ILLINOIS POLLUTION CONTROL BOARD
October 2, 1980

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

MS. PERCY ANGELO, ATTORNEY, MAYER, BROWN & PLATT, APPEARED FOR SHEREX CHEMICAL COMPANY, INC.

MS. ANNE MARKEY, ASSISTANT ATTORNEY GENERAL, APPEARED FOR THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by I. Goodman):

Sherex Chemical Company, Inc. (Sherex) on April 7, 1980 filed with the Board an appeal of the Agency's March 6, 1980 denials of two permit applications, a construction permit for a 40-foot extension of the 100-foot boilerhouse stack and a renewed operating permit for the boilerhouse.[1]

In denying the operating permit pursuant to §39 of the Illinois Environmental Protection Act (Act), the Agency stated that to allow Sherex the permit might violate §116 of the Clean Air Act, which prohibits either the Agency or the Board from adopting or enforcing emission standards or limitations which are less stringent than those in effect under the SIP.

The modeling data used by the Agency in its determination were "only" those derived from Sherex's Dames & Moore submittal with the

---

[1] On May 9, 1978 the Third District Appellate Court had directed the Agency to issue Sherex an operating permit for the boilerhouse because of then-improper Agency and Board reliances on Rule 204(c)(1)(A) (sulfur dioxide emission limitations), which had been recently overturned by Illinois courts as having been improperly adopted under state law. However, that rule has been in effect as part of Illinois' implementation plan (SIP) (see §110 of the Clean Air Act, 42 U.S.C. §7401, et seq.) since its submittal to the U. S. Environmental Protection Agency (USEPA) by the Agency in 1972. See Illinois v. Commonwealth Edison Co. and a related case, Nos. 78C2675 and 79C311 (D.C., N.D.,E.Div., Memorandum Opinion entered February 19, 1980).

application. In the application Sherex had requested that if the Agency were to rely on any information other than that submitted, Sherex would like to purchase copies of same pursuant to §7 of the Act.

Under Rules 103(a)(3) and 103(b)(4) of Chapter 2, permit applicants are entitled to notification by the Agency within 30 days if the information submitted does not meet the requisites set out in Rules 103(a)(2) and 103(b)(3), in which case the notification acts as a denial of the application for purposes of review. These rules address the completeness of the application and not its sufficiency. The Agency did not notify Sherex under this procedure; therefore, it appears that the Agency deemed the applications to be complete under Rules 103(a)(2) and 103(b)(3). The Board notes that the Agency argues that §39(a)(3) of the Act authorizes it to deny a permit application on its merits if it is incomplete. However, a more proper construction of that section allows denial on the merits only if the incompleteness relates to sufficiency of proof of the to-be-permitted activity's not causing a violation of the Act or of Board regulations.

The application contained more than Sherex's Dames & Moore modeling data. It contains, generally, extensive references to its previous operating permit application (denied October 26, 1979). It states that the Agency's previous denial was based in part upon modeling, etc. data given by Sherex in its petition before the Board for a Peoria source-specific sulfur dioxide emission limitation (R77-15) and upon the fact that that data would now indicate possible violations at Sherex's then-existing stack height of 100 feet. Sherex refutes this latter contention using results obtained by Dames & Moore modeling at a stack height of 140 feet (the height of which represents good engineering practice for the boilerhouse stack). Finally, Sherex's application states that the Agency considered the Dames & Moore data in its October 26, 1979 denial of the previous application.

Sherex states the issue of its operating permit denial to be that "better air quality is obtained with [its present] 5.12 lbs./mbtu emission rate and good engineering practice stacks than with [Rule 204(c)(1)(A)'s] 1.8 lbs./mbtu emission rate and the existing stacks." Sherex concludes, from modeling of both background contributions and its own contributions, that a 140-foot stack "will not cause or contribute to any failure to attain or maintain sulfur dioxide ambient air quality standards." (Application, p.5.)

