ILLINOIS POLLUTION CONTROL BOARD
December 6, 1973

PACKAGING CORPORATION OF AMERICA, a Corporation	)	
	)	#71-352
v.	)	
ENVIRONMENTAL PROTECTION AGENCY	)	
ENVIRONMENTAL PROTECTION AGENCY	)	
	)	#72-10
v.	)	
PACKAGING CORPORATION OF AMERICA, a Corporation	)	

JAMES E. BECKLEY OF ROAN & GROSSMAN APPEARED ON BEHALF OF PACKAGING CORPORATION OF AMERICA
DOUGLAS MORING AND FREDERIC C. HOPPER, ASSISTANT ATTORNEYS GENERAL, APPEARED ON BEHALF OF ENVIRONMENTAL PROTECTION AGENCY

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

These consolidated actions relate to Packaging Corporation of America's (PCA) Quincy paperboard manufacturing facility located along the Mississippi River and the alleged pollutional discharges by it into the river. The first proceeding (#71-352), was a petition for variance seeking relief from Sections 12(a) and 12(b) of the Environmental Protection Act, relating to water pollution. On January 7, 1972, a complaint was filed by the Agency alleging that on six specified dates between July 1, 1970 and July 20, 1971, PCA caused or allowed effluent emissions into the Mississippi River, so as to violate Section 12(a) of the Environmental Protection Act and various provisions of SWB-13. The specifics of the original variance petition and original complaint are not detailed herein because an amended variance petition and an amended complaint were later filed.

The two proceedings were consolidated by order of the Board and a partial hearing held on the consolidated cases on May 15, 1972. On July 10, 1972, a stipulation of facts and proposed settlement were filed by the parties, together with an amended petition for variance filed by PCA. By our opinion and order of August 15, 1972, the stipulation and proposed settlement were rejected, principally because of the inclusion in the stipulation of a proposed $3,000 penalty, which the Board concluded to be inadequate in consideration of the admitted violations set forth in the stipulation. The Board suggested that the parties renegotiate and increase the penalty substantially, or,

in the alternative, conduct a full hearing on all issues enabling the Board to render a plenary decision on the basis of the record.

The matter appears to have remained dormant until February 8, 1973, when an amended complaint was filed by the Agency to which PCA filed an answer on May 22, 1973. The answer denied the essential allegations of the complaint and additionally, asserted various affirmative defenses which will be commented on hereafter, all of which we find without merit. Additional hearings were held on the consolidated cases on June 4, 1973 and July 23, 1973. A stipulation with respect to PCA's water use, effluent emissions and abatement program was filed on July 30, 1973. Briefs were filed by both sides.

Disposition of this matter is difficult, not only because of the complexity of the subject matter involved, but because of the inordinate passage of time between the filing of the original variance petition and complaint and the present date, a circumstance for which all parties, including the Board, must bear some responsibility. Further complicating the disposition of the case is the fact that PCA's Quincy facility was sold to Celotex Corporation on June 1, 1973 and as a result PCA has ceased to have any control over the Quincy mill's operations since that date (Stipulation July 30, 1973, paragraph 11). The matter is further complicated by the fact that while the May 15, 1972 hearing was devoted exclusively to the variance proceeding, we have received no brief from the Agency indicating its views with respect to the allowance or denial of the variance petition.

In arriving at our decision, we have considered only the pleadings, the transcripts of all hearings and the briefs filed, together with the July 30, 1973 stipulation. We have not considered the stipulation originally filed on July 10, 1972, later rejected by the Board. We grant PCA's petition for variance for the period between November 5, 1971 and November 4, 1972, extended from November 5, 1972 to June 1, 1972, the date on which PCA ceased to own and operate the subject facility. We assess a penalty against PCA in the amount of $10,000 for the reasons and with respect to those specific violations found to have occurred as hereinafter set forth.

