ILLINOIS POLLUTION CONTROL BOARD
February 4, 1988

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Complainant,	)	
v.	)	PCB 86-27
MODINE MANUFACTURING COMPANY,	)	
Respondent.	)	

MESSRS. MICHAEL JOHN MAHER AND MICHAEL K. OHM, ASSISTANT ATTORNEYS GENERAL, APPEARED ON BEHALF OF THE COMPLAINANT;

MESSRS. ROY M. HARSCH AND DANIEL F. O'CONNELL APPEARED ON BEHALF OF THE RESPONDENT MODINE MANUFACTURING COMPANY, INC.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board upon a February 25, 1986 complaint filed on behalf of the Illinois Environmental Protection Agency ("Agency") against Modine Manufacturing Company, Inc. ("Modine"). In Count I of the complaint the Agency alleges that Modine violated Section 9(b) of the Illinois Environmental Protection Act ("Act") and 35 Ill. Adm. Code 201.141 and 201.144 by operating without a permit from October 31, 1983 to the time of filing of the complaint. In Count II of the complaint the Agency alleges that stack tests show that on various dates from December 15, 1981 to March 28, 1985 Modine's emissions exceeded allowable limits under the Air Pollution Regulations which constitute violations of Section 9(a) of the Act and 35 Ill. Adm. Code 201.141 and 212.322. The Agency requested that for each count the Board impose a penalty not to exceed $10,000 for each violation plus a fine of $1,000 for each day during which the violation continued. A hearing was held on June 19, 1987 during which the parties entered into a Stipulation of Facts (hereinafter cited as "Stip." and "Stip. par. _____") with exhibits. The Agency filed its brief on September 9, 1987 and Modine filed its brief on November 6, 1987.

BACKGROUND

Modine engages in the manufacture of aluminum air conditioning condensers and evaporators for use in automobiles, trucks and off-highway vehicles at a plant located near Ringwood in McHenry County, Illinois ("Ringwood plant") (Stip. par. 1). From at least December 15, 1981 to January 24, 1986, Modine manufactured evaporators using the Alfuse process. In the Alfuse process, unassembled aluminum evaporator cores and fins are

prepared for bonding and a bonding slurry is applied. The bond is cured in an evaporator oven which is a source of particulate emissions. Particulates emitted by the evaporator oven pass through a venturi scrubber before emission from the stack (Stip. par. 2-5).

The Stipulation indicates that on September 21, 1982, the Agency issued a renewal operating permit to Modine for its condenser and evaporator manufacturing process. A special condition of the permit required that a particulate stack test be performed on the evaporator oven not more than 180 days from the date of permit issuance. The permit was to expire on October 31, 1983 (Stip. par. 10). A stack test performed on January 11, 1983 demonstrated that Modine's emissions from the bonding oven were in compliance. However, subsequent stack tests, including those conducted February 25 and April 19, 1983, indicated non-compliant emissions rates (Stip. par. 11-13).

On June 28, 1983 Modine submitted an application for renewal of its operating permit for its aluminum condenser and evaporator production operations (Stip. par. 17; Stip. Ex. K). On August 3, 1983 the Agency denied Modine's application and on August 9, 1983 Modine resubmitted a renewal operating permit application covering evaporator production only. The Agency denied the application on September 13, 1983 (Stip. par. 18-19).

VIOLATIONS

The Board finds that since Modine's operating permit for its evaporator production expired on October 31, 1983, and that Modine continued operation of the evaporator line from that date until January 28, 1986, Modine violated Section 9(b) of the Act and 35 Ill. Adm. Code 201.141 and 201.144 during that time period. Although the Agency's complaint states that Modine operated without a permit to February 25, 1986, the date of the filing of the complaint, the Stipulation indicates that on January 28, 1986 the last evaporator was manufactured at the Ringwood plant using the Alfuse process (Stip. par. 30). The Agency also acknowledges in its brief that to at least January 24, 1986 Modine operated its evaporator line (Agency Brief p. 2, 3). The only issue remaining regarding Count I is the amount of any penalty to be imposed. The penalty will be discussed later.

The Stipulation indicates that Modine's stack test results for particulate emissions at the Ringwood facility were as follows:[1]

[1] Section 212.322 of the Air Pollution Regulations utilizes an equation which considers the data of the specific facility process and results in an allowable emission rate of pounds per hour. In each of the six excursions one or more stack tests were conducted to obtain the data which was inserted in the above mentioned equation (Agency brief at 4).

