ILLINOIS POLLUTION CONTROL BOARD
January 16, 1973

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
	)	#72-180
v.	)	
	)	
MYSTIK TAPE, A DIVISION OF BORDEN, INC., a New Jersey Corporation, Qualified To Do Business in Illinois	)	

RICHARD W. COSBY AND DOUGLAS T. MORING, ASST. ATTORNEYS GENERAL, ON BEHALF OF ENVIRONMENTAL PROTECTION AGENCY
JAMES W. KISSEL AND THOMAS M. McMAHON OF SIDLEY & AUSTIN, ON BEHALF OF RESPONDENT

OPINION AND ORDER OF THE BOARD (BY SAMUEL T. LAWTON, JR.):

Amended complaint was filed by the Environmental Protection Agency against Mystik Tape, a corporate division of Borden, Inc., Respondent, alleging that Respondent's plant has emitted odor-producing gases and other contaminants and thereby caused air pollution in violation of Section 9(a) of the Environmental Protection Act and that Respondent installed new equipment capable of causing or contributing to air pollution or designed to prevent air pollution without having first obtained permits from the Agency, in violation of Section 9(b) of the Act and Rule 3-2.110 of the Rules and Regulations Governing the Control of Air Pollution (Air Rules). We find that the evidence sustains the allegations of the complaint with respect to the causing of air pollution as defined in the Act and that Respondent has failed to obtain permits in violation of the Act and the Air Rules. We assess a penalty for said violations and require the institution of an abatement program, all as more fully set forth below.

Before considering the merits of the case, it is necessary to dispose of certain procedural matters raised by the pleadings and motions filed. The Agency's original complaint was filed on April 27, 1972. On June 8, an amended complaint was filed without objection by Respondent to plead more specifically the assertions with regard to the permit violations. Odor and air pollution violations occurring between July 1, 1970 and the date of the filing of the complaint were asserted. On August 30, the Agency filed a second amended complaint alleging violation of Section 9(a) "during the period beginning July 1, 1970 and continuing each day of operation until the close of the record herein." (Emphasis added). To this, Respondent objected and moved that evidence of violation subsequent to June 8, 1972 be excluded from the record. The Hearing Officer permitted such evidence

to be presented during the hearing but referred the decision as to its admissibility to the Board (R. 481). We grant respondent's motion in this respect.

Hearings were held on the First Amended Complaint on August 18, 19, September 8, 16, 29, October 10 and 30, 1972. The filing of a Second Amended Complaint after the beginning of the hearings in the form submitted presents a recurring issue that must be disposed of for the protection of the interests of all parties concerned. The complainant has alleged violation of Section 9(a) "continuing until the close of the record". This would include violations subsequent not only to the filing of the complaint but also beyond the commencement of the hearings. The admission of such evidence would create an impossible burden for Respondent in the preparation of its case. Adequate preparation would be virtually impossible if the parties are expected to respond to unspecified events occurring subsequent to the initiation of the proceeding. The Board is being faced with increasing frequency with pleadings alleging violations continuing "to the close of the record." Sometimes, as in the present case, it is in the form of an amendment to the complaint subsequent to the commencement of hearings and justification for the practice, premised on the ability to cause pleadings to conform to the proof. However, even this is questionable, because at the time of the pleading some of the alleged events of violation may not have yet taken place.

