ILLINOIS POLLUTION CONTROL BOARD
October 14, 1971

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
	)	
v.	)	# 71-69
	)	
	)	
INCINERATOR, INC.	)	

Opinion of the Board on Motion to Stay (by Mr. Currie):

On September 30 we entered an order finding Incinerator in violation of the law and regulations with respect to air pollution, particulate emissions, and failure to file a compliance program. We imposed a penalty of $25,000 and ordered the plant closed until the following conditions were met: 1) the gross interference with the neighbors was reduced substantially: 2) a firm program for compliance with the particulate regulations was submitted and a bond posted to secure its completion; and 3) thermocouples indicating operating temperatures were made operable. Our order specifically provided that upon receipt of a variance petition committing the company to such a program a further hearing would be held and the Board would enter "such further order as it deems necessary under the circumstances."

On October 6 we received a motion asking us to stay the order. The Agency filed a motion to strike, and the parties appeared before us October 12. We denied the motion to strike and granted the stay motion in part, for reasons given in this opinion.

I. Stay Pending Review

In part the motion seeks that enforcement of the order--and most importantly the plant shutdown--be delayed pending the outcome of judicial review proceedings concurrently filed in which the validity of our initial order is challenged. As in other cases decided today, we think it appropriate, upon the filing of a suitable bond, to suspend payment of the money penalty pending appeal. But to suspend the cease and desist portions of the order would allow the very harm the order meant to prevent, and delay would be injurious to the public interest. Therefore we would not be inclined to stay the shutdown order simply on the ground that judicial review has been sought. See Spartan Printing Co. v. EPA, # 71-19 (Oct. 14, 1971); Citizens Utilities Co. v. EPA, # 71-125 (Oct. 14, 1971); Pyramid Mobile Estates, # 71-154 (Oct. 12, 1971).

II. Rehearing

The motion also contains allegations respecting the hardship that a shutdown would impose on the company and arguments that the Board lacks power to order a shutdown. But the Act is clear that the sanctions we may impose include not only money penalties but also the familiar order to stop violating the law (Environmental Protection Act, section 33 (b)). There is no right to pay and pollute. Money penalties, like money damages in private nuisance cases, are often inadequate, and they have the further disadvantage of conferring no direct relief upon the victims of the emissions. In a case such as this, where there is essentially no control equipment at present, there is no chance that the incinerator can be operated without violating the regulations, and an order requiring shutdown is the equivalent of an order forbidding violation of the law. That such an order is contemplated by the statute is emphasized by the provisions requiring the Board, as it did in this case, to take into account the social and economic value of the pollution source in determining what order is appropriate (section 33 (c)); for the value of the source is far more relevant in determining whether or not to forbid continued operation than in determining the amount of a money penalty. The special provision for a shutdown order in section 43 in no way detracts from this conclusion; that is an emergency provision allowing ex parte shutdowns in crisis situations without the usual requirements of notice and hearing. We therefore reaffirm our authority to order a shutdown where operation would in itself violate the law or regulations, and we decline to reconsider the merits of our original order, since the place to argue about the hardships of a shutdown--and there was testimony on that issue by the respondent--was in the initial hearing. We cannot be forever rehashing what we have already decided.

III. Compliance with Order

But in our view the significant part of the motion is that the company has already, only a few days after entry of our order, come up with the control program that we required. We construe the motion as the variance request contemplated by that order; the procedural objections suggested by the Agency are of little weight compared with the important business of getting this incinerator operating with adequate controls as soon as possible.

So construed, the motion alleges that Incinerator is prepared to purchase immediately a scrubber of a type believed adequate to meet the regulations--not the questionable wet baffles discussed in the initial hearings--to have it in operation within five months; and to post security for its completion. In the meantime, Incinerator promises to operate only one of its two units, thus reducing emissions by half to begin with; to avoid any overloading; to restrict the types of refuse accepted so as to minimize unnecessary emissions; and to repair or replace and operate the thermocouples. It further alleges that it has made improvements

that have "substantially increased" the efficiency of its existing sprays. Upon completion of the scrubber installation on the one unit, the other will be closed down until it too is equipped with a scrubber. On the basis of this program Incinerator asked that we allow operation under the proposed conditions.

It is Incinerator's contention that operation of its facility under the proposed conditions will substantially reduce the nuisance. If so, the company will have satisfied the essential purpose of paragraph 1 of our original order, which required such a reduction before operation of the incinerator would be allowed. It is immaterial that the improvement is to be achieved by means other than the installation of a control device; what counts is the effect on the neighbors. And of course it is not fatal that the improvements will not enable the incinerator to comply with the numerical emission standards; the initial order expressly comtemplated that operation would be allowed prior to ultimate compliance as soon as the more serious neighborhood effects could be cured. Moreover, the company's plan for ultimate compliance looks extremely promising. In short, Incinerator is telling us that it has already done what our order required as a condition of reopening the plant (which was shut down October 10) and therefore asks that we allow operation on the ground that it has complied with the order.

A hearing, as stated in the first order, will be necessary to determine whether or not the program is adequate for ultimate compliance and, most importantly, whether or not the nuisance has been sufficiently reduced to make operation tolerable during the five months while the scrubber is being constructed. The difficult question is what to do in the meantime. It is clear that the shutdown does cause considerable hardship, and we do not know the effects on the neighborhood of operation under the new conditions except that mathematically we can expect at least a 50% reduction in emissions. The only way to find out whether the plant will still be a nuisance is to allow limited operation for the next few weeks until our decision after the hearing. While this procedure exposes the neighbors to an additional risk of nuisance for a short period, it also assures the company of the opportunity to prove the adequacy of its interim program. The burden will be on the company to show that the nuisance has been reduced to a tolerable level; if it fails to do so the shutdown order will remain in effect. For now, however, the shutdown order has been stayed pending our decision after the hearing.

We stress that the new hearing is not to be a rehashing of the old, but only an inquiry into the adequacy of the interim and ultimate compliance measures described in the motion. The issue is whether the company has complied with the terms of our order that impose conditions upon reopening the plant. As for the ultimate scrubbers, we urge that no time be lost in getting them ordered and installed. Probably the quickest assurance of their adequacy would be to obtain a permit from the Agency, if possible in advance of the hearing; for if the Agency certifies that the scrubbers

will meet the particulate standard there is no doubt that the Board will approve the five-month schedule.

The company's swift action in the face of the shutdown order in no way affects the penalty provision of the initial order, which was based upon the failure to pursue a plan comparable to its present one some time ago.

Mr. Dumelle dissented from the grant of the stay and will file a separate opinion.

I, Regina E. Ryan, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion this 14 day of October, 1971.

Regina E. Ryan