ILLINOIS POLLUTION CONTROL BOARD
October 2, 1980

SHEREX CHEMICAL COMPANY, INC., Petitioner,	)	
v.	)	PCB 80-66
ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

CONCURRING OPINION (by J. Anderson):

I believe that the Board's holding that a permit can be submitted as a State Implementation Plan (SIP) revision is the best that can be made under these circumstances, where an interlocking mechanism has become unlocked. Unless the SIP system itself is changed, however, the dilemma facing the Board will continue, to the benefit of none.

The Illinois courts have ruled that the regulation in question, Rule 204(c)(1)(A), was improperly adopted and is therefore unenforceable. A federal court has ruled that this same regulation, even though improperly adopted at the State level, remains a valid SIP provision since the Administrator had approved it.* The resulting inconsistency of air regulations surely cannot reflect Congressional intent.

The SIP was designed to create an interlocking mechanism between the federal and state governments for consistency in attainment of the goals of the Clean Air Act (Air Act). While the SIP system provides unilateral flexibility for the state in

*Rule 204(c)(1)(A) was stricken by the Illinois Supreme Court, applying solely state laws concerning procedures in Commonwealth Edison v. Pollution Control Board, 62 Ill. 2d 494 (1976), and the readopted rule was also stricken on state law procedural grounds in Ashland Chemical Company v. Pollution Control Board, 64 Ill. App. 3d 169 (3rd Dist. 1978), and so is unenforceable before the Board or in the Illinois courts. In Illinois v. Commonwealth Edison, No. 78C-2675 and related No. 79C-311, Memorandum Opinion and Order of February 19, 1980 (N.D. Ill.), Rule 203(g) was found to be a still valid, enforceable SIP provision, despite its earlier invalidation as state law. This decision would therefore presumably apply to Rule 204(c)(1)(A) as well.

some respects, such flexibility ends if the standard or limitation is less stringent than the SIP, whether or not it achieves the ambient air quality requirements of the Air Act (see e.g. Sec. 116 of the Air Act). The SIP system is "in place" and enforceable only when the USEPA Administrator approves state submitted regulations, such as emission controls, as sufficient to achieve the ambient air quality requirements of the Air Act. Subsequent changes also are "in place" only when approved by the Administrator.

The two-level SIP adoption and revision system promises the complying state freedom from federal sanctions and the complying emitter consistent standards for avoiding both Federal and State enforcement actions. However, the court decisions, which have focused on one or the other but not both levels of the system, have highlighted flaws in the system as a whole.

The federal Edison decision pinpoints the problem of "what to do until the doctor comes." Under "normal" circumstances, a considerable time lag can ensue between the State's proposal to change its SIP, and federal approval of that change. The problem is truly compounded when a provision has been stricken in its entirety at the state level by the state courts and yet remains part of the federally enforceable SIP. The federal Edison decision gives the Administrator little incentive to deal with this problem other than to enforce, or judiciously watch and wait.

The state Edison and Ashland decisions pinpoint the State's lack of immediate recourse. The Air Act does not provide the State with an emergency or short term correction mechanism for withdrawal of any regulation once it has become a SIP provision. Nor should the State ignore permit requests until the situation is untangled, when the grounds for refusing a permit no longer exist as state law, and when the emitter needs a state permit to operate.

The frustration of the emitter here is, of course, understandable. Its permit application incorporates changes that appear to improve its compliance with ambient air quality; yet, even with a permit, it is exposed to enforcement of the regulation in question as long as the system stays unlocked.

The Board cannot completely resolve this dilemma. It can only note that the goals of clean air are ill-served by an administrative system which operates in part to expose those who must comply to the classic "damned if you do, damned if you don't" situation. The goals are best served by a system that is rational and, therefore, credible.

Joan G. Anderson

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was filed on the 23rd day of October, 1980.

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board