The concept of allowing pleadings to be amended to conform to proof was never intended to permit omnibus assertions of unspecified violations that may occur in the future. If events have taken place since the original filing of the complaint that the Agency wishes to assert as violations, the Agency should move that the complaint be amended to include those offenses before making proof of such violations. The Respondent would then be forewarned of what it was being charged with and would have an adequate opportunity to prepare its defense. Shotgun assertions of future violations will no longer be tolerated. This does not foreclose some latitude in the showing of continuing violations for purpose of imposition of penalties or promulgation of abatement programs. Likewise, while we do not look with favor upon generalized allegations of violations covering a specified period of time, as distinguished from detailed specification of alleged offenses, such method of pleading is not fatally defective if it relates to a period in the past. Particularization needed by Respondent can be obtained by use of pre-trial discovery processes if it desires. However, allegations of offenses for periods projecting into the future will no longer be tolerated. For purposes of determining violation of the Act and regulations in the present case, consideration of all allegations and proof relating to periods beyond the filing of the amended complaint will be excluded for purposes of determination of violation. Allegations and proof relating to periods prior to June 8, 1972, the date of the filing of the first amended complaint, will be the only allegations considered by the Board for determination of violation. Accordingly, admission of the second amended complaint will be denied.

The Mystik Tape plant is located in Northfield, Illinois. The area surrounding the plant is mixed residential, industrial and commercial with a high school adjacent to the plant property. In 1953, the first plant, containing 23,000 square feet, was constructed on a 20 acre tract. Subsequently, additions to the plant were made as follows: 83,000 square feet in 1960, 82,000 square feet in 1964, 23,000 square feet in 1965 and 89,000 square feet in 1970 (R. 766-767). In 1963, seven acres of Respondent's property was condemned for construction of the high school. The high school buildings and playing fields lie directly east of Respondent's plant.

There is testimony that citizens were affected by noxious odors emitted from the plant prior to 1970. (R. 127-130). Other witnesses provided records indicating that there were numerous days between January, 1970 and June 8, 1972 when they were aware of noxious odors being emitted from the Mystik plant. (R. 101-11, 211-39, 290-321, 321-369, 369-410, 410-448a, 448b-477, 622-690). All witnesses identified the Mystik plant as the source of these odors and were positive of the source. They based their certainty on wind direction, visual observation and inspection of surrounding area. They characterized the odor variously as "rubber or burning rubber" (R. 248), "heavy or acrid like a new plastic object or magic marker" (R. 299), "sweet and strong" (R. 324), "sickeningly sweet and burning" (R. 372), "burning" (R. 422), "sharp, acrid, smelling like burning adhesive" (R. 457), "sweet" (R. 493), "strong, penetrating and pungent" (R. 630-31). The witnesses described their reactions as changing from "feeling nauseated" (R. 468) to "having a burning sensation when inhaling" (R. 422) to causing "watery eyes" (R. 373) to producing "headaches and sore throats." The witnesses were able to characterize other sources of odor and differentiate them from that attributed to respondent. The odor prevented residents from using their yards (R. 377) and interfered with their indoor life when the windows were open (R. 296). The odor did not appear to cause any property damage or to force people to seek medical treatment. However, there is no question that the odors interfered with the comfort and enjoyment of life of the nearby residents, and constituted a nuisance and violated Section 9 (a) of the act prohibiting the causing of air pollution.

Respondent concedes that it emits odors from its plant but disputes the effect of the odors on those who live and work in the surrounding area. There has been correspondence between the Respondent and the Village of Northfield respecting odors from the plant (Complainant's Exhibits 15 through 19). Further, Respondent has met with citizens of the area and students from the high school on one or more occasions to assure them that the Company was attempting to deal with the problem (R. 117-119). There is indication of improvement in the situation in recent months.

In 1970, Respondent installed two separate "odor counteractant" devices on its facilities. The purpose of the devices was to absorb or counteract any of the odors that might be emanating from the process (R. 275). A device known as Air-Chem was installed in the exhaust vent (R. 281). In August of 1970, a device known as Chem-Screen was installed on the roof (R. 274), covering approximately one-half of the roof area and intended to operate as an air-curtain forcing any odors to pass through a curtain of odor-counteractant (R. 274-76). The odor-counteractant material has an odor of its own (R. 278).

In early 1971, Respondent began installation of its "No. 9 spreader", a coating line where adhesive is applied to a material backing to create an adhesive tape (R. 273). Installation was completed in October of 1971. This spreader, to be discussed in greater detail below, is presently responsible for over one-half of the production of the Mystik plant in square yards of pressure-sensitive tape. (R. 801). Subsequent to the start of construction of the No. 9 spreader, Respondent applied to the Agency for construction permits for its No. 9 spreader and an oder-counteractant device.