The focal point of this controversy between the parties seems to be whether Sherex's extending its stacks 40 feet will eliminate a downwash problem, where concentrations from the plume interact with the wake from the boilerhouse structure and contribute to ground level concentrations of sulfur dioxide. Sherex's application states that the extension will; the Agency's denial letter states merely that from "only" the Dames & Moore data it cannot "verify" compliance with Rule 308's sulfur dioxide ambient air quality standards.

The Agency is entitled to rely on emission and other data to which it has access that is not appended to permit applications under Rules 103(a)(2) and 103(b)(3). However, §39(a) of the Act mandates that Agency denials of applications must state:

1. the provisions of the Board's regulations which may be violated;

2. the specific type of information, if any, deemed by the Agency not to have been provided; and

3. a statement of specific reasons why the Act and Board regulations might not be met if the permit were to be granted. (Emphasis added.)

The Agency met 1. and 2. above by citing §9(a) of the Act, §116 of the Clean Air Act, and Rules 102, 103(b)(3), and 308 of Chapter 2. As to Rule 103(b)(3), the Board finds that, although under §39(a)(3) of the Act the Agency may deny permits when it deems that certain information was not included in the permit, Rule 103(b)(4), construed in light of this statute, contemplates that when the Agency cannot make a reasoned decision on the basis of the information submitted in the application as well as other data it customarily and reasonably relies upon, it shall notify the applicant of the specific additional information necessary for its determination. It would be a somewhat capricious exercise of its powers under the Act for the Agency to deny a permit on its merits for insufficiency of information proving nonviolation while knowing that if specific additional data or information were provided or were considered it could make a better-informed decision on the application. Indeed, Sherex many times invited the Agency to request Sherex to provide any additional information the Agency might deem necessary in order to make a determination on its application.

In light of the past efforts of Sherex to obtain an operating permit, the Board finds that the Agency, since its denial considered "only" the Dames & Moore data though it had access to additional relevant data, had a duty under Rule 103(b)(4) to notify Sherex within 30 days of its application that the Dames & Moore information in its renewed application was considered insufficient. This is especially true in light of Sherex's request that the Agency inform Sherex in the event it considered other data in making its decision on the application. Not only had Sherex no reason to presume the Agency would disregard testimony in R77-15, but Sherex had, in its renewed application, answered the Agency's reasons for denying the previous application forthrightly and clearly. The Agency's March 6, 1980 letter of denial did not meet §39(a)(4)'s minimum requirement of specifying why granting the permit might violate the Act or Board regulations (3. above). It was only at a Board hearing that the Agency specified that certain input data to Dames & Moore's modeling study were questionable (even then there was no allegation that these parameters showed that Sherex would violate the Act or Board regulations).

From a reading of the record, the Board cannot ascertain why granting this operating permit would violate Rule 308's sulfur dioxide air quality standards. The evidence presented shows that Sherex's emissions (5.12 lbs./M Btu's), combined with Peoria area background concentrations, show a maximum 3-hour concentration of 507.1 ug/m^3 whereas the secondary standard is more than twice that (1,300.0 ug/m^3). (Ex.1,p.5). Sherex's modeling, using the applied-for, 140-foot stack height at a rate of 5.12 lbs./M Btu's, shows its contribution to the maximum 3-hour concentrations will be 502.0 ug/m^3. Using its present 100-foot stack height, but at Rule 204(c)(1)(A)'s emission rate of 1.8 lbs., its contribution should under present conditions be 625.0 ug/m^3. (Ex.1,p.4) Thus, Sherex argues, issuance of the stack construction permit simultaneously with the boilerhouse operating permit will decrease its present contribution to the secondary air quality standard, which contribution does not cause the 1,300.0 ug/m^3 standard to be violated in the Peoria area. It is apparent that the Agency considered both the construction and the operation permit applications in tandem. It apparently decided, since the application was otherwise deemed complete, that to allow a rate of 5.12 lbs./million Btu's at a stack height of 140 feet would cause or contribute to violations of the Act or the Board's regulations.

