ILLINOIS POLLUTION CONTROL BOARD
December 4, 1980

THE CELOTEX CORPORATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 78-177
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

JOHN L. PARKER, JOHN L. PARKER & ASSOCIATES LIMITED, APPEARED ON BEHALF OF PETITIONER.

DOUGLAS P. KARP, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF RESPONDENT.

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

On June 30, 1978 the Celotex Corporation (Celotex) filed an appeal before the Board from the Illinois Environmental Protection Agency's (Agency) May 18, 1978 denial of an operating permit for Celotex' two boilers at its Peoria, Illinois plant. Four hearings were held in this matter and the Board has received no public comment.

The subject of this case is the denial by the Agency of an operating permit for the Celotex facility in Peoria. Celotex alleges that the operation at the facility remains precisely the same as it was in prior years when the Agency had issued an operating permit. The Agency, on the other hand, alleges that it has evidence of a possible change in operation at the facility and cites Celotex' lack of response to a request for more information by the Agency as the major reason for the permit denial.

With respect to Rules 204(c)(1)(A) and 203(g)(1)(A) of Chapter 2, Air Pollution Control Rules and Regulations, whether or not the Agency was correct in invoking the rule at the time of the permit application denial is now an academic question, as the promulgation of those rules has been overturned by the state courts.[1] If the Board were to find the Agency had acted correctly with respect to these rules, the legal result would be either that the case would be remanded to the Agency to apply the rules as they exist today or that any appeal to the appellate court would also result

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[1] Ashland Chemical Company v. PCB, 64 Ill.App.3d 169, 381 N.E.2d 56 (3d Dist.1978); and Illinois State Chamber of Commerce, et al. v. PCB, 67 Ill.App.3d 839, 384 N.E.2d 922 (1st Dist.1978).

in the application of the rules as they exist today. The Board feels constrained, therefore, to apply the rules as they exist today. The Board finds that the Agency was in error in applying those rules to Celotex' application. The Board notes that the rules still exist as a part of the Illinois State Implementation Plan and are enforceable at the federal level (Sherex Chemical Company Inc. v. Illinois Environmental Protection Agency, PCB 80-66, October 2, 1980).

The requirement of §39(a) of the Illinois Environmental Protection Act (Act) with which Celotex alleges the Agency did not comply is that the Agency must issue the permit if Petitioner had demonstrated that there will be no violations of the Act or of the Board's regulations (see Par. (iv)(2) of the petition).

In hearings concerning permit appeals the burden is on the petitioner (§40(a) of the Act). In the instant case, Celotex must prove that the following reasons for the Agency's denial were in error (see discussion at Tr.179-88):

1. The application was insufficient under Rule 103(b)(3) of Chapter 2;

2. Opacity readings taken on January 18, 1978, April 19, 1978 and April 20, 1978 indicated that Rule 202(b) of Chapter 2 would be violated.

The Agency's denial, except for No. 2 above (opacity), was based upon its inability to complete its technical analysis of whether violations of the Act or Board regulations would result. The denial letter stated that Petitioner did not respond to its April 14, 1978 letter requesting additional information, and that because of the absence of actual emission level data, the total suspended particulates (TSP) level was calculated with reference to the emission factors given in the document AP-42, "Compilation of Air Pollution Emission." Petitioner's sulfur dioxide (SO_2) emission levels were calculated based upon the data Petitioner submitted with its application. Finally, the Agency denial letter invited Petitioner to resubmit the application and listed the specific information which should be included with that resubmittal.