We consider first the amended variance petition. The petition alleges that PCA acquired the paperboard mill in 1965. The plant had been in operation since 1865, and is located on the Mississippi River. During 1970, 96,000 tons of waste paper were recycled in the production of paperboard. A schedule of the types of waste paper used is attached to the petition as Exhibit "A". Petitioner represents that the 96,000 tons of waste paper processed by the plant is the equivalent of 1,632,000 trees, which, if it were not for the waste paper recycling process employed in the petitioner's plant, destruction of this number of trees would be necessary to produce the same amount of paper.

PCA employs 167 salaried and hourly employees. The 1971 payroll was $1,554,489. Process water is obtained from deep wells used first as cooling water and then mixed with waste paper in pulpers to form a slurry. Equipment in the process removes wire, plastic and other insoluable materials from the slurry, which trash is trucked to a sanitary landfill. The resulting slurry is converted into paperboard on two paperboard machines (Nos. 4 and 6) and the process water discharged into the Mississippi River through two outfalls.

The variance petition further recites that PCA was notified in February, 1971 that its operation violated the Environmental Protection Act and that steps should be taken to abate such violation. Pursuant to this directive, PCA engaged the services of Sverdrup and Parcel and Associates of St. Louis, for engineering studies and design of waste treatment facilities to bring the plant into compliance. The services to be performed and costs are set forth in the variance petition under Exhibit "B". In July, 1971, the engineering firm submitted a proposal to the Agency proposing the installation of solids separation equipment and a primary clarifier. The study and submission letter are attached to the petition as Exhibit "D". On August 18, 1971, an application for permit to construct a solids separation facility and primary clarifier was filed with the Agency which permit was granted on October 25, 1971. Engineering details were completed and a cost estimate provided. The various permits, correspondence, cost estimates and engineering details are attached to the petition as Exhibits E, F, G & H. Included in the petition are the waste water characteristics discharged by both paperboard machines. The petition further represents that PCA has contracted with the engineering firm for the design of additional treatment facilities to meet existing effluent quality standards by December, 1973 (Exhibit B). The estimated start-up date for primary treatment facilities was predicted to be March 21, 1973. A variance is sought from Sections 12(a) and 12(b) of the Environmental Protection Act and "any regulations thereunder" for such time as is necessary to install the solids separation system and primary clarifier.

PCA summarizes that as of the date of the amended variance petition, it has committed itself to an expenditure of $227,000 for engineering and design studies and has projected an expenditure of $1.8 million dollars for the solids separation systems and primary clarifier facilities. Electric equipment necessitated by the installations is estimated to be $611,000 and the total expenditure in excess of $3,000,000 is projected for total construction when final treatment is completed.

Petitioner contends that insistence on compliance with the statute and regulatory provisions would constitute an arbitrary and unreasonable hardship on PCA for the following reasons:

A shut-down of the plant as an alternative to immediate compliance would result in the possible loss of 167 jobs in the Quincy area,

termination of a payroll in excess of $1,000,000 and loss of real estate and property taxes in the approximate amount of $57,000. In addition, plant purchases of coal, paper stock and chemicals totalling almost $7,000,000 per year also would be lost. Lastly, PCA alleges that its recycling of waste paper serves a vital public function as compared with disposal of waste paper by burning or landfill, and results in the conservation of timber which, among other things, preserves needed recreational space and facilities. Petitioner urges that the grant of the variance, for a limited period until the solids operation systems and primary clarifier are completed, would have a minimal detrimental impact on the public.

The hearing of May 15, 1972, while predating the amended variance petition, established the essential allegations of PCA's amended petition. Albert Haller, Assistant Secretary and General Counsel of PCA, testified to the 1971 meetings between PCA and Environmental Protection Agency personnel, ultimately resulting in the hiring of the engineering firm of Sverdrup & Parcel to design and engineer the treatment facilities (R. May 15, 1972, p. 13). (All record references in this portion of the opinion are to the May 15, 1972 hearing.) The purchase order and contract were introduced into the record as PCA Exhibit 1. This witness testified with respect to a contract entered into in October of 1971 with Norfolk & Western Railroad for the acquisition of approximately 22,500 square feet of land adjacent to the mill for the accommodation of the new treatment facility, although the title to the land as of the date of the hearing had not been conveyed to PCA (R. 16). In addition, in April, 1972, a contract was entered into with Wapora, Inc. for water treatment study of final effluent (R. 17). The primary or solid operation system was described as that which removed bulky materials "from the system".

