ILLINOIS POLLUTION CONTROL BOARD

October 18, 1973

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| ENVIRONMENTAL PROTECTION AGENCY<br>COMPLAINANT | ) | |
| v. | ) | PCB 73-104 |
| D. H. MAYOU ROOFING AND SUPPLY COMPANY<br>RESPONDENT | ) | |

MR. DENNIS FIELDS, ASSISTANT ATTORNEY GENERAL, on behalf of the ENVIRONMENTAL PROTECTION AGENCY
MESSRS. JOHN A. BERRY, ANDREW J. O'CONOR AND MICHAEL REAGAN, ATTORNEYS, on behalf of the D.H. MAYOU ROOFING AND SUPPLY COMPANY

DISSENTING OPINION (by Mr. Marder & Mr. Dumelle):

On October 18, 1973, the Board, by a 3-2 decision, found Mayou Roofing and Supply Company in violation of Section 9 (a) and Rule 3-2.110 of the Rules and Regulations Governing the Control of Air Pollution. There is no dissent from the findings of the Board; the dissent arises in the amount of penalty assessed.

The Order of the Board directed payment of a $1000 penalty. It is the feeling in this dissent that the penalty was low in relation to the violation proven. The finding of violation of Rule 3-2.110 is a minor point in this opinion, in that there were sufficient mitigating circumstances which would allow a minor penalty for this violation. The main point of dissent is the penalty imposed for violation of Section 9 (a) of the Environmental Protection Act.

Respondent has been found to have emitted particulates well within the allowable amount as directed by Rule 203. The emissions, however, did violate Section 9 (a) of the Environmental Protection Act by causing a severe nuisance and greatly interfering with the enjoyment of life and property of residents in the immediate vicinity.

Based on the record (R. 261), Respondent was ignorant of the applicable air pollution regulations. This is understandable and could be construed as a mitigating factor. However, several witnesses have testified (R. 31, 95, 102, 114) that they have directly or indirectly voiced complaints regarding odors and emissions to the Respondent. The record is devoid of any effort on the part of Respondent to either investigate the claims or attempt to abate same. It is largely on the basis of this fact that this dissenting opinion is written. It is one thing to be unaware of a violation, and quite another to have been questioned by residents as to a potential violation and ignore the issue. At one point in response to a complaint issued, Respondent answered that his equipment was state-approved (R. 96). Nothing could be further from the truth.

The question as to the amount of the monetary penalty imposed in relation to the ability of Respondent to pay was raised during the Board's discussion on this matter. In response to this, this dissenting opinion simply states the facts.

A) No evidence was elicited as to Respondent's financial status.

B) Sums of money were expended to hire a professional photographer in Respondent's behalf (approximately $350).

C) Sums of money were expended to hire a consulting firm to conduct an "odor survey" in Respondent's behalf.

In regards to (B) and (C), Respondent certainly has the prerogative of generating whatever evidence he deems necessary to fully present his case. However, it is suggested that the willingness to expend the sums involved in Steps (B) and (C) would indicate that Respondent could also expend sums on air pollution abatement, and should not be granted a reduced penalty for unknown financial hardship.

Perhaps the most disheartening factor involved in this action was the thread of lack of concern, or even worse, contempt for the witnesses called, and the surrounding areas, as displayed by the Respondent.

I. Photographic evidence on the part of Respondent: There is no dispute that Respondent's facilities are located in an area which allows manufacturing. If proof of this was required, a simple copy of zoning regulations would have sufficed. This causes one to ponder the rationale of presenting approximately 55 photographs to portray the "character of the neighborhood." (R.177.)

It is felt that this subject was too lightly covered in the Opinion and Order of the Board. Testimony shows that there are two separate sets of railroad tracks in the area, and fully 18 of the approximately 55 photographs show railroad tracks (R. 219-220). It is clear that the intent is to show a rundown neighborhood. However, whether the neighborhood is rundown or the most fashionable, the protection afforded to its residents is equal. There is nothing in Section 9 (a) which equates protection from air pollution with individual affluence.

II. No detailed discussion on the following point will be given. Suffice it to say that there is quite a difference between counsel's pursuing his client's interests vigorously and bullying and badgering witnesses. The attitude displayed during cross-examination by Respondent's counsel shows a complete disregard for the dignity of the individual.

In past cases the Board has found that odorous emissions have been found to warrant significant fines (John Juergensmeyer vs. Fox Valley Grease Blending Company, PCB 70-35, Environmental Protection Agency vs. Southern Illinois Asphalt Company, PCB 71-31).

Because of the above, it is felt that the penalty imposed in this action was below the amount warranted.

Sidney M. Marder,
Board Member

Jacob D. Dumelle,
Chairman

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Dissenting Opinion by Sidney M. Marder and Jacob D. Dumelle, was submitted on the 25th day of October, 1973.

Christan L. Moffett, Clerk
Illinois Pollution Control Board