The hearing officer, during each of the four hearings held in this matter, ruled that under three federal cases the relevant witnesses would be "who[ever] makes [investigations as to TSP or SO_2 emissions] on behalf of the [Agency]," rather than heads of departments of the Agency. He ruled that the Director of the Agency and the Manager of the Agency's Air Pollution Control Division need not appear unless and until Petitioner shows that they would have "personal knowledge of something substantially important" to the case (1Tr.32-37).[2] The hearing officer made several other rulings throughout the four hearings regarding the

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[2] 1Tr. refers to the transcript of June 18, 1979;
2Tr. refers to the transcript of August 8, 1979.

prohibition in Oscar Mayer & Company. v. IEPA, PCB 78-14 (June 8, 1978 Interim Order) of inquiry into why the permit decision maker made the decision he or she did, and stressed throughout that the facts within the Agency's record must stand or fall by themselves without regard to motive or other state of mind. The Board finds no abuse of discretion and no lack of authority in any of the hearing officer's rulings. In fact, under the circumstances of this case, including the discovery squabbles noted in Board discovery-related Orders in this case, the Board finds the conduct of the hearing officer to have been exemplary and to be commended. Fair and orderly proceedings have been conducted consistently for two full years in this matter.

The hearing officer ruled that the Agency's 1973 permit denial, which is part of the record, was irrelevant to its 1978 denial (1Tr.116-26). This is true, especially as the 1973 denial was not based upon the permit application and other facts upon which Celotex in 1978 sought renewal. Mere presence in the record of a particular fact does not create a presumption of relevancy to the issues on appeal (see 1Tr.222).

Celotex' May 8, 1978 response to the Agency's letter requesting additional data (Ex.I, p.186) stated that Rule 103(b) does not require it to forward additional information since the Agency's request was not made within the 30-day period required under subsection (4) of that rule. Petitioner added, "Besides, we cannot understand why you would need the additional information, since our previous [applications] were deemed sufficient ... As indicated in our renewal application ... the operation as described in the ... permit has not been modified."

Rule 103(b)(4) provides that applications are deemed "filed" when all information required under Rule 103(b)(3) is submitted. If the Agency's letter requesting information is not received by an applicant within 30 days of its original purported filing, then its application is deemed "filed" as of the date the incomplete application was first filed (see Sherex, supra). Finally, a Rule 103(b)(4) Agency letter, whenever sent, is grounds for an appeal to the Board of a permit denial based upon the sufficiency of the application (see also §39(a)(3) of the Act).

In this matter, the date of the original purported filing with the Agency was March 13, 1978. Celotex' receipt of the Agency letter on April 21, 1978 was more than 30 days after March 13, 1978; therefore, the purported filing date is the true filing date for purposes of the 90-day statutory decision period under §40 of the Act. The Agency letter also entitled Celotex to treat the application as having been denied, but Celotex did not do this at that time. Nor did it provide the Agency with this additional information it deemed necessary for its decision (Ex.I, pp.178-9):

1. Whether Celotex' August 5, 1974 letter of intent to purchase annually 30,000 tons of coal with a maximum sulfur content of 1.0% was still valid;

2. Proximate coal analyses and annual tonnages of coal

received from each supplier;

3. Blending procedures utilized to comply with Rule 204(c)(1)(A) if coal was received from more than one supplier;

4. Whether flyash reinjection units were in use and, if not, the date of their disconnection and whether they have been removed from the plant; and

5. Addendum L, Disposition of Solid Waste Material From Dry Collector (APC-103).

The Agency's letter further notified Petitioner that failure to supply this information by May 12, 1978 could cause a denial of the permit. On May 18, 1978 the Agency denied the permit (Ex.I, p. 205), citing Rule 103(b)(3) and §39 of the Act. On June 30, 1978 Celotex appealed this May 18, 1978 denial, stating the date of denial to be May 30, 1978, which was when the Agency's May 18, 1978 letter, sent by certified mail, was alleged to have been received.

The question before the Board in this matter is whether the Agency properly denied the March 13, 1978 application on May 18, 1978. The Board finds that it did. Under §39(a)(3) of the Act, the Agency is entitled to deny a permit for insufficiency of information when the entire application does not provide adequate proof that the equipment or facility will not cause violations of the Act or the Board's regulations, and the denial letter so stated. The further questions before the Board are (1) whether Celotex' application, as filed, was sufficient to prove to the Agency that no violations of the Act or Board regulations would occur. The issue of sufficiency of the application centers upon the items listed in the Agency's April 14, 1978 letter, to which its May 18, 1978 denial letter refers (as previously set forth herein) because one reason for denial was insufficiency; and (2) whether Petitioner demonstrated no violation of Rule 202(b).