Henry G. Schwartz (R. 20) affiliated with Sverdrup and Parcel, testified that he was Project Manager for the PCA facility installation. A floor plan introduced as PCA Exhibit 2 diagrammed the present system schematically, portraying the two paper machines and related operations producing the slurry, which, in turn, was used in the paper board production. Exhibit 3 diagrammed the existing facilities with the proposed abatement equipment added. (R. 29). The essential characteristic of this system would be to recover fiber within the plant system itself, thereby reducing the total waste load and also to provide a primary clarification system to treat the effluent that remained (R. 31).

A float purge system would enable greater recovery of fiber in the pumping and subsequent operations. Testimony was received relative to the classifining and deflaking processes. Paper machine effluent ultimately passed through a liquid cyclone, the rejection of which passes to the solids handling system and recycled. These materials which would be retained and recycled are what have been discharged from the plant's system (R. 33). Separated solids would be pumped

to a sludge dewatering system and ultimately treated as discharge of solids. The clarified supernatant from the primary clarifier would go to a sewer system or a secondary treatment system as yet not formulated.

Additional electrical power would be needed to achieve the foregoing (R. 34). The proposed electrical changes are reflected in Exhibit 4 and were testified to in detail. This witness (R. 41) testified that the installation of the proposed system would reduce water consumption by more than 1,170,000 gallons per day. Removal of 65% of the suspended solids and 25% of the BOD by the primary clarification system was estimated (R. 41).

Harry W. Gehm (R. 48) testified for PCA. He is a Vice-President of Wapora, Inc. with whom PCA has contracted for the necessary testing to enable achievement of the relevant regulatory effluent limits. The nature of the contemplated testing was described by this witness.

Merlyn F. Wollcott (R. 81), Engineering Manager of PCA, testified that the final completion date for the solids operation facility and primary clarifier was anticipated to be March 21, 1973 (R. 85). He testified that 110 people were employed by the mill and that the 1971 payroll was $1,016,000. Counsel for PCA, Inc. stated that the variance was sought until March 25, 1973 for the installation of the primary clarifier equipment at which time PCA expected to be in compliance with State standards. However, a program for secondary treatment as of the date of the hearing had not been finalized, but was still in the study stage.

The Environmental Protection Agency introduced no witnesses in opposition to the variance. While the original stipulation was rejected by the Board, the later Stipulation of July 30, 1973 contained material relevant to the variance request.

As of April 30, 1973, $197,693 had been expended for engineering and $2,076,358 had been expended for equipment purchases and installation with respect to the primary treatment and solids separation system. The details of the entire installation by contract and amounts paid are set forth in the stipulation.

Samples taken subsequent to installation of the primary clarifier from the #6 paper machine sump and the outfall for the clarifier indicate that settleable, filterable and total solids are as follows:

	#6 Sump	Outfall
Imhoff	+200 ml/l	0.5 ml/l after 45 min.
Filterable	1.217	.900
	-.850	-.890
	.367 g/100 ml	.010 g/100 ml
	=58.4 lb/1000 gal	=1.59 lb/1000 gal
Total	.427 g/100 ml	.108 g/100 ml
	=67.9 lb/1000 gal	=17.2 lb/1000 gal

The Quincy mill was sold by PCA to the Celotex Corporation on June 1, 1973 at which time PCA ceased control of its operations.

The foregoing constitutes the entire variance case so far as the record is concerned. PCA has devoted a considerable portion of its brief in urging the Board to grant the variance retroactive to November 5, 1971, the date of the filing of the original variance petition. While this is a procedure that we normally would not follow, the somewhat unique circumstances of the instant case call for a different treatment than that characteristic of other variances in the past.

