ILLINOIS POLLUTION CONTROL BOARD

OZARK-MAHONING CO.)
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v.)
) PCB #70-19
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ENVIRONMENTAL PROTECTION AGENCY)

December 22, 1970

Opinion of the Board (by Mr. Currie):

This is a petition for variance to permit the emission of particulate air pollutants from a fluorspar processing plant in Rosiclare, Illinois in excess of the regulation limits until June 1, 1971, while installing equipment to bring the operation into compliance. We grant the petition, subject to conditions stated below.

Fluorspar is a mineral widely used in the manufacture of hydrofluoric acid and in the fluxing of steel (R. 22 (corrected); petition for variance). According to the undisputed testimony, fluorspar is in short supply today (R.22). It is mined and processed by Ozark-Mahoning in Hardin County, near the Ohio River in extreme southern Illinois. In the process the product is dried before shipment in rotary dryers which cause the emission of fine particles of fluorspar. (R. 9-10). Existing collection equipment is not wholly adequate to avoid emissions in excess of those allowed. The regulations of the former Air Pollution Control Board, which remain in force under section 49 of the Environmental Protection Act, limit particulate emissions from such facilities (five tons per hour capacity each, see R. 52) to twelve pounds per hour. Regulations Governing the Control of Air Pollution, Rules 2-2.21, 3-3.111 and Table I. Stack tests performed for the company showed emissions from one of its two dryers to be in compliance with the regulations (9.9 lb/hour) and the other not (16.8). (R.78).

The regulations governing particulate emissions took effect April 15, 1967. They gave a one-year grace period for bringing existing equipment into compliance, in recognition of the hardships that would be imposed if plants were required to shut down during installation of control equipment. Moreover, an additional grace

period was offered to particulate emitters who, by filing a timely letter of intent (by October 15, 1967 outside the Standard Metropolitan statistical Areas) followed by a timely air contaminant emission reduction program (ACERP) (by April 15, 1968), evidenced the need for more time and diligent efforts toward meeting their obligations. See Rules and Regulations, supra, 2-2.22, 2-2.3, 2-2.4. Many pollution source operators followed this schedule, many programs were approved, and a number of sources have been successfully brought into compliance.

Ozark-Mahoning filed a letter of intent in November, 1967 (R. 24) setting forth information as to emission sources within its Rosiclare plant, (ex. 1) and disclosing that one of the dryers was discharging in excess of the regulation limits, but so far as the record discloses no ACERP was submitted by the April, 1968 deadline. Indeed, the next communication by the company to the air pollution authorities apparently took place in 1970, when application was made to the new Environmental Protection Agency for approval of the present program. On September 29, 1970 Ozark filed with the Agency the present variance petition. On October 8 the Board voted to authorize a hearing to determine the facts relevant to the petition, calling particular attention to the question whether the company had complied with the ACERP deadlines and, if not, why not. See Minutes of Board meeting, October 8, 1970. Mr. Walter Romanek was appointed hearing officer, and a public hearing was held in Elizabethtown November 25, 1970.

At the hearing the company established the above facts respecting the nature of its operations and emissions as well as facts about its proposed control program and the hardships that would be inflicted if the petition for variance were denied. The plan is for the installation of new cyclone primary collectors, followed by baghouse filters, to achieve a removal of 99% of the particulate matter that would otherwise escape the dryers. (R. 18, 31) The collected material will be recycled. (R. 74-75) Purchase and installation contracts have been concluded; many of the bills have been paid; the equipment is on the premises; installation work has begun. (R. 14-16, 65; Ex. 10). Completion of the project and compliance with the regulations are promised by June 1, 1971 (R. 22, 56-57, 69).

The company presented evidence, which was not disputed, that denial of the variance would require the immediate shutdown of the dryers and, within a few weeks, of the entire plant. The consequence would be to put the company's 181 employees out of jobs, to deprive the company of the fruits of six months' production, and to require customers to seek alternative sources of supply in a short market. Ozark is the principal industrial employer in Hardin County, and there was evidence that other jobs for laid-off employees would be hard to come by (R. 19-21, 27-29, 70-71).

The benefit that would result from denying the variance is an immediate end to pollution from the plant. The Environmental Protection Agency, pursuant to its stautory duty to investigate the harm that is done by emissions from sources for which variances are sought, filed with the Board two letters objecting to pollution from Ozark-Mahoning. The first, dated July 8, 1970 and signed by eighteen persons, requested the Agency to take action against the company because:

> The short smokestacks at this mill pour out smoke and dust at ground level, covering the entire residential area around and near this mill. We are greatly concerned about our health and that of our children, because of this smoke and dust that we breathe daily.

