ILLINOIS POLLUTION CONTROL BOARD
September 30, 1971

CLAYTON MARK & CO.	)	
	)	
	)	
v.	)	# 71-176
	)	
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

Alan Becker, for Clayton Mark & Co.
Roger C. Ganobcik, for the Environmental Protection Agency

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

Clayton Mark operates a brass foundry in Vermont, Illinois, consisting of five uncontrolled melting furnaces producing an aggregate 2,500 pounds of brass per hour and emitting, on the basis of standard emission factors, an estimated 20 pounds of particulate matter per hour to the atmosphere. Regulations adopted in 1967 limit emissions from such operations to 4.76 pounds per hour. After an Agency investigation in 1971 the company petitioned for a variance, seeking to continue operations in excess of regulation limits pending implementation of a compliance program.

The parties have helpfully stipulated the relevant facts (R. 5-15). In addition to the facts stated above, the stipulation relates that the plant has never been a serious nuisance to its neighbors; that it is the principal source of employment in Vermont, employing 110 persons with a payroll of over $800,000 per year; that it has operated at a loss for several years; and that, as confirmed by later citizen testimony (R. 36-62), there was widespread citizen opposition to closing the plant. The parties have agreed that Clayton Mark should be given until November 1, 1971 to submit a firm program and until August 31, 1972 to carry it out, with a bond to assure compliance. We think this entirely appropriate; the hardship to the community from closing the plant would greatly outweigh the harm from pollution in the short time agreed upon, given the facts of this case.

The sole disagreement between the parties is over the question of a penalty. The Agency points out that four years passed without word or action from Clayton Mark after the regulation was adopted and urges that a penalty be made a condition of the variance, as in prior cases of unexcused delay, e.g., Marquette Cement Co. v. EPA, # 70-23 (Jan. 6, 1971). Not only has continued operation without controls enabled the company to profit from its violation "in that it has thus far avoided the expense of installing equipment needed to meet applicable standards," says the Agency recommendation, but "a course of conduct in violation of the Regulations will be attractive to others in the industry unless this Board imposes an appropriate money penalty."

The company replies that it has no record of receiving the notice, admittedly mailed in 1967, informing it of the regulations and of the duty to file a control program for sources in violation. The company also argues that it did not know its emissions were over the standard and therefore that it did not know it had to take action. But neither of these facts can be an excuse. Businessmen are expected to keep abreast of applicable regulations even in the absence of individual notice; it cannot likely have escaped the company's attention that there have been particulate regulations for four years, but if it has that indicates an inattention that must be discouraged. It is equally the duty of every manufacturer to find out whether his operations violate the law, and there is no indication that Clayton Mark ever made any effort to do so. Standard texts have long been available to indicate probable emissions for anyone taking the least trouble to investigate. We cannot condone the principle that a company may simply ignore the regulations until someone proves it to be in violation. We think a penalty of $2000 is an appropriate variance condition in the light of the company's apparently difficult profit-loss situation.

We note in the stipulation that the company is considering "whether installation of new equipment is a feasible alternative to closing the foundry" (R. 11) and also the threat that "the company will be obliged to consider any penalty in addition to the cost of new equipment in determining whether to install new equipment or whether to close the foundry" (R. 88-89). Of course it must, but the sums involved here are minimal. The stipulation is that control equipment could have been put in for about $30,000 (R. 7), and the amortization of this figure over several years, together with the small penalty we impose, is not a major expense for a company with a payroll exceeding three-quarters of a million dollars. If this plant closes it will be because of the persistent losses it has incurred in operating without benefit of pollution control equipment (e.g., $170,000 in 1968; $35,000 for the first half of 1971 (R. 11)), and not because of minor expenditures required by the pollution laws.

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

ORDER

Clayton Mark & Co. is hereby granted a variance to permit particulate emissions in excess of regulation limits from its five brass melting furnaces in Vermont, Illinois, until August 31, 1972, on the following conditions:

1) Within 35 days after receipt of this order Clayton Mark shall post with the Agency a bond in an amount equal to the cost of appropriate control equipment, which shall be forfeited if the foundry is operated in violation of the particulate regulations after August 31, 1972;

2) Within 35 days after receipt of this order Clayton Mark shall pay to the State of Illinois the sum of $2000 as a penalty for its unexcused delay in complying with the particulate regulations;

3) On or before November 1, 1971, Clayton Mark shall file with the Agency and with the Board a firm program to achieve compliance with the particulate regulations by August 31, 1972;

4) Failure to adhere to such program or to the conditions of this order shall be grounds for revocation of the variance;

5) Clayton Mark shall file detailed quarterly progress reports with the Agency and with the Board beginning February 1, 1972.

I. Regina E. Ryan, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion and Order this 30 day of September, 1971.

Regina E. Ryan