The Board's rejection of the original stipulation, the length of time between the original pleadings and the ultimate decision, and the evident achievement of success in PCA's installation justify the departure from our previous procedures. While nothing in the evidence justifies in any way the inordinate delay on the part of the PCA in embarking on a pollution control program, which facts will be dealt with in greater detail when we consider the enforcement action, we are constrained to consider the variance application in the context of what the petitioner proposed and actually achieved since the filing of the original petition. As we observed in Medusa-Portland Cement Company v. Environmental Protection Agency, #70-27, 1 PCB 237 (February 17, 1971):

> "While it is inexcusable for the company to have taken almost five years to reach its present proposal, the Board must consider the variance program in light of the current factual situation and determine whether petitioner's proposed program, or some modification thereof, is compatible with the statutory requisites for the allowance of a variance."

The delay in rendering a decision enables the Board to determine whether, in fact, the petitioner has accomplished that which it set out to do at the time that the variance was sought. PCA has made installation of its solid operation system and primary clarifier within the time frame originally proposed. Furthermore, it presently is no longer in control of the Quincy operation. A variance is nothing more than a shield from enforcement actions, pending installation of abatement equipment to achieve compliance. We see no reason to deny the variance, as requested, primarily since PCA has accomplished what it set out to do by the variance, and is no longer in control of the operation. No useful purpose would be served by continuing PCA's exposure to penalties during the period when compliance was being effectuated.

We grant the variance from the provisions of Sections 12(a) and 12(b) of the Environmental Protection Act and SWB-13 as applicable, for the period between November 5, 1971 and November 4, 1972, and extend the same from November 5, 1972 to June 1, 1973, the date on which Celotex acquired the subject facility from PCA.

We now consider the amended complaint filed by the Environmental Protection Agency.

The amended complaint was filed on February 8, 1973, subsequent to the Board's rejection of the stipulation and settlement. The complaint is in five counts and alleges that PCA, in the operation of its Quincy paperboard facility, discharged effluent into the Mississippi River between July 1, 1970 and the dates as indicated below, thereby violating the Environmental Protection Act and SWB-13, as follows:

Count I: Between July 1, 1970 and the date of the filing of the complaint, violated Section 12(a) of the Act by the discharge of approximately 4,000,000 gallons per day of fluids, substances and wastes containing contaminants, having a BOD count in excess of 200 milligrams per liter,suspended solids in excess of 200 milligrams per liter and an oxygen demand index of in excess of 200 milligrams per liter.

Count II: Violation of Rule 1.05-7 of SWB-13 between July 1, 1970 and March 7, 1972 by the discharge of the foregoing contaminants so as to cause substantial visible contrast with natural appearance of, and interference with, legitimate uses of the aforesaid waters and that the discharges created turbidity, in violation of Section 12(a) of the Act.

Count III: Violation of Rule 1.05-8 of SWB-13 by the foregoing discharges between the same dates, causing substantially the same vibrations and that the discharges caused color changes violating Section 12(a) of the Act.

Count IV: Violation of Rule 3.01-10(b) of SWB-13 by the discharges aforesaid and in failing to provide facilities for substantially complete removal of settleable solids, the removal of floating oil, scum or sludge solids and the removal of color, odor or turbidity below obvious levels. Failure to comply with Rule 3.01-10(b) of SWB-13 is alleged to be a violation of Section 12(a) of the Act.

Count V: Between March 7, 1972 and the filing of the amended complaint, discharges of fluids, substances and wastes containing the same contaminants into the Mississippi River causing formation of unnatural sludge deposits and unnatural color or turbidity, in violation of Rule 203(a) of the Water Pollution Regulations and Section 12(a) of the Act.

With respect to each of the foregoing Counts, the Agency prays for the entry of a cease and desist order and penalties in the maximum statutory amounts.