In October 1971, the Agency denied both permits (R. 49). The permit for the oder counteractant device was denied because the Agency believed it was not intended to reduce or prevent odor but only to perfume or mask the odor. (R. 46). The other permit was denied because the Agency believed that the spreader was a potential source of air pollution and therefore, needed an accompanying pollution control device (R. 52).

Correspondence between the Agency and the Respondent ensued in which Respondent indicated its willingness to comply with any criteria the Agency supplied. (R. 58-60). Respondent also indicated that it believed it did not need a construction permit for either device. (R. 64-66). The Agency stated that the operation of the devices contributed to air pollution and would violate the Act, and that technical information should be submitted on the device's operation. The Agency also requested that calculations and actual experimental tests with technical reference be included. (R. 66-67). A subsequent meeting in Springfield took place between the parties. Another application for permit was filed for the spreader which was denied on March 20, 1972 (R. 49), because of potential emissions from the new equipment. (Complainant's Exhibits 4 and 5).

Respondent contends that a construction permit for the devices described above is not necessary. It is Respondent's posititon that:

1. The original Illinois Air Pollution Control Act does not authorize any regulation in regard to air pollution control devices such as the odor counteractant devices under consideration.

2. Section 3-2.110 is invalid because it requires permits for air pollution control equipment which is not authorized by the Air Pollution Control Act.

3. Section 9 (b) of the Environmental Protection Act requires permits for equipment designated by the Board regulations.

4. Rule 103 of the Air Pollution Control Regulations being the only applicable regulation applies only to specified air contaminants of which there is no proof of emissions by Respondent.

We find the contentions of Respondent wholly lacking in merit. The power to regulate air pollution control devices has been within the scope of powers of administering boards since the promulgation of the Air Pollution Control Act. This power has in no way been diminished by the Environmental Protection Act or the regulations of this Board.

Under the Air Pollution Control Act (Chapter 111-1/2 Illinois Revised Statute, Section 240.2,the following definitions appear:

(a) "Air contaminant" is particulate matter, dust, fumes, gas, mist, smoke, or vapor, or any combination thereof.

(b) "Air contaminant source" is any and all sources of emissions of air contaminants, whether privately or publicly owned or operated. Without limiting the generality of the foregoing, this term includes all types of business, commercial and industrial plants, works, shops and stores, and heating and power plants and stations, building and other structures of all types, including single and multiple family residences, apartments, houses, office buildings, hotels, restaurants, schools, hospitals, churches and other institutional buildings, automobiles, trucks, tractors, buses and other motor vehicles, garages and vending and service locations and stations, railroad locomotives, ships, boats and other water-borne craft, portable fuel-burning equipment, incinerators of all types, indoor and outdoor, refuse dumps and piles, and all stack and other chimney outlets from any of the foregoing.

(c) "Air Pollution" is presence in the out-door atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant or animal life or to property, or which unreasonably interfere with the enjoyment of life and property.

Section 240.5 provided as follows:

"It is the intent and purpose of this Act to maintain purity of the air resources of the State consistent with the protection of the normal health, general welfare and physical property of the people,

maximum employment and the full industrial development of the State. The Board shall seek the accomplishment of these objectives through the prevention, abatement and control of air pollution by all practical and economically feasible methods."

From the foregoing statutory provisions, it is clear that the odor producing facilities of Respondent and specifically, its spreader equipment, stacks and other sources of emission, constitute air contaminant sources. The installation of odor abatement equipment on such sources becomes an inherent part of the sources. The totality of the equipment, stack or emission source constitutes installation of new equipment capable of becoming a source of pollution. Section 240.5-1.2 permits adoption of regulations consistent with the general intent and purposes of the Act which include, but are not limited to, installation of new equipment capable of becoming a source of air pollution. Improperly installed or operating abatement equipment on an air contaminant source could become a source of air pollution.