The second letter, written October 15 in response to the Agency's newspaper notice requesting the views of affected citizens respecting the variance, says that "the obnoxious odor from the mill" can sometimes be smelled twelve highway miles away; that the newspaper notice would not produce much adverse comment, because many would not understand the notice and others who work for the company would be afraid to speak up; and that "it would be in the best interests of people everywhere if Ozark-Mahoning's request were denied". (Both letters are Exhibit 9).

The Agency after inspecting the plant and talking to both company personnel and complaining residents recommended that the variance be granted subject to the posting of a performance bond to assure completion of the project by the promised date. The Agency's assessment of the harm caused by present emissions and of the attitude of the neighbors was that "no physical or material harm" was caused but that the emissions did constitute a "nuisance"; and that the residents who were interviewed felt "the variance requested was reasonable only if the emissions were to cease by June 1, 1971". (R.92). To subject the public to another few months of this, the Agency thought, was justified by the hardship that closing the plant would impose upon the entire community.

We agree. We note in addition that the Agency assured us that the people who filed written objections also agreed, on condition that unlawful emissions cease by June 1, 1971 (R. 85). Thus although grant of the petition would inflict continuing discomfort on the public, no one asks us to deny the variance at this point. This is some evidence, subject to the very real reservations expressed by the letter of October 15, that the people who must live with this company for better or for worse feel the community would suffer much more by shutting down the plant than by putting up with a final few months of excessive emissions.

While the absence of vigorous community objection to the variance is not decisive, the evidence in the record leads us to conclude that denial of the petition would indeed impose an arbitrary and unreasonable hardship on the community as a whole. The harm done by present emissions appears to be significant but not devastating; present emissions are not grossly in excess of the standard. The time remaining for installation is relatively short, and the company's good intentions are demonstrated by the facts that it has al-

ready paid most of its bills for the job and that the equipment is already on the premises. On the other side of the balance, the economic hardship to the entire community from the closing of its central industry would be extreme. A variance must be granted.

In EPA v. Lindgren Foundry Co., #70-1 (September 25, 1970), we denied a variance that would have permitted operation of a particulate emission source during the time controls were being installed. We believe the facts of this case are substantially different. First, in Lindgren there was overwhelming citizen opposition to the grant of the variance and persuasive citizen testimony that continued pollution during the installation period would be intolerable. Here there was no citizen testimony at all, and the residents who had initially complained about Ozark-Mahoning reportedly were reconciled to a short variance. Second, emissions from the Lindgren plant would have been wholly uncontrolled and nearly seven times those allowed while the control equipment was being installed. In the present case emissions from one dryer were apparently in compliance, and from the other only a third more than allowed, as a result of existing control equipment. Third, the compliance period here requested is somewhat shorter than in Lindgren, and compliance with the remaining schedule is made more certain by the fact that the equipment is already paid for and on the premises. Fourth, the degree of hardship is greater in the present case, largely because we deal here with the question of closing down an existing business. We will not hesitate to do this if it becomes necessary, but the hardship of throwing 181 persons out of work is considerably more significant than the hardship in Lindgren, where the plant had been closed for some months and the issue was reemployment of an undetermined number of former employees. Fifth, there is stronger evidence here of a hardship on the company's customers due to a world-wide shortage of fluorspar. Finally, in Lindgren any hardship suffered by the owners was thought to be self-inflicted, since they had bought the business and invested additional time and money with reason to know they had to comply with the emission limitations. In sum, denial of the petition in this case, when the benefits of immediate compliance are considered in light of the costs, would cause an unreasonable hardship; denial in Lindgren did not.

We think, however, that the date for compliance in this case should be not June 1 but May 1, 1971. The company's general superintendent testified that it would be the company's intention to complete the installation in advance of the proposed date; he conceded that, "if pressed," he believed "it would be possible" by adding a "few more employees for spot work" to have the system in operation by March or April; and he said that the company by putting men on the installation job full time "probably could" finish by May 1 (R. 55-56). The company vice-president confirmed this prediction: subject to the weather, he estimated that the project could be completed "possibly some time in April". (R.77) The six months' request, the company admitted, was designed to afford a margin of safety: "we would prefer to have this in case something would happen where this schedule would be interrupted." (R. 55).

We do not think it too much to ask a petitioner to work full time to eliminate a nuisance as quickly as he can when we allow operation during installation of controls. May 1, by the company's own testimony, is a likely target date. If adverse weather, unexpected strikes, or other circumstances render compliance with this schedule impossible, the company can ask us for more time. But we think it should bear the burden of hastening its activity and of proving at a later date any such circumstances that make completion by May 1 impossible.

