ILLINOIS POLLUTION CONTROL BOARD
October 10, 1974

PERK FOODS COMPANY, INC.	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	PCB 74-248
ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

Mr. Patrick J. Phillips, Attorney, on behalf of Petitioner;
Mr. Peter E. Orlinsky, Attorney, on behalf of the Environmental Protection Agency.

OPINION AND ORDER OF THE BOARD (by Mr. Seaman):

The Perk Foods Company, Inc. (hereinafter Petitioner), filed a Petition for Variance with the Environmental Protection Agency (hereinafter Agency) on July 1, 1974. A public hearing was held on September 12, 1974.

Petitioner operates a facility in Chicago which manufactures wet canned dog food, dry bagged dog food, and metal cans. Petitioner's operations include four mixer cookers, two extruders, and a drying oven.

Petitioner is seeking a one year variance from Section 9(a) of the Environmental Protection Act as it applies to malodorous emissions from its facility.

On or about January 17, 1974, Petitioner filed a Petition for Variance with the Board seeking a variance from Rule 203(a) of the Air Pollution Control Regulations and Section 9(a) of the Environmental Protection Act. Said Petition was subsequently amended three times.

On May 23, 1974, in PCB 74-8, the Board granted Petitioner a variance from Rule 203(a) until December 31, 1974: but denied without prejudice Petitioner's request for a variance from Section 9(a).

In its current Petition for Variance, Petitioner alleges in its "statement of hardship" that denial of its variance request would cause the shutdown of its mixing-cooker operation thereby eliminating 160 jobs.

The Agency correctly states that it is established Board policy that the denial of a variance is not tantamount to the shutting down of a facility; rather, it is merely a refusal to grant a shield from prosectuion. Norfolk and Western Railway Company v. EPA, PCB 70-41; GAF Corporation v. EPA, PCB 71-11; Mt. Carmel Public Utility Company v. EPA, PCB 71-15, Flintkote Company v. EPA, PCB 71-68; ABC Great States, Inc. v. EPA, PCB 72-39; Forty-Eight Insulations, Inc. v. EPA, PCB 73-478; Amerock Corporation v. EPA, PCB 74-13.

However, as an allegation, not rebutted or denied, we must consider it with the case.

Petitioner plans to eliminate its odor problem by ducting the exhaust gases from the mixer-cookers and blending room through a wet scrubber. The cost of the control equipment is estimated by Petitioner to be $33,600.00 (See Petitioner's Exhibit 8-A). Petitioner plans to have the scrubber fully operational by June 18, 1975.

The Agency is of the opinion that the proposed control system will most likely abate the odor problem. The Agency further believes that the time schedule suggested by Petitioner is not unreasonable. The Agency notes, however, that Section 9(a) of the Environmental Protection Act has been in effect since July 1, 1970, and that Petitioner has been in violation since that date.

The Agency is strongly in favor of Petitioner's current efforts to comply with standards. However, the Agency believes that the major reason Petitioner cannot comply with applicable standards is due to his own past delay, and therefore recommends denial.

On the question of Agency's Exhibits referred to in the Record (R. 41) and not offered into evidence by the Agency, we do not concur with the Hearing Officer in his ruling denying the Petitioner's Motion To Strike. Testimony was elicited from an Agency witness (R. 41) referring to Exhibits A thru G concerning citizen complaints. Subsequently, the Agency refused to move for their admission into the record as Exhibits. We hold that testimony be stricken and held for naught; it is hearsay in its most objectionable form. Board Rule 321 cited by Agency is inapplicable.

This rule is intended to relax the formal and strict rules of evidence but not to allow testimony which is objectionable. The Agency never made the question of citizen complaints an issue in the case. The Agency attached to its "Recommendation" copies of these "citizen complaints." This represents a blatant attempt to inflame the Board.

The Board is now and always will be responsivle to citizen testimony when properly presented.

We are not dealing here with legally unrepresented parties - both are more than adequately represented. We cannot deny the opportunity for cross-examination or any other Constitutional safeguards. And so what record do we have before us? The testimony of an Agency inspector who testified that he inspected the petitioner's premises and "had perceived some odors which I felt were objectionable to me." All of the rest of his testimony has been stricken.

The only citizen testimony was from a husband and wife living in the area who objected to the strong odors but who also testified that "if they are doing something about it, and they are doing it as fast as they can, I think that is about all we can ask." They further testified that they did not object to the granting of a variance.

On the other hand, the Petitioner has presented evidence of a compliance program, acceptable to the Agency. The affects of the public in the area have been shown to be minimal by the Agency's own witnesses. The economy of today together with the high unemployment rate do not allow us to speculate on the unemployment of the 160 employees of the Petitioner.

From the Record presented to us together with the Agency's favorable position to Petitioner's control program, we will grant the variance for one year commencing on July 15, 1974 with certain conditions as recommended by the Agency.

This Opinion constitutes the findings of fact and conclusions of law of the Board.

IT IS THE ORDER of the Pollution Control Board that:

1. Petitioner be granted a variance from Section 9(a) of the Environmental Protection Act for one year commencing on July 15, 1974 subject to the following conditions:

a. That the compliance program of the Petitioner as submitted and approved by the Agency be adhered to in all its details.

b. Within 30 days of the Board's Order herein, Petitioner shall post a performance bond for $33,000.00 in a form satisfactory to the Agency. The purpose of said bond is to assure completion of the compliance program. The bond shall be sent to:

Environmental Protection Agency
Fiscal Services
2200 Churchill Road
Springfield, Illinois 62706

c. Commencing 30 days after the Board's Order herein, and continuing monthly thereafter, Petitioner shall submit reports to the Agency detailing all progress made toward compliance with Section 9(a). Said reports shall be sent to:

Environmental Protection Agency
Division of Air Pollution Control
Control Program Coordinator
2200 Churchill Road
Springfield, Illinois 62706

d. Petitioner shall apply for all necessary permits from the Agency.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion and Order was adopted on this 10th day of October, 1974 by a vote of 5-0.

Christan L. Moffett