Section 3-2.110 of the Air Rules adopted pursuant to statutory authority provides as follows:

"A permit shall be required from the Technical Secretary for installation or construction of new equipment capable of emitting air contaminants to the atmosphere and any new equipment intended for eliminating, reducing or controlling emission of air contaminants."

This provision is in implementation of the foregoing statutory provisions and expressly provides for the installation of new equipment intended for the eliminating, reducing or controlling of air contaminant emissions.

Section 9(b) of the Environmental Protection Act provides that no person shall:

"Construct, install, or operate any equipment, facility, vehicle, vessel or aircraft capable of causing or contributing to air pollution or designed to prevent air pollution of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit."

Section 49(c) of the Act keeps in force and effect all previous regulations of the Air Pollution Control Board, including those presently under consideration until repealed, amended, or superceded by new regulations. Installation of the equipment with respect to which violations are asserted pre-dated the new air pollution regulations, and arguments that the new Regulation 103 supercedes Section 3-2.110 even if correct, would not be available to Respondent for installations having taken place prior to the effective date of this regulation. Likewise, while it is not controlling to the case, the odor counteractant installations are themselves capable of emitting odors which would

make them potential sources of air pollution, and, accordingly, subject to the provisions of the regulation. Accordingly, we find that Respondent's failure to obtain permits for the installation of the odor abatement equipment constituted a violation of Air Rules, Section 3-2.110 and Section 9(b) of the Act. Respondent made application to the Agency for permit covering its odor abatement devices in apparent recognition that permits were required for these devices under the relevant rules and statutory provisions. Once having pursued the permit process, Respondent should have continued with it pursuant to the statutory framework. After having received a rejection of the permit applications by the Agency, Respondent should have appealed the decision to the Board. This would have properly brought the issue before the Board for determination as to whether the Agency's position was correct and conceivably resulted in an agreement as to the cause and source of the odor. Respondent's failure to follow the statutory procedures suspended the ultimate determination an inordinate length of time and led to the events that culminated in the present proceeding.

Respondent is in the midst of a program which will result in the replacement of all photo-chemically reactant solvents by June of 1973 (R. 1090). All odor counteractant devices have been shut down. Odor counteractants are being mixed into the adhesive process to achieve a stoichiometrically balanced reaction (R. 1138). In addition, Respondent is developing a "hot melt" process which would use no solvents (R. 1091). It believes that this process would provide substantial savings if the process is implemented.

The preceeding makes plain that the Company has been aware of the existence of the odor problem for a substantial period of time. It has attempted, and is attempting, to cope with the problem by a variety of methods. Good faith has been demonstrated in this respect.

Respondent's technical expert, a chemical engineer now employed as Environmental Engineering Manager for the parent corporation, testified that the odor problem has been isolated. Six basic tapes were found to be stronger in odor than other basic tapes by a significant margin (R. 1119). Particular processes that have been a source of the odor have been isolated, namely, the cure zones of the higher temperature zones of the ovens and in some cases, the release coat zones (R. 1071-72). Respondent's expert is responsible for the implementation of all environmental control activities at the plant (R. 954-56). He has testified that the parent corporation, Borden, Inc., will proceed with odor abatement regardless of the outcome of this proceeding.(R.985). He disputes the Agency's evidence that the odor problems emanate from the solvents used in the tape-making process (R. 1067). Solvents with low odor thresholds, toluene, xylene and ethanol are to be replaced completely by June of 1973 (R. 1090).

Respondent introduced testimony that incineration can achieve a measureable improvement in the odor problem (R. 1136). The necessary equipment, installation costs and operating expenditures have all been carefully calculated (R. 1058, and following). All tapes which Respondent believes are responsible for the odor emissions can be run on one spreader and thereby reduce the necessary odor abatement equipment (R. 1120). Respondent believes that if all of those tapes were run on the No. 9 spreader, and if an incinerator is installed on that line, "...it would reduce the strength of odors significantly below any detectible levels at ground levels". (R. 1120).

