ILLINOIS POLLUTION CONTROL BOARD
January 6, 1971

MARQUETTE CEMENT MFG. CO.	)	
	)	
v.	)	#70-23
	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

Opinion of the Board (by Mr. Currie):

Marquette Cement Manufacturing Co. filed a petition for variance October 14, 1970. After a hearing we grant the petition subject to several conditions enumerated below.

Marquette operates in Oglesby, Illinois, a large and elderly cement manufacturing plant whose emission of cement dust concededly "far exceeds" the limits set by the particulate emission regulations adopted by the old Air Pollution Control Board in 1967. The regulations (Rule 2-2.31) required the submission by April 15, 1968, of a firm program (ACERP) for bringing emissions into compliance. On September 1, 1967 Marquette filed a letter of intent (this and the following communications are combined in EPA Ex. 3) stating that because the plant was "obsolete" the company was "studying feasibility of completely rebuilding this plant or building at a new location" and promising that an ACERP would be filed on or before the date prescribed. Just before that date, however, the company requested an extension of time to study the alternatives, which had been "narrowed" to "five or six" and which now included "upgrading the existing plant to meet operating and air pollution requirements." An extension was granted until December 15, 1968.

In December of that year Marquette wrote that a committee of its Board of Directors had concluded that "the plant should be enlarged and modernized with the first phase to include completely new kiln department and a completely new finish grinding department,"and that the new design "will include the installation of the most modern and effective dust collection equipment available," which would "be designed to fully meet the Illinois code." This program was to be recommended to the company's Board of Directors in February, and "it is expected that approval will be given

and an appropriation of funds made." A letter a few weeks later listed five firms that had submitted proposals to build the new facilities, stated the belief that the company would "be in a position within the next week to make a final selection of an engineering firm for the Oglesby project" and would then "enter into a contract," and included a schedule as follows:

> "(1) Detailed engineering to start not later than April 30, 1969.
>
> "(2) Construction to start May 1, 1970.
>
> "(3) Construction to be completed in September, 1971."

On the basis of these assurances the Air Pollution Control Board approved the air contaminant emission reduction program January 30, 1969, requiring the filing of annual progress reports beginning July 1, 1969.

Then the vacillations began. After obtaining state approval of the program the company's Board of Directors, confronted by what Marquette described as "a sharp increase in the interest rates for long term capital borrowing," voted only "conditional" approval of the plan the company had submitted, making the whole program contingent upon "arrangements . . . to increase the company's long term debt on a basis approved by the Administrative and Advisory Committee of this Board of Directors." If no such arrangements could be made, the officers were authorized to install control equipment on the existing kilns. (Letter of March 12, 1969). Six weeks later a telegram informed the Air Board that the company had made the decision to install control equipment on exising facilities and that a letter containing a new program would be submitted the following week.

But no letter was submitted, and neither was the progress report required by the order approving the original program. On August 29, 1969 the Board wrote to Marquette urging that the report be filed immediately to avoid enforcement action. On September 10 the company responded that it regretted the "oversight" and placidly reported that after two years and a half of studying alternatives (and polluting the air) it was right back where it had started. This letter is so blatant in its assumption that the company could get away with whatever it pleased that I quote it rather extensively:

"We are proceeding with detailed Oglesby engineering and financial studies along two lines, both of which would include satisfactory air pollution control. The first encompasses modernization of the present plant, and the second installing new air pollution control equipment on the present plant.

"Discussions with the institutions from which we have secured our present long term debt indicate that financing the modernization of the present plant may become a problem, and this has raised the question about our ability to continue with this plan which your Board has approved. Should we find it necessary to take the alternative course of installing satisfactory air pollution control equipment on the present plant, we shall present to you and the Board for your consideration an amended Air Contaminant Emission Reduction Program and time schedule."

That was the last heard from Marquette Cement Manufacturing Company about fixing up its air pollution problems until the present petition for variance was filed in October, 1970--three and a half years after the regulations took effect. Pollution continues unabated.

Now the company has presented a plan that, if it were not for the delay, would seem satisfactory. The new plan calls for replacement of the eight oldest kilns with a single new one (complete with electrostatic precipitator) to be completed by December 31, 1972, and for fitting the two other existing kilns with precipitator by March 31, 1972. The Environmental Protection Agency agrees that this program will bring Marquette into compliance with the particulate regulations. Moreover, although the Agency raised questions as to whether the timetable proposed could be expedited, the only evidence in the record supports the company's schedule. Precipitator suppliers, the testimony shows, are presently overcommitted; substantial demolition work must be done to make room for the new installations in a crowded work area; provision must be made for a new electrical supply (R. 29, 42, 66, 71, 82-83, 88). On this record we accept the uncontradicted testimony that, given today as the starting date, the schedule is as tight as we can require.