Modeling data using Sherex's present rate, whether with or without the applied-for stack height extension, show no contributions to violations of the ambient air quality standards for sulfur dioxide. Therefore, the Agency's denials of both the operating permit and the stack construction permit were wrong and are hereby overturned. This the Board determines from modeling data in the record, which because of the Agency's denial letter, theoretically included "only" the Dames & Moore results, but which in point of fact included all prior permit application considerations. This is true, despite the provision in Rules 103(a)(2) and 103(b)(3) that information contained in previous applications must be certified by the applicant as remaining correct, because the Agency had access to that information, because it was alerted to it by Sherex's rebuttal references to the October, 1979 denial of the previous application, and because the previous permit denial record was incorporated into this record. This time around, Sherex sought the operating permit along with a permit for construction of the stack extension.

Under Rule 103(a)(1), a construction permit is necessary because the boilerhouse stack is an existing emission source which would be modified were it to be extended by 40 feet. This is true, contrary to Sherex's assertion, whether "modifications" under that rule would increase or would decrease ambient air quality levels. Also contrary to Sherex's assertion, stack heights can relate to compliance with sulfur dioxide emission limitations for purposes of enforcement actions as well as for permit issuance because they affect the location at which pollutants are concentrated. However, as the Agency record before us shows no relationship

between Sherex's extending the stack height 40 feet and its causing or contributing to violations of the sulfur dioxide ambient air quality standards, the Agency was in error to deny Sherex the construction permit as well.

The Board now turns to the question of whether the Agency's granting of the operating permit would violate §116 of the Clean Air Act by "enforcing" an emission "limitation" less stringent than that contained in the SIP (Rule 204(c)(1)(A)). It is the Agency's position that §116 prohibits it from issuing a permit containing an emission limitation of 5.12 lbs./million Btu's. Sherex's position, on the other hand, is that §116 does not prohibit issuance of this permit. Sherex further argues that Rule 204(c)(1)(A)'s emission limitation is not enforceable as part of the SIP, in addition to being unenforceable as state law, by the Agency.

Resolution of the issue depends upon whether Rule 204(c)(1)(A) is part of the SIP; if it is, then the issuance of a permit to operate at an emission limitation less stringent than that which the rule provides raises the further issue of whether the Agency would be in violation of §116.

The February 9, 1980 U. S. District Court (N.D.,E.Div.) Memorandum Opinion in People of the State of Illinois v. Commonwealth Edison Company, No. 78C-2675, and related case No. 79C-311, speaks to the issue. The Court stated that Rule 203(g), "as adopted in the [SIP] and approved by the Administrator, is and will continue to be enforceable until such time as a revision is submitted ... pursuant to Section 110(a)(3) of the Clean Air Act ..." Because Rule 204(c)(1)(A) was adopted in the SIP and approved by the Administrator at the same time and manner as was Rule 203(g), and since no revision of Rule 204(c)(1)(A) has been submitted pursuant to §110(a)(3), Rule 204(c)(1)(A) must also be, and continue to be, enforceable.

In Metropolitan Washington Coalition for Clean Air v. District of Columbia, 511 F.2d 809 (D.C.Cir.1975), it was stated: "If unilateral state [variance] action served to relax its implementation schedule pending E.P.A. approval, any state could sidestep the crucial limitations on the revision procedure and undermine the national program of air quality improvement" (at 813). (Emphasis added.) In that case, and in Edison, the Courts held that state-issued variances containing terms less stringent than the terms of SIP's do not shield polluters from SIP enforcement actions until the Administrator approves the state variance as a SIP revision. Train v. NRDC, 421 U.S. 60, 92 (1975) pointed out that "should either [the state or the federal agency] determine that granting the variance would prevent attainment or maintenance of national air standards," then failure to comply with the regulations from which the polluter seeks variance, pending appeal of the variance denial, will not insulate it from enforcement actions. Finally, Friends of the Earth v. Carey, 535 F.2d 165, 169 (2d Cir.1969)