	Allowable lbs/hr	Actual lbs/hr
December 15, 1981	1.75	5.72
February 25, 1983	4.26	6.73
April 19, 1983	2.79	8.13
	2.83	10.40
March 29, and 30, 1984	2.54	11.80
	2.42	13.90
	2.48	14.80
March 28, 1985	2.71	9.30
	2.71	13.50
	2.71	13.70

(Stip. par. 6, 12, 13, 25, 29).

In view of the above stack test results, the Board finds that on six different days Modine's particulate emissions exceeded allowable limits. Modine therefore violated Section 9(a) of the Act and 35 Ill. Adm. Code 201.141 and 212.322.

ESTOPPEL

Modine asserts that the Agency is estopped from bringing this enforcement action because of an alleged agreement by the Agency not to bring the action if Modine would take certain steps to achieve compliance, and in the alternative, that the Agency is estopped from seeking penalties for the violations because of its prior actions. The Board in determining whether there is a basis for application of the doctrine of estoppel in this instance will initially set out the relevant facts and allegations.

As the Stipulation indicates, there were pre-enforcement conferences and numerous communications between the Agency and Modine. Modine presented details of these conferences through the testimony of Gary A. Fahl, Supervisor of Environmental Engineering for Modine. There were three pre-enforcement conferences, on July 21, 1983, June 25, 1984, and June 26, 1985. Modine asserts that at all three the Agency, after reviewing Modine's proposed compliance efforts, had agreed not to bring an enforcement action. At the third conference, Modine testified that the Agency specifically agreed to accept Modine's compliance plan to phase out, rather than attempting further upgrading, of the Alfuse process and install the Nocolok process. Modine asserts that "in so doing", the Agency agreed not to bring an enforcement action, and to support a grant of variance from wastewater effluent limitations (which the Agency later did), while the Alfuse process was being replaced. Modine also testified that the Agency subsequently advised Modine that it would not need variance from excess particulate emission limitations during the Alfuse phase-out. (R76,77,81,82,88-90, Ex.

J). The Agency's enforcement action was filed on February 25, 1986, approximately one month after Modine shut down its Alfuse process.

Mr. Fahl further stated that because of the projected environmental benefits and specifically in reliance upon statements made by the Agency at the June 26, 1985 pre-enforcement conference and thereafter, Modine decided not to install the Nocolok system at an out of state plant and close the McHenry plant and to use the Nocolok process on the evaporator line and so informed the Agency at the meeting (R. at 89) (emphasis added). The Agency's only response to Modine's testimony was the testimony of Mr. Sudhir Desai, environmental engineer, whose June 29, 1984 internal staff memorandum concerning the second conference on June 24, 1984 indicates that the Agency was continuing to determine whether to initiate an enforcement action; the Board notes that no enforcement proceedings were initiated at that time. (Agency Ex.1, R. at 59-60).

The Board notes that Illinois courts have been reluctant to apply the doctrine of estoppel against the State. As the Second District Appellate Court in Tri-County Landfill v. Pollution Control Board, 41 Ill.App. 3d 249,255, 353 N.E. 2d 316 (1976); quoted People ex rel. Brown v. Illinois State Troopers Lodge No.41, 7 Ill.App. 3d 98, 104,105, 286 N.E. 2d 524 (1972), leave to appeal denied.:

> [A]n estoppel in this situation is not appropriate for the reason there is involved a public right and the protection of the public. As was said in C.J.S. Volume 31, Section 138 at page 675:
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> > Estoppels against the public are little favored. They should not be invoked except in rare and unusual circumstances, and may not be invoked where they would operate to defeat the effective operation of a policy adopted to protect the public.
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> In cases involving public revenue, public rights and the exercise of governmental functions, estoppel against the State has been denied [citations omitted]. In the case of Hickey v. Illinois Central R.R. Co., 35 Ill. 2d 427, 220 N.E. 2d 415, the Supreme Court did find an estoppel against the State when acting in a proprietary function, as against a governmental function. The court therein points out that there may be estoppel against the State when operating in a governmental capacity but only under compelling circumstances. In explaining the hesitancy of the courts to apply estoppel to public bodies, the court stated on page 447:

> There are sound bases for such policy. It is said that since the State cannot be sued without its consent, an inevitable consequence is that it cannot be bound by estoppel. More importantly, perhaps, is the possibility that application of laches or estopped [sic] doctrines may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials.
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> In this case, the court is involved with a matter of rights of the public and a statutory proscription. The mere registration of the defendant is not sufficient to justify the curtailing of the police powers of the State and preventing the State from proceeding to remedy a continuing violation of the statutory provisions of the Solicitation Act. To hold otherwise would effectively curtail the power and the right of the State to enforce public rights when mistakes or errors in judgment of those acting in an official capacity appear.