Hearing was held on the consolidated proceeding again on June 4, 1973. While the proceeding remained as a consolidated cause the only evidence introduced at the later hearing was with respect to the foregoing violations, PCA apparently resting on its evidence at the earlier hearing to support its variance petition as amended and the Agency introducing no evidence in opposition thereto. It should be noted that pursuant to Stipulation filed on March 30, 1973, the sale of the mill to Celotex Corporation had been completed on June 1, 1973, and prior to the continued hearing. The Agency witnesses were as follows: Mrs. Dorothy Bennett, chemist employed by the Environmental Protection Agency and Supervisor of the Springfield laboratory (R.19-24); Roy Frazier, Agency Chemist (R. 27-33); William Tucker, EPA biologist, (R. 35-47); James Lienicke (R. 52-71); James Kammuller, Agency Sanitarium (R. 79-136). All record citations immediately above and hereafter refer to the June 4, 1973 hearing.

Mrs. Bennett testified with respect to Environmental Protection Agency Exhibits 2, 3 and 4, being laboratory reports of samples of PCA discharges, taken on January 6, 1971, April 26, 1971 and June 10, 1971, respectively. Exhibit 2 reflected effluent discharges taken January 6, 1971 from the #4 outfall line of 2108 mg/l suspended solids and from the #6 outfall line of 4,956 mg/l suspended solids. Exhibits 3 reflects samples taken on April 8, 1971 of effluent from the #4 line of 930 mg/l suspended solids and from the #6 line of 980 mg/l suspended solids. Exhibit 4 reflects effluent samples taken on June 10, 1971, showing discharges from the #4 line of 364 mg/l suspended solids and from the #6 line of 342 mg/l suspended solids.

William Tucker testified with respect to sampling of the river in the area of the PCA plant on September 1, 1971. Exhibit 6 reflects the results of this sampling. Stream classification made at Station C-1 opposite the plant's three smoke stacks was defined as disrupted, but not destroyed (R. 43). Testing made at Station C-2, approximately three-fourths of a mile downstream from Route 24 bridge was characterized as polluted and no aquatic life observed. At this station, mats of fibrous material were observed and a half pint of paper parts was observed in the sieve. The water was discolored and further characterized by a maroon color (R. 46). While the admission of this exhibit was objected to, we believe that the proximity and character of the sampling stations substantiates a causal connection between the discharge of the plant and the observations noted. Photographs introduced as Environmental Protection Agency Exhibits 12 and 13, substantiate this connection.

James Lienicke testified with respect to his visits of January 6, 1971. The samples he collected were those that were reflected in the Environmental Protection Agency Group Exhibit #2 indicating suspended solids from the #6 machine discharge of 4,956 mg/l and from the #4 paper machine of 2,108 mg/l. The samples were described as "gray-colored, thick...suspension of paper fiber materials."

James Kammuller testified to his visits to the plant on April 26, 1971. His samples of the #6 and #4 machine effluents are reflected in Environmental Protection Agency Group Exhibit 3. He testified that the samples appeared gray and turbid in color and contained paper materials. The results of his visit to the plant of June 10, 1971 are reflected in Environmental Protection Agency Group Exhibit 4. The samples taken on this occasion were described as "gray and turbid in color and contained paper solids." (R. 87). He observed a turbid color above the #6 outfall, approximately 20 feet from the East bank of the Mississippi River. Samples taken on January 16, 1973 when the newly installed primary clarifier was not in operation reflected effluent discharges from the #4 line, gray and turbid in color, and containing paper solids and from the #6 line, brown and turbid in color and containing paper solids. Suspended solids in the amount of 690 mg/l were sampled from #4 effluent and in the amount of 950 mg/l from the #6 effluent (Environmental Protection Agency Exhibit 5). Samples taken by this witness on June 28, 1971 from the #4 and #6 lines indicated dark red turbid color and paper solids in the #4 effluent and dark gray color and paper solids in the #6 effluent. On this occasion, the witness noticed that the Mississippi River was being discolored red above the #4 outfall, which extended to 200 to 300 feet downstream and that a gray scum was present downstream from both outfalls (R. 100-1). Samples collected later the same day from both lines indicated a continuing red discharge into the river from a #4 outfall and discoloration downstream to approximately the location of the #6 outfall. Discharges from the #6 outfall were gray-white in color and when mixed with the red discoloration extended downstream in excess of one-fourth of a mile (R. 103). Tests made of the samples are contained in Environmental Protection Agency Exhibit 8 reflecting suspended solids discharges of 590 mg/l at 2:20 P. M. and 418 mg/l at 6:02 P. M. from the #4 line, and 1074 mg/l suspended solids at 11:05 A. M., 3180 at 2:30 P. M. and 920 mg/l at 6:10 P. M. from the #6 line. Photographs taken on this occasion were introduced as Environmental Protection Agency Group Exhibit 12. Further inspection was made by Mr. Kammuller of the PCA outfalls on January 20, 1971. Gray-brown colored waste emerging at the surface was observed from the #4 outfall (R. 111-112). Photographs taken on this occasion were introduced as Group Exhibit 13. The discharge from #4 outfall extended downstream to the #6 outfall where it mixed with that discharge resulting in a gray discoloration of the river extended 800 to 1,000 feet downstream (R. 114). A large mass of paper sludge approximately 30 feet wide and 60 feet long downstream of #6 outfall was observed (R. 14), as well as a mass of paper sludge surrounding the #4 outfall (R. 115).