stated law regarding compliance with the SIP: "Since abatement and control of air pollution through systematic and timely attainment of the air quality standards is Congress' overriding objective, a plan, once adopted by a state and approved by the EPA, becomes controlling and must be carried out by the state. Modifications are permitted by the Act only cautiously and grudgingly." (Emphasis added.) The Edison Court cited Friends in its opinion that Rule 203(g) as adopted in the SIP is enforceable until a revision of the rule is submitted as a revision of the SIP. In Edison, the State was permitted to enforce a SIP provision against an unpermitted polluter because the court found that provision to be enforceable notwithstanding that it had been, subsequent to its approval as part of the SIP, held invalid under state law.

Further, under §110 (i) of the Clean Air Act, the Agency may not take any "action modifying any requirement" of the SIP with respect to any stationary source unless it constitutes a revision to the SIP under §110(a)(3). This arguably means that the Agency would be violating §110(i) were it to issue an operating permit unless said permit is to constitute a revision to the SIP. (See §110(a)(2), particulary subsection I). Concurrently, the Agency's issuing the permit would violate §116 unless it were to constitute a revision to the SIP. The Board is not aware of any provision under Illinois law, federal law, or the SIP which would prohibit the Agency from submitting permits as revisions to the SIP.[2]

In light of the above, the Board finds that until the Agency acts to revise the SIP's Rule 204(c)(1)(A), and the USEPA approves such revision, that rule is binding upon the Agency in issuing permits by virtue of §110(i) of the Clean Air Act unless the permit is to be presented to USEPA as a SIP revision. This finding is consistent with Metropolitan and Friends, both of which speak to actions of states which may be inconsistent with the SIP. The finding is also consistent with the Illinois Legislature's findings in §2(a)(2) and §9.1(a) of the Act, which address the overlapping of state with federal regulations. However, this is not to say that the effect of §110(i) here would necessitate a violation of §116. A permit intended to be submitted as a SIP revision (even conditioned on USEPA's approval as a SIP revision) could not be enforcing an emission limitation less stringent than that in the SIP. Secondly, §116 speaks specifically to action "adopting" or "enforcing", while §110(i) speaks more generally to "action modifying"; and where §116 speaks of emission standards or limitations, §110(i) speaks of "any requirement" of the SIP. Thus, regardless of whether §116 applies here, §110(i) acts to bind the Agency to Rule 204(c)(1)(A) in determining permit applications.

---

[2] The Agency is the sole Illinois agency having the authority to grant or deny stationary source operating permits. The Board's role is merely to, upon appeal of permit denials, determine whether the Agency's decision was in error; in such proceedings the Board's function is quasi-judicial in nature. (See IEPA v. IPCB and U. S. Steel, No. 78-2114, _____ Ill.App.3d _____, (1stDist.1980).)

However, §116 does seem inapplicable, given §110(i)'s binding effect, when the Agency action in intended for submittal as a SIP revision.

The Board finds that the record shows that Sherex would not violate Rule 308 and that the Agency can properly issue the permit. The Board further finds that neither §110(i) nor §116 prevents the Agency from determining the merits of a permit application in accordance with state law, regardless of related or conflicting SIP provisions, under its powers under the Act. However, a permit issued without subsequent acceptance as a SIP revision does not shield the permittee from enforcement actions under §304(f) of the Clean Air Act.

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

ORDER

The Illinois Environmental Protection Agency's March 6, 1980 denials of Sherex Chemical Company, Inc.'s construction permit application (C912017) and operating permit application (D03032131) are reversed.

The permit applications are remanded to the Agency for reconsideration in light of this Opinion.

IT IS SO ORDERED.

Mrs. Anderson concurs.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 2nd day of October, 1980 by a vote of 5-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board