In view of the above, the Board finds that the extraordinary or compelling circumstances which would warrant application of the doctrine of estoppel do not exist in this instance. Such application of the doctrine would impair the functioning of the State in its role of protecting valuable public interests in the environment. The Board agrees that the Agency presented little evidence to dispute Modine's testimony as to what the Agency had agreed; however, "to allow estoppel here would be to permit the people of Illinois to be denied their constitutional right to a healthful environment (Ill.Const., art. XI, 2), because of the actions of certain State officials" Tri-County Landfill supra, at 255. [See also, Dean Foods Co. v. Pollution Control Board, 143 Ill.App. 3d 322, 492 N.E. 2d 1344 (1986).]

The Board notes that under the Act, entities are expected to achieve compliance whether that compliance comes through improvements made to existing control devices or through the application of new technologies, irrespective of any alleged agreements with the Agency. Mr. Fahl's above cited testimony that Modine chose the Nocolok process because of the "projected environmental benefits" illustrates this fact. The Board further notes that Modine's reliance on Wachta v. Pollution Control Board, 8 Ill.App. 3d 436, 289 N.E. 2d 484 (1972); is misplaced. As the Second District stated referring to a petitioner's reliance on Wachta:

> That case and two succeeding cases, Bederman v. Pollution Control Board (1974), 22 Ill.App. 3d 31,

> 316 N.E. 2d 785, and Kaeding v. Pollution Control Board (1974), 22 Ill.App. 3d 36, 316 N.E. 2d 788 while holding the Board estopped from revoking a permission previously granted the landowners to connect to the North Shore Sanitary District after the landowners had incurred considerable expense in reliance on the permits, did not involve the question of pollution. [emphasis added] Indeed, in Kaeding v. Pollution Control Board, this court specifically pointed out that the Board had found that none of the defendants including Kaeding had violated the Environmental Protection Act.
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> Tri-County Landfill, supra at 249.

PENALTY

Having found that the violations existed as stated in the complaint, and further that the doctrine of estoppel is inapplicable in this instance, the only question remaining is the penalty to be imposed. In that regard the Board must consider the factors set forth under Section 33(c) of the Act.

The first consideration under Section 33(c) is the character and degree of injury to, or interference with the health, general welfare or property of the public. As Modine correctly states in its brief, there is very little information in the record regarding any possible environmental impact from Modine's operations. The Agency presented none. Mr. Fahl presented estimates of what the excess particulate emissions might have been for 1982 through 1985. He calculated that the excess emissions for each of the above years had been 1.4, 3.6, 4.7, and 3.2 tons respectively; totalling 12.7 tons for the four year period (R. at 92-3). It is also worth noting that McHenry County is designated as an attainment area for total suspended particulates.

While these sparse facts seem to indicate no significant interference with the public health, welfare, or property from Modine's emissions, the Board is compelled to find such interference does in fact exist because of its operation without a permit. The Board's rationale in Illinois Environmental Protection Agency v. Trilla Steel Drum Corporation, PCB 86-56, June 25, 1987, modified August 6, 1987 is equally applicable here:

> On the other hand, the Agency correctly points out that the Board has long held that operation without a permit is a serious violation of the Act. (Reply at 3). As stated in Illinois Environmental Protection Agency v. George E. Hoffman & Sons, Inc., PCB 71-300, 12 PCB 413, 414 (May 29, 1974):

> We have often stated that enforcement of the permit provisions ... is essential to the environmental control system in Illinois. It is rare indeed when a permit violation does not call for at least some monetary penalty.
>
> The permit system is the cornerstone of the State's environmental program. Through that system the Agency's ability to monitor compliance is greatly enhanced as, in turn, is the protection of the public. Any failure to comply with the permit requirement, therefore, interferes with the protection of the public.

It is this extremely important point that Modine passes over, particularly in its estoppel arguments. The real problem here is that whatever reliance was placed on an Agency decision not to enforce after looking at compliance plans to reduce emissions simply does not relieve Modine of its continuing responsibility to operate with a permit, and to seek a variance if it needed temporary relief from the general standards, the violation of which caused the permit to be denied. The Agency had twice denied Modine's permit reapplications on August 3, 1983 and September 19, 1983.

