pollution is found in section 3.02, which states,

"'AIR POLLUTION' is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property."

In an air pollution enforcement action such as this, Section 31(c) of the Act places the burden of proof on the complainants. (Ill. Rev. Stat. ch. 111 1/2, sec. 1031(c).) To carry that burden of proof, the complainants must show that Koppers has caused or threatened to cause air pollution as defined in Section 3.02. Since the complainants have not alleged any injury to health or to property they then have the burden of proving that the alleged air pollution caused an unreasonable interference with their enjoyment of life and property. The Board determines whether or not the burden of proof has been met in accordance with Section 33(a) of

the Act. Section 33(a) states:

a. After due consideration of the written and oral statements, the testimony and arguments that shall be submitted at the hearing, . . . the Board shall issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstances.

Interference

The Board finds that the complainants have carried their burden of proving that the creosote and naphthalene odors from Koppers have caused an interference with their enjoyment of life and property. The complainants proof that Koppers is the source of the tar odor failed because of the close proximity of other petroleum related industries.

At the hearing, the complainants described the odors and the impact the odors had on their lives. Mrs. Listermann testified that:

A. Yes, I feel that basically the strong odors sometimes have caused me -- the way I look at the question is it has caused me to close my windows, come inside because the odor itself can produce headaches, nausea and sometimes irritation to the throat and nose.

[R. at 58.]

* * *

Q. Are there other dates listed on your formal complaint, other dates that you have smelled odors from the Koppers plant?

A. Those are only examples. And there are many more. In fact, such as Friday, November 25th, 11:15, and yesterday evening at 9:30 pm, also; and those are just a few.

[R. at 59.]

* * *

A. Change in the sense of cancelling out, no. Maybe coming inside and turning on the air conditioning, yes.

Q. But I believe it was your testimony that the odors have not changed your day to day life style?

A. No, except for the fact of turning on the air conditioning when you don't really need it, or coming inside when you want to be outside.

[R. at 76]

* * *

Mr. Arendovich also testified to the source, nature, and effects of the odors.

Q. What made you feel that Koppers was the source of the problem, of your problem?

A. In, I believe, say the month of May, '87 or something like that, when the Sanitary District shut down the drying beds, it was suddenly a mask, a different odor started to be unveiled and there was a tar odor, naphthalene odor, and creosote odor.

So I looked, I thought perhaps there were some of the tanks along the canal. But as I looked closer and started to look at what are the plants in the area, I have seen a tar processing plant, and I passed by there several times on a private road and the more you pass in certain areas the worse it becomes.

So I parked myself on the outside and stand there for a few minutes and the odor that was coming out of the Koppers premises, it makes me nausea and just about vomit in that area.

[R. at 94-95]

* * *

A. Because they ask you in what area do you live and where do you smell it. The wind is constantly changing. So when the wind blows in my direction, I smell it. If the inspector comes to my area and the wind is not blowing in my direction, he says what smell? There is no smell. So we are subject to this wind direction.

[R. at 106]

* * *

A. Sometimes you smell it. You get mad and you just walk away from it. But sometimes you feel like writing it down. And July 5 was another from Koppers, specifically . . . And then August 15 was specific from Koppers. Then, say, later I just locked myself in air conditioning. I don't want to be out, unless I have to go out.

[R. at 121-122]

* * *

The complainants also spoke extensively of their attempts to solve the odor problem before a formal complaint was filed with the Board. Beginning in 1985, the complainants filed complaints with the Illinois Environmental Protection Agency and the Cook County Environmental Protection Agency about odors in their community. Mr. Arendovich arranged two public meetings at Morton College in 1987. He invited the IEPA, the management of MSD, and politicians from the area to participate in these meetings. Further meetings were arranged by Mike Orloff of the IEPA, some at Morton College and two at the Koppers facility. According to testimony at the hearings, the meetings facilitated the exchange of information between Koppers and complainants but had minimal value in solving

the problem.