Moreover, we agree with the Agency (R. 87-88) that security for the company's performance is in order. The statute provides for the posting of bond or other assurance as an additional incentive to adhering to the installation schedule. The threat of automatic forfeiture of the posted sum or a part of it, in the stead of a protracted enforcement proceeding, is a valuable tool for securing compliance. The amount of the bond should be high enough to make it more expensive for a petitioner to default than to perform; in the ordinary case this might require a bond somewhat in excess of the cost of the control equipment and of its installation. In the present case the equipment has been paid for; default would save the company only the cost of installation work by its own employees, which it estimates at 15% of the $110,000 paid to contractors for the equipment and services. A bond or other security in the amount of $20,000, we think, will suffice. The bond should provide for forfeiture of the entire sum, in addition to liability for the penalties provided by statute in an enforcement proceeding, in the event that the plant is operated without the new control equipment after May 1, 1971. The details of this security should be worked out between the company and the Agency within the next thirty days.

It remains to discuss a serious issue that has troubled us throughout our consideration of this case, and which will arise in a number of variance proceedings in the near future. That issue is what we should do about particulate emitters who failed to submit control programs on the date required by the regulations. In the present case it appears that no program was filed for more than two years after the generous twelve-month period allowed. There is no explanation of this lapse in the record. It is made clear that the company began its efforts to locate a satisfactory control device even before the regulations were adopted, and that its progress toward installation was slowed by a six-month strike during 1969. But neither of these facts excuses the apparent failure to file the required program. The regulations provided a procedure whereby any company with a legitimate claim of hardship requiring additional compliance time could obtain it, and it is difficult to condone or to understand those who chose not to take advantage of it. The failure to submit the program on schedule is itself a violation of the law for which penalties can be and have been imposed. See

Alpha Portland Cement Co., #APCB 69-3, decided by our predecessor Board February 25, 1970.

Ignorance of the requirement cannot be an excuse; for notices were sent to all industrial emitters shortly after the regulations were adopted, and Ozark indicated its awareness of the rules by filing its letter of intent. Today's opinion should serve as notice, once again, that anyone who has not yet filed the program of emission reduction required by the regulations had better do so, for every day of failure to file constitutes an infraction for which penalties can be imposed.

The Agency in this case has not conterclaimed for penalties on account of the failure to file a timely program, and we refrain from imposing them without being asked to in light of the fact that the record is incomplete on this issue. But it should be said for the benefit of those who remain in violation of their obligations that the time may come when this Board refuses to accept a plea of hardship on behalf of one who has for his own gain deliberately delayed commencement of a control program. Those who have done nothing in three years to abate their pollution have brought about their own hardship; and, as we held in EPA v. Lindgren Foundry Co., supra, a self-inflicted hardship is not ground for a variance. In such a case the hardships imposed on innocent employees, customers, and others when the plant is shut down will be attributable to the company's default, not to the state's regulations. In the present case we give the petitioner the benefit of the doubt, but to ignore deliberate delays in future cases would unfairly penalize those many responsible companies which, often at great expense, took prompt action to bring their emissions under control.

We shall return to this issue in the near future. For now let it be known that while we may find it necessary to impose penalties on those who have not filed to date, we expect to be much more severe with those who do not file in the very near future.

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

ORDER

Ozark-Mahoning Co. is authorized to emit particulate air contaminants in excess of those permitted by the Rules and Regulations Governing the Control of Air Pollution from its two rotary dryers located at Rosiclare, Illinois, until May 1, 1971, subject to the following conditions:

1. The company shall within thirty days post with the Environmental Protection Agency a bond or other adequate security in the amount of $20,000, which sum shall be forfeited automatically in the event that the dryers are operated after May 1, 1971, without the control equipment specified in the petition for variance and in the record;

2. The company shall file progress reports with the Agency on or before March 1 and May 1, 1971, and, if the control equipment is not in operation by May 1, 1971, a final report when the control equipment is in full operation;

3. Until the new control equipment is in operation, the company shall not operate the dryers in question without their present control equipment and shall not increase emissions from the dryers beyond their present level;

4. After May 1, 1971, the dryers shall not be operated so as to cause emissions in excess of those permitted by the regulations;

5. Failure to comply with these conditions shall be grounds for revocation of the variance and the imposition of penalties under the Act.

I concur:

I dissent:

I, Regina E. Ryan, certify that the Board has adopted the above Opinion this 22 day of [illegible], 1970.

Regina E. Ryan
Clerk of the Board