A pre-enforcement conference, no matter what the Agency's view is of Modine's compliance efforts or what the Agency's statements were regarding its enforcement intentions, does not excuse Modine from taking steps it was certainly familiar with to protect against operating without a permit, which it failed to take from October 31, 1983, when an earlier permit expired, until January 28, 1986, when it finally decided to phase out its Alfuse-process, about two and one-quarter years later. Moreover, Modine's own tests showed it was in violation of its earlier permit some time before it expired. Whether Modine could have demonstrated that its hardship and compliance efforts were sufficient to justify variance is another matter. The point is that Modine simply did not make the effort; instead, Modine continued to operate without a permit. Staving off an enforcement action is not a substitute forum.

The second consideration under Section 33(c) is the social and economic value of the pollution source. Evidence in the record pertaining to the social and economic value of the Modine facility consists of the fact that the plant manufactures evaporators and condensers and employs between 25 and 40 people (R. at 72, 103). The Board finds that the social and economic value of Modine's facility is significant, but that that social and economic value is substantially reduced when the facility fails to secure a permit and emits pollutants in excess of standards.

The third consideration under Section 33(c) is the suitability of the location of the site. The Board notes that there is no evidence in the record regarding the lack of suitability of the location of the site, and so will presume the site suitable for a properly run facility.

The fourth consideration is the economic reasonableness and technical feasibility of reducing the pollution. The record shows that after notification of the excess particulate emissions from the evaporator oven as revealed by the stack tests, Modine retained a consultant and proposed to implement his suggestions for alterations to the scrubber in attempting to achieve compliance (Stip. par. 7, 8). Modine apparently attempted further alterations, including the installation of a new I.D. fan for the scrubber and adjusting the liquid to gas ratio, which were unsuccessful (R. at 102). Modine then opted for discontinuing the use of the Alfuse process and installation of the Nocolok process. Mr. Fahl testified that Modine has presently achieved compliance on the evaporator line (R. at 90-1). The Agency does not dispute this. The Board notes that Modine was economically able and did install the technology to come into compliance. However, this did not occur until over two years after its permit expired and at least four years after the initial noncompliant reading in December, 1981.

Modine asserts that there should be no penalty since it was indeed making all good faith efforts to bring its operation into compliance and that all it needed was some time. The Board finds it difficult to give much weight to this argument in an enforcement setting when Modine chose to operate without a permit rather than subject its good faith arguments to variance review, a process by which the Agency would have made a formal recommendation and given its views regarding Modine's compliance efforts. Modine argues that the Agency, by declining to enforce, agreed that Modine was doing its good faith best; however, the Board believes that three enforcement conferences followed by an enforcement action suggest otherwise. Also, the Agency testified that it did not believe Modine was being aggressive enough (R at 26).* In any event, the Agency correctly argues that Modine should have applied for a variance during the time of its intermittent noncompliance. (Agency Brief at 5; R. at 27).

Based upon its consideration of the factors set forth in Section 33(c) of the Act and other matters as stated in this Opinion, the Board finds that a penalty of $10,000.00 for the above cited violations is warranted in this case. As stated above, Modine operated its facility for a period of over two years after its permit expired and for at least four years after the initial noncompliant reading was reported. This was

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* In so saying, the Board emphasizes that it is not making any comment about the use the Agency makes of enforcement conferences.

inexcusable. For this violation alone a $10,000 penalty is warranted.

Modine's good faith arguments are considerably under-cut by its failure to do anything to operate lawfully. The little weight that can be given to Modine's good faith arguments serves to mitigate against the finding of a more substantial penalty. Under these circumstances, the Board believes that imposition of a greater penalty would not aid in the enforcement of the Act.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

It is the Order of the Board that:

1. Respondent has violated Sections 9(a) and 9(b) of the Act; 35 Ill. Adm. Code 201.141; 201.144; and 212.322.

2. Respondent shall cease and desist from further violations of the Act and regulations promulgated thereunder.

3. Respondent shall, by certified check or money order payable to the State of Illinois and designated for deposit into the Environmental Protection Trust Fund, pay a civil penalty of $10,000.00. Respondent shall pay this penalty within forty-five (45) days of the date of this Order to:

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

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985 ch. 111½ par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

J. D. Dumelle and R. Flemal dissented.

J. T. Meyer concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 4th day of February, 1988, by a vote of 5-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board