The statute provides for a variance to be granted only if the petitioner carries the burden of proving that to comply with the regulations would impose an "arbitrary or unreasonable

hardship" (§35). The evidence as to hardship if the plant were closed during installation of the pollution control equipment is convincing, although one is tempted to say the hardship was self-inflicted by the company's long record of unnecessary delay. To close the plant would of course cause the loss of business for two years, and the company maintains that it would never be able to reopen the plant if the variance were denied (R. 62). More importantly, the closing of the plant would deprive over 400 people of their jobs (R. 17), in an area that has few obvious opportunities for reemployment (R. 100). On the other side of the balance, while there have been a number of complaints about dust emissions from the cement kilns (R. 8), there is no evidence that they are acutely toxic, and no one has asked us to shut down the plant while controls are being installed. To the contrary, there was overwhelming community sentiment in favor of the grant of the variance. The manager of the regional chamber of commerce (R. 97-101), the mayor of Oglesby (R. 104), the local Roman Catholic priest (R. 112) and Protestant minister (R. 127), vice-presidents of a local bank (R. 115) and of a local savings and loan association (R. 125), the president (R. 149-50) and recording secretary of the union representing Marquette's employees (R. 150) and another citizen (R. 153) all testified that they hoped the variance would be granted. Two other residents of Oglesby voluntarily testified that they objected to air pollution and noise from trucks serving the cement plant but that they did not object to the grant of the variance (R. 139, 146). This community sentiment cannot be ignored. The people who will suffer most from continued pollution during the next two years while controls are being installed have told us in no uncertain terms that they would suffer much more if the plant were closed. We think hardship is amply shown and the variance must be granted.

This does not, however, mean that we simply give the company what it asked for with no strings attached. To begin with, the statute expressly limits any variance to one year (§36 (b)), in accord with the salutary policy of requiring the petitioner to come back within a reasonable time and demonstrate that it has made satisfactory progress toward completing its program. We will grant the variance for one year, and Marquette may obtain an extension as the statute provides upon a timely petition and proof that it has made satisfactory progress and has complied with the conditions of today's order.

Moreover, today's variance order does not authorize violations of anything other than the particulate regulations, or by any equipment other than that covered by the variance request. Questions were raised during the hearing concerning dust and diesel smoke (as well as nocturnal noise) from trucks entering and leaving the plant through a residential area (e.g., R. 139-47), and concerning carbon monoxide and sulfur dioxide emissions as well (R. 54-56). We urge the Environmental Protection Agency to investigate whether Marquette's operations cause violations other than those involved in the present case and to take appropriate action if such violations are found. While the present proceeding does not permit us to issue orders against such violations, we have not been asked to allow them, and our order today does not do so.

Finally, the statute explicitly authorizes the Board to "impose such conditions as the policies of this Act may require" when granting a variance (§ 36 (a)). Several conditions are required here to further the purposes of the statute. First, we shall require Marquette to submit quarterly progress reports in order to assure that it is living up to its promised schedule and so that prompt corrective action can be taken if it is not. We do not wish to be in the position, a year from now, of discovering for the first time that there have been further delays. For the same reason, we shall insist not only that the company aim toward ultimate compliance by the end of 1972 but that it meet several interim deadlines, in accord with its own variance proposal, in order to give us intermediate checkpoints against which to measure progress.

Third, since this is a case in which the hardship is temporary and the sole reason for the variance is the need for time in which to install control equipment, the statute (§ 36 (a)) requires the posting of security to assure that the company meets the dates it has set itself. There is some suggestion in the record that bonding companies may be reluctant to give security for this purpose, partly because the idea is a novel one with this statute and partly because the details of the required bond are not spelled out in the statute (R. 117-23, 128-31). There is even a suggestion that the security requirment may be unconstitutional (Petitioner's summation, p. 4), but no constitutional principle is cited in support of this contention, and the argument is patently without merit. We have required security in comparable past cases (e.g., Nestle Co. v. EPA, #70-22, decided December 22, 1970), and statutory bond requirements are in fact quite common and accepted in other fields.

As for the alleged reluctance of bonding companies, the statute and today's order leave the Agency considerable flexibility in working out the details of the security; it may be that a commercial bond will not be required.

The purpose of the bond requirement is to provide an additional incentive to the variance holder to meet his deadlines, by imposing the threat of forfeiture if he does not. The amount must be high enough to make it more unattractive to default than to spend the money for control equipment. While the cost of the equipment may be an adequate measure of this amount in some cases, it is not so here since much of the cost of the new installation is for new kilns. We think a security in the amount of $50,000 will suffice, to be forfeited if the plant is operated without a further variance and without controls after January 6, 1972.