Tests made by PCA of its effluent during February, 1971, indicate that composite samples from the #4 line averaged 1916 mg/l suspended solids and 436 mg/l BOD. Discharges from the #6 line averaged 2574 mg/l suspended solids and 540 mg/l BOD. (Stipulation - Exhibit C).

The stipulation further verifies discharges from the #4 line during the same period of 1,116,102 gallons per day and from the #6 line of 2,691,385 gallons per day. In summary, the Agency asks in its brief, that in framing an order with respect to the enforcement proceeding, the Board consider the following:

"1. That SWB-13 which required primary treatment of wastes was enacted prior to the adoption of the Act and continued it in to effect.

2. That this Board adopted R70-3 which in addition to primary treatment required secondary treatment by December 31, 1973.

3. That until at least March 21, 1973, PCA had no treatment facilities for its wastes prior to discharge to the Mississippi River.

4. That the discharge from the No. 4 line during February, 1971 averaged 1,116,102 gal/day with an average of 1,916 mg/l suspended solids and 436 mg/l BOD. That during this same period, the No. 6 discharge averaged 2,691,385 gal/day with an average of 2,574 mg/l and 540 mg/l BOD. (Stipulation.)

5. That on January 6, 1971, Agency samples of effluent showed 2,108 mg/l suspended solids on the No. 4 line and 4,967 mg/l suspended solids on the No. 6 line (E. P. A. Exhibit).

6. That on April 28, 1971, Agency samples of effluent showed 990 mg/l suspended solids from the No. 4 line and 980 mg/l suspended solids from the No. 6 line (E. P. A. Exhibit 3).

7. That on June 10, 1971, Agency samples showed the No. 4 line to have 364 mg/l suspended solids and the No. 6 line to have 342 mg/l suspended solids (E. P. A. Exhibit 4).

8. That on June 28, 1971, Agency samples showed the No. 4 line to have 590 mg/l suspended solids and the No. 6 line to have 1,074 mg/l suspended solids. That the visual observation taken on this day reflects the degree, duration and extent of the PCA discharge on the Mississippi River (E. P. A. Exhibits 8 and 12).

9. That on July 20, 1971, Agency samples showed continued violations and the visual observations again reflected the degree and extent of the PCA discharges on the Mississippi River (E. P. A. Exhibit 13).

10. That on January 16, 1973, Agency samples showed continued violations of the Act and that the No. 4 and No. 6 effluent samples were visually discolored and contained paper parts (E. P. A. Exhibit 5).

11. That on September 1, 1971, a biological survey showed an absence of aquatic life at Station C-2 and the presence of approximately one-half pint of paper parts on the sieve.

12. That the record reflects no substantive action by PCA to minimize its discharges or its impact on the Mississippi River until November, 1971 with the filing of a petition for variance, approximately ten months after the first Agency visit... .