Unreasonable Interference-Section 33(c) criteria

The Board is permitted to find interference with the enjoyment of life and property on the basis of testimony describing the effects and impact of the pollution. City of Burbank v. Overnite Trucking, PCB 84-124. The "unreasonableness" of an interference is determined by referring to the statutory criteria of Section 33(c). Wells Manufacturing Co. v. Pollution Control Board, 73 Ill.2d 226, 383 N.E.2d 148,151 (1978). Section 33(c) states:

c. In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
2. the social and economic value of the pollution source;
3. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source;
5. any economic benefits accrued by a noncomplying pollution source because of its delay in compliance with pollution control requirements; and
6. any subsequent compliance.

The Act does not however require the complainants in an enforcement action to provide evidence for each of the criteria. Processing & Books, Inc. v. Pollution Control Board, 64 Ill.2d 68, 75-77, 351 N.E.2d 865 (1976). Nor is the Board required to find against a respondent on all Section 33(c) criteria before deciding against the respondent. Wells, 73 Ill.2d 226, 383 N.E.2d 148,151 (1978); Processing & Books, 64 Ill.2d 68, 75-77, 351 N.E.2d 865 (1976).

As for criteria (1) of Section 33(c), it is apparent from the testimony in the record that the odors have a significant year-round, detrimental effect on the complainants' enjoyment of life and property. The odors tend to interfere with both indoor and outdoor activities and are unpredictable due to shifting wind direction. The normal running of the household is disturbed by the otherwise unnecessary closing of windows or use of the air conditioner. Headaches and irritation of the nose and throat are serious interferences with the enjoyment of life. The complained

of odors obviously cause a disruption in the enjoyment of the normal life of the complainants. The Board finds that the interference suffered by the complainants is substantial and goes beyond trifling interference, petty annoyance, or minor discomfort. Processing & Books, Inc. v. Pollution Control Board, 64 Ill.2d 68, 351 N.E.2d 865 (1976).

With reference to criteria (2), the Board finds that Koppers has significant social and economic value, although that value is diminished by the continuing distress it has caused to its citizen neighbors. Mr. Lawrence Flaherty, vice president and manager of tar operations, testified on the economic impact of the Koppers plant. He stated that in 1988, Koppers' Stickney facility employed 200 people, paid in excess of six million dollars in total wages to those employees, spent approximately four million dollars on outside labor and materials, spent another four million dollars on utilities in Illinois, paid \$268,000 in property and school taxes, and made a profit of approximately six million dollars. [R. at 185-187, 195.] In addition, Koppers has made the chemical fire truck at the Stickney plant available to the Stickney Fire Department and it contributes an annual monetary award to charities. [R. at 188.]

Mr. Dennis Callan, assistant plant manager, testified to the nationwide impact of the Stickney facility. After describing the processes and work done at the facility, Mr. Callan stated that Koppers produces 28 percent of the American market for carbon pitch, 30 percent of the American market for creosote, and 17 percent of the domestic market share of phthalic anhydride. [R. at 210-211.]

After evaluating the testimony for criteria (3), the Board finds that Koppers is suited to its location and has priority of location over the complainants. Mr. Callan testified that the location of the Stickney plant allows access to the Sanitary and Ship Canal, the railway system, and the interstate highway system. These systems are vital in the transportation of raw materials and finished products.

Mr. Callan also presented pictures showing the construction of the Koppers facility in 1921. The area surrounding the construction site at that time was a mix of residential and prairie. Specifically, the complainants' neighborhood was grassland in 1921. [R. at 212, 215.] Although the Board agrees that Koppers enjoys priority of location, that is not an absolute defense to a claim of air pollution. Wells Manufacturing Co. v. Pollution Control Board, 73 Ill.2d 226, 383 N.E.2d 148 (1978).

The fourth criteria of Section 33(c) requires an evaluation of the technical practicability and economic reasonableness of reducing the pollution. Testimony from both sides referred to a "Koppers' proposed control strategy" which was introduced by

Koppers at a meeting between the IEPA, the community, and Koppers. [R. at 114] According to Dennis Callan, assistant plant manager, the strategy "lists possible places where emissions can come from, the control strategy, and any action that we were taking at the time or proposing to take." At a cost of approximately \$600,000, the control strategy would maintain or improve air emission controls at Koppers. [R. at 231-232] The Board finds that Koppers' own testimony supports a conclusion and the Board so finds, that it is neither technically impracticable nor economically unreasonable to reduce its air pollution emissions, in that Koppers had plans to implement control technology at the Stickney facility in the immediate future.