The Respondent's odor emissions have violated Section 9 (a) of the Act. While Respondent has conscientiously pursued various methods of alleviating the problem there is no question that the emissions have created a burden on the community and have resulted in air pollution. We will direct Respondent to submit a program to alleviate this condition. This procedure has proven most effective in abating odors and has been ordered in similar cases. See Environmental Protection Agency v. Teepak, Inc., #72-81 (November 8, 1972) 5 PCB and Environmental Protection Agency v. Union Carbide Corporation, #72-54 (October 3, 1972) 5 PCB .

We order Respondent to submit to the Board and the Agency within 45 days, a plan for odor abatement at the Northfield facility. The program shall result in the complete abatement of the odor nuisance as soon as possible and in no case later than June 1, 1973. We note that many odor control techniques exist of which the Respondent has mentioned process modification and incineration as having a high probability of success. Since process modification is being explored by Respondent as a means of reducing photoreactive hydrocarbon emissions, it should be possible to achieve both odor and hydrocarbon emission control by this date. This order, however, does not hold the Respondent to a particular method for reducing odors and all possibilities should be explored in order to achieve the desired goal.

We find that Respondent, by its installation and operation of No. 9 spreader without a permit, violated Sec. 9(b) of the Environmental Protection Act and Rule 3-2.110 of the Air Pollution Control Regulations. We find that Respondent's installation of the odor counteractant devices without a permit, being equipment designed to prevent air pollution, violated Section 9(b) and Rule 3-2.110 of the Air Pollution Control Regulations.

A penalty in the amount of $3,500 is imposed for violations of the statute and Rules above set forth. As we stated in Environmental Protection Agency v. George E. Hoffman & Sons, Inc., #71-300 (December 12, 1972) 6 PCB :"It is only by the permit process that the proper location and operation of a plant of this character can be determined and adequate equipment be installed to achieve compliance with the law."

Compliance with the requested procedures would have gone far in the elimination of odors and nuisance found to have resulted without the need for the institution of this proceeding.

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

IT IS THE ORDER of the Pollution Control Board:

1. Respondent, Mystik Tape, a Division of Borden, Inc., is found to be in violation of Sections 9(a) and 9(b) of the Act and Rule 3-2.110 of the Air Pollution Control Regulations. Penalty in the amount of $3,500 is assessed against Mystik Tape and Borden, Inc. for the aforesaid violation. Payments shall be made by February 21, 1973, by check or money order to Fiscal Services Division, Environmental Protection Agency, 2200 Churchill Drive, Springfield, Illinois 62706.

2. Within 45 days from the date hereof, Mystik Tape and Borden, Inc. shall submit to the Board and Agency, a program for the abatement of air pollution and nuisance caused by its facility as demonstrated by the record in this proceeding. The program shall result in the complete abatement of the odor nuisance as soon as possible and in no case later than June 1, 1973. The Agency shall evaluate the program so submitted and submit its report thereon to the Board within 15 days after receipt thereof. The Board retains jurisdiction of this cause for such other and further orders as may be appropriate.

3. Respondent shall post with the Environmental Protection Agency, within 60 days from the date of this Order, a bond or other security in the amount of $100,000, in form satisfactory to the Agency, which shall secure installation and operation of all facilities and abatement equipment to be installed and operated by Respondent pursuant to the program and installation schedules required to be submitted pursuant to paragraph 2 of this Order.The bond shall be mailed to: Fiscal Services Division, Environmental Protection Agency, 2200 Churchill Drive, Springfield, Illinois 62706.

I, Christan Moffett, Clerk of the Illinois Pollution Control Board, certify that the above Opinion and Order was adopted on the 16th day of January, 1973, by a vote of 3 to 0.

Christan L. Moffett