13. That PCA, as a direct result of its discharges, has violated the applicable rules alleged in the complaint and has shown no factors in mitigation. The Agency, therefore, submits that penalties are called for to redress the egregious violations of the applicable rules and regulations..."

We believe that the foregoing represents a fair evaluation of the evidence in the record.

The company's defense is premised primarily on its criticism of the testing and sampling methods employed by the Agency, and its contentions that because of the installation ultimately made to approach or achieve compliance, no substantial penalty should be invoked. No evidential defense disproving the findings of the Agency was made at the hearing.

In its answer to the complaint and its brief, the Company asserts alleged infirmities in the controlling provisions of the Environmental Protection Act and the regulations of which violations have been asserted. The term "water pollution" is alleged to be vague and uncertain and the Legislature is deemed to have made an invalid delegation of legislative power to the Pollution Control Board. These contentions have been answered many times by the Board in past cases, and need not be re-examined here. The contentions are wholly lacking in merit and serve in no way as a defense to the alleged violation in this case (See Granite City

Steel Company v. Environmental Protection Agency, #70-34, 1 PCB 315, (March 17, 1971 and Environmental Protection Agency v. Modern Plating Corporation, #70-38, Modern Plating Corporation v. Environmental Protection Agency, #71-6, 1 PCB 531, (May 3, 1971). PCA further contends that it has installed the necessary equipment for compliance with SWB-13. This may or may not be so, but in any event, the record makes clear that whatever was installed was not done until subsequent to the alleged violation and constitutes no defense. The company also asserts that the Federal Government, by virtue of the supremacy clause in the United States Constitution, has preempted and superceded all regulatory powers involving pollution control. We respect this contention in view of the obligation imposed on the states to implement Federal legislation.

Lastly, the Company contends that a suit filed in the Adams County Circuit Court relates to the same facts as alleged in the amended complaint and forecloses the present proceeding. Nothing has been submitted to the Board enabling it to make a determination of this question nor does it appear to have been seriously advanced, since no reference is made to it in the Company's brief. The Board has been informed that Adams County Circuit Court is holding its opinion until the Board acts in the present case. We hold that all of the legal contentions asserted by way of defense are completely devoid of merit, and in no way foreclose the Board from considering the merits of the case.

The Company's next line of defense is subjective and relates to the methods employed by the Agency in its testing, sampling and observations and the procedures employed to ascertain violations. Without itemizing such area of contention, it appears to be the Company's view that Standard Methods for Examination of Water and Waste Water were not properly followed in all particulars, that storage conditions between collection and testing were not proper, that the containers used may have been polluted, that the temperature standards with respect to samples were not adhered to and that the testing methods generally were not performed within the time frame required. While we do not view with indifference contentions of this sort, it seems to us that more is needed than a mere assertion that testing procedures were not rigidly adhered to. The Agency, by the submission of its data, and test results, has established a prima facie case. Proof of failure to adhere to approved testing methods might, in an appropriate case, serve as a valid defense if the burden of the Respondent had been properly sustained. However, the present record is completely devoid of any indication that the defects in the testing method resulted in an erroneous conclusion, or that the errors such as might have existed worked to the detriment of Respondent's position. For all that appears the defects in testing alluded to may have resulted in measurements and conclusions based upon such measurements more favorable to the Company. In any event, in order for this line of defense to negate the findings of the Agency, Respondent is obliged either to demonstrate that the failure to adhere to standard testing methods resulted

in an erroneous report of contaminants, or that testing made by the Company demonstrated compliance, or at the very minimum, result in contaminant counts substantially different from those asserted by the Agency.

We find nothing of either category in the present record. On the contrary, the Company has presented no affirmative defense of any kind with respect to the specific allegations made and initially proven by the evidence of the Agency. While we by this opinion in no way sanction indifferent or inaccurate testing procedures, we do not believe departures from testing methods such as suggested by the evidence, nullify what has been established as a prima facie case of violation. The Company has not established its burden of coming forward to rebut the case established by the Agency. On the contrary, the admitted pollutional discharges stipulated to by the Company support, rather than vitiate the proof of violations as established by the Agency. The Company has submitted no countervailing evidence to negate the case established by the Agency and its own admissions support the Agency's case. Furthermore, the visual observations made by Agency witnesses add additional support to violations alleged.