The Board has some difficulties in the consideration of criteria (5) in a Section 9(a) setting. Evaluating the economic benefits accrued from delay affects the issues of whether a violation occurred and the imposition of penalties. The record clearly indicates that Koppers was less than diligent in responding to the odor complaints and that it would not be unreasonable to speculate that economic benefits accrued. However, the record contains little for the Board to discern the nature of any economic benefits. Complainants did not raise this issue directly in seeking a finding of violation and did not seek the imposition of a penalty. Under the circumstances, the Board finds that criteria (5) considerations merit little discussion.

The Board will also give little weight to considerations of criteria (6). In a Section 9(a) complaint, subsequent compliance has little significance in making a determination as to whether a nuisance violation occurred. Koppers stated, in unrebutted testimony, that it had not been in violation of the Act nor had the plant's emissions been above the permitted levels. [R. at 309] The Board finds that these statements have little weight in the determination of a Section 9(a) violation.

Conclusion

Based on the Board's findings of substantial interference with the enjoyment of life and property, and after consideration of the criteria listed in Section 33(c), the Board finds that the odor emissions from the Koppers facility, particularly the emissions of creosote and naphthalene, are unreasonable and constitute a violation of Section 9 of the Environmental Protection Act.

Due to circumstances created by the respondent, the Board finds it necessary to issue an Interim Opinion at this time. A detailed final order describing the steps necessary to rectify the violation of the Act is not possible because of a deficiency in the record. Specifically, the record lacks the control strategy plan that Koppers asserted would control odor emissions. The control strategy plan was identified as Respondent's Exhibit No. 3 at the hearing but was not received by the hearing officer and is not in the record before the Board.

Due to these deficiencies, the Board is ordering Koppers to prepare a report containing a copy of the Exhibit 3 control strategies plan, informing the Board of the measures taken since the hearing to rectify the situation, and providing the Board with a detailed plan of what Koppers will be doing in the future to rectify the situation. The report should be prepared by a competent individual or firm and should evaluate all methods of control (including those methods that have been and will be implemented). Each control option evaluation should include the anticipated pollution reduction, the cost of implementation, and an estimate of a reasonable time for implementation.

The Board notes that testimony was heard relating to an accident at a Koppers loading site. The record stated that a 23 thousand gallon spill of creosote occurred because "no one was in the immediate vicinity" during the time of the overflow. [R. at 263-265] It is difficult for the Board to conceive that such an accident is unavoidable given that a variety of shut off, check, and spill control technology is available, including the low technology option of hiring someone to watch the loading operations. The Board intends for this matter to be addressed in the report required by this Interim Order.

The Board will retain jurisdiction in this case pending receipt of the report, and final disposition of this matter. The report is to be filed with the Board, Mr. Arendovich, and Ms. Listermann, not later than April 25, 1990. The Board will entertain any appropriate motions filed within 30 days after the filing of Koppers' report. The Board will issue a final order regarding compliance as soon as possible thereafter.

This Interim Opinion constitutes the Board's initial findings of fact and conclusions of law in this matter. The Board declines to impose a penalty at this time.

ORDER

1. The Board finds that Koppers Company, Inc. has violated Section 9 of the Environmental Protection Act.

2. Koppers is Ordered to submit to the Board and to each complainant, not later than April 25, 1990, a report on recently implemented, planned, and potential odor emission reduction methods at the Stickney facility consistent with this Opinion. The report shall comment on the expected effectiveness of the methods.

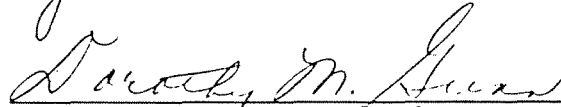
3. The Board will retain jurisdiction in this matter pending receipt of the report. Unless a motion is received during the 30 day period, the Board will proceed to issue a final order.

IT IS SO ORDERED.

Board Members J. Dumelle, R. Flemal, and B. Forcade dissented.

Board Member J. Theodore Meyer concurred on the Opinion only.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 8th day of February, 1990, by a vote of 4-3.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board