Finally, the purposes of the statute require that we impose as a further condition of this variance the provision that Marquette pay to the State of Illinois the sum of $10,000 as a penalty for its inexcusable dilatory tactics. To let Marquette walk away without even so much as a slap on the wrist would suggest that the State does not mean business about pollution and would encourage other emitters to delay controlling their processes until the last possible moment. For Marquette, as amply shown by this record, publicly thumbed its corporate nose at the State of Illinois for at least one and a half years. After requesting and receiving a nine-month extension of a year's grace period to devise a plan for compliance, the company received approval of its plan only to change its mind and procrastinate. It is not as if the old Board had granted approval of a program whereunder the company was to study the problem for another year or two; the ACERP submitted and approved in January 1969 contemplated that Marquette would replace the old kilns with new ones equipped with adequate controls by September, 1971. The failure of the company's Board of Directors to endorse the program the State had approved put an end to that program, and the company did not submit another--or even request another time extension--for more than a year and a half thereafter. Rather the company kept putting off the Air Pollution Control Board with assurances that it was still "studying" the problem. But the time for study had long passed. The Air Pollution Control Act did not grant people an indefinite period in which to make up their minds. Marquette was given plenty of time to decide how to bring its plant into compliance, and without leave it proceeded to take twice as long as was allowed. The result is that the company was in clear and flat violation of the particulate regulations, from February 1969, when the Board of Directors refused to endorse the ACERP that the State had approved, until the submission of the present

plan and its approval today. The failure to live up to the ACERP and the failure to submit the progress report required in July, 1969 were additional violations for which penalties may be imposed. To ignore these violations would frustrate the purpose of the statute to "restore, maintain, and enhance the purity of the air" (§ 8), by encouraging delays that are prejudicial to the entire control program.

As we said last month in Ozark-Mahoning Co. v. EPA (#70-19, decided December 22, 1970), the time may come when this Board refuses to accept a plea of hardship on behalf of one who has deliberately brought about his own plight by delaying the installation of control equipment. Today we choose not to deny the variance on this ground, but we think it necessary to impose a penalty as a condition of our variance order so that in the future people will understand that deligence in pursuit of a program of compliance is required. By dragging its feet Marquette has postponed for over a year and a half (since the original approval of the ACERP) the spending of the three million dollars it plans to invest in control equipment. The interest thus saved amounts to a pretty penny. While it is true that some of this saving is offset by rising construction costs, this could not necessarily have been foreseen at the time. It remains true that the company that delays making expenditures for air pollution control is likely to benefit financially at the expense of its innocent neighbors, and a penalty must be imposed as a deterrent. The sum of $10,000 is peanuts to a company undertaking a $15,000,000 construction program; I would be inclined to favor a penalty of $50,000. But the Board is of the opinion that a $10,000 slap will serve as adequate warning to those in similar positions in the future who might be tempted similarly to delay. Future penalties may not be so trivial, for the statute (§ 42) permits penalties of $10,000 plus an additional $1000 for each day a violation continues.

Accordingly, the variance will be granted upon the conditions stated above, including the payment of $10,000 to the State as a penalty for emitting particulate air contaminants in violation of the regulations promulgated by the Air Pollution Control Board and without pursuing a program of delayed compliance as authorized by those regulations. The ACERP approved by that Board is no defense, for the regulations plainly provide that there is such a defense only so long as the program is being implemented (Rule 2-2.41). The protective mantle of that program expired

when the company board refused to endorse it in February, 1969. The violation continued at least until the filing of the present petition in October 1970, and the penalty assessed is easily within the amounts authorized over this extended violation period by either the Environmental Protection Act or its predecessor.

I conclude by quoting from the recommendation of the EPA:

> "The Agency can only conclude that petitioner was using the program to delay as long as possible the time when it must bring itself into compliance. . . . Petitioner's only real progress, since submitting its January 1969 program, is to have finally decided what it is going to do."

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

ORDER

The Board, having considered the transcript and exhibits in this proceeding, hereby grants the petition of Marquette Cement Mfg. Co. for a variance, subject to the following conditions.

1. This order shall shield the company from proceedings for enforcement of the particulate emission regulations adopted by the Air Pollution Control Board and preserved by section 49 of the Environmental Protection Act, with regard to emissions from the kilns for which control plans were submitted in the petition for variance filed in this proceeding, from the day of this order until January 6, 1972, provided that the other conditions of this order are complied with.

2. Marquette shall adhere to the following schedule, as set forth in its petition for variance:

Evaluation of bids and application for permits (for collection equipment)	February 1, 1971
Start of construction work	April 1, 1971
Completion of dust collection on two old kilns	March 31, 1972
Completion of construction, total compliance	December 31, 1972

3. Marquette shall file progress reports with the Board and with the Agency on April 6, 1971, and every three months thereafter, and shall apply for an extension of the variance, if necessary, no later than October 6, 1971.

4. Marquette shall post with the Environmental Protection Agency, on or before March 1, 1971, and in such form as the Agency may find satisfactory, a bond or other adequate security in the amount of $50,000, which sum shall be forfeited to the State of Illinois in the event that the plant in question is operated after January 6, 1972, without an extension of this variance and without control equipment sufficient to reduce emissions to those permitted by the regulations.

5. Marquette shall pay to the State of Illinois, on or before March 1, 1971, the sum of $10,000 as a penalty for continued violations of the statutes and of the regulations with regard to particulate emissions from the plant in question from February, 1969 until October, 1970.

6. Emissions shall not be increased above the levels disclosed in the forms submitted by Marquette in connection with its letter of intent (EPA Ex. 3) during the period of this variance.

7. The failure of the company to adhere to any of the conditions of this order shall be grounds for revocation of the variance.

I, Regina E. Ryan, certify that the Board adopted the above opinion and order January 6, 1971.

I CONCUR

I DISSENT