On the basis of the foregoing evidence of the Agency which on this state of the record, we accept as proven, we will assert a penalty in the amount of $10,000 for the violations found. The Company's indifference to pollutional control until called to task by the Agency, coupled with the magnitude, intensity, continuity and character of pollutional discharges, make this penalty appropriate. It is the type of inaction demonstrated by Respondent that has made the Mississippi River the polluted river that it is. The photographs contained in Environmental Protection Agency Exhibits 12 and 13 emphatically support the observations testified to by Agency witnesses during their inspections of June, 1971 and July 20, 1971. The gray scum and red discoloration resulting from the Company's emissions are dramatically portrayed by Exhibit 12. Exhibit 13 manifests the gray-brown turbidity resulting from the Company's pollutional discharges, together with the gray paper pulp sludge thathas accumulated in the river bed and in-shore areas, consequential to the #4 and #6 line emissions. In assessing this penalty, we are not unmindful of the steps taken recently by the Company to approach or achieve compliance. In the absence of such improvement, our penalty might have been substantially greater. Nor are we persuaded that the fact that the Mississippi River is already a polluted river in any way serves as justification for the past inaction of the Company. It is this very attitude that has caused the Mississippi to take on the attributes that Government agencies are attempting to abate. We find that the Agency has established the essential elements of its complaint and will enter our Order accordingly. We believe that the amount, character and content of the pollutional discharges emanating from the PCA facility over the period covered by the complaint, limited by our variance allowance, are of such a degree and

magnitude that proof of water pollution pursuant to Section 12(a) of the Act has been established as the term is therein defined. Clearly, the likelihood of creation of a nuisance is evident and the waters have been rendered detrimental to the public health, safety and welfare and for the uses contemplated by the Section. We further find that the discharges in the amount, character and quantity hereinabove established by the inspections, testing and analyses introduced by the Agency and contained in EPA Exhibits 2, 3, 4, 5, 6, 8, 12 and 13 on the dates of the inspections establish violations of SWB-13 in the following respects: 1.05-7 with respect to visible contrast with natural appearance and interference of legitimate uses and turbidity; 1.05-8 with respect to visible contrast with natural appearance and interference with legitimate uses and color; 3.01-10(b) with respect to the presence of settleable solids, the failure to remove floating oil, scum or sludge solids and the presence of color, odor and turbidity in excess of obvious levels. We further find that the discharges of contaminants aforesaid into the Mississippi River has caused formation of unnatural sludge deposits and unnatural color and turbidity, in violation of Rule 203(a) of the Water Pollution Regulations. We find that the violation of SWB-13 and Rule 203(a) aforesaid, constitutes violation of Section 12(a) of the Act. We further find that all violations aforesaid occurred during the time specified in the complaint, limiting the period of violation, however, to between July 1, 1970 and November 5, 1971, the date on which the variance is allowed pursuant to our order. Because the effective date of Rule 203(a) was April 6, 1972 the Board assesses no penalty for the violation of Rule 203(a).

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. Variance is granted Packaging Corporation of America from the provisions of Section 12(a) and (b) of the Environmental Protection Act and SWB-13 from November 5, 1971 to November 4, 1972.

2. Penalty in the amount of $10,000 is assessed against Packaging Corporation of America for violations of Section 12(a) of the Environmental Protection Act and SWB-13 as found in this proceeding during the periods between July 1, 1970 and November 5, 1971. Penalty payment shall be made by certified check or money order within thirty-five days from the date of this order, and sent to: Fiscal Services Division, Environmental Protection Agency, 2200 Churchill Drive, Springfield, Illinois 62706.

3. In view of the parties having stipulated that Packaging Corporation of America is no longer in control of the subject premises, no cease and desist order will be imposed by this order.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the above Opinion and Order was adopted on the 6th day of December, 1973, by a vote of 4 to 0.

Christan L. Moffett