The record of the four hearings is inadequate to support Celotex' contention that the items about which the Agency requested information were unnecessary to show that issuance of the permit would not cause environmental violations. At hearing Celotex' constant position was that, because the Agency had granted it a permit in 1977, effective from August 30, 1975 through March 17, 1978, and that, because its 1978 application stated no change in the circumstances which had existed on August 30, 1975, Celotex was entitled to a renewed permit.

The Agency's April 14, 1978 letter made clear that it needed more proof of present conditions than Petitioner's statement that circumstances had not changed in five years. Accordingly, it sought information as to those circumstances which it believed relevant to operating the facility in 1978. This it was entitled to do even had it found to its satisfaction that certain 1978 circumstances were exactly the same as in 1975. This is because not only can applicable state or federal laws change in the interim, but the Agency's own procedures, especially those regarding testing,

monitoring and other technology-related requirements, may have changed. Indeed, the Agency testified that prior stack testing methodology had become contrary to its 1978 permit-issuing policies (2Tr.225-30; 250-2; 261-3).

Between the time of the June 2, 1975 application and the May 18, 1978 denial, the Agency received information which supplemented that contained in the 1978 application. It received Celotex' coal analysis (Ex.I, pp.192-9), a USEPA report on visibility (Ex.I, pp.200-04), and interoffice calculations regarding opacity (Ex.I, pp.180-5), all of which were properly considered by the Agency.

On April 20, 1978 representatives from both the USEPA and the Agency read visual stack emissions and obtained opacity readings for each boiler. At that time, Celotex represented that an updated coal analysis would be submitted. The Agency's conclusion from these readings was that "the visual emission standards of Rule 202(b) have not been met" (Ex.I, p.180). Readings taken on April 21, 1978 also showed noncompliance with Rule 202(b) (Ex.I, p.202).

Celotex sent the USEPA its coal analysis by letter dated May 11, 1978 (Ex.I, p.192). Copy was also sent to the Agency. The report showed ash (9.55%) and sulfur (2.38%) contents and was based upon a sampling taken on April 19, 1978, which was after the date of the Agency's letter requesting more information (Ex.I, p.198). A second sampling on April 21, 1978 indicated an ash content of 7.69% and a sulfur content of 2.43% (Ex.I, p.199). The Board presumes the Agency received the analysis before its May 18, 1978 denial.

Even considering the fact that Celotex' submittal of the coal analysis responded in part to the Agency's request for additional information, the Agency had evidence of violations of Rule 202(b) from its first-hand stack readings, which conflicted with the statement in the application that there had been no change in circumstances. Celotex bore a burden at hearing to prove that its operation, as described by the information submitted in its application, would not cause a violation of Rule 202(b). Celotex produced no evidence that the Agency's readings were inaccurate or in any way unreliable.

The Board finds that neither Celotex' application nor evidence produced at hearing demonstrated that its operations would not violate Rule 202(b) and therefore §9 of the Act. At hearing, Celotex offered testimony that increased opacity does not necessarily indicate increased TSP emissions (Tr.459,464,536-8); however, this was produced as an opinion of an engineer from U. S. Pipe and Foundry Company, whose only personal knowledge of the issues in this case is limited to the record (2Tr.520-25). Furthermore, Agency witnesses, including one that was involved in the calculations for the 1974 permit application, testified that increased opacity is usually considered good evidence of increased TSP emissions (2Tr.685). From the Agency's findings as to opacity violations one could reasonably infer TSP violations. This is especially true

given the lack of coal-related data (other than the coal analysis) which the Agency by its letter deemed necessary for Celotex to provide. Celotex' claim that Rule 202(b) does not apply given the exception thereto in Rule 202(c)(3) is erroneous because there is no mass emission limitation in force as a Board regulation with which to comply so as to exempt the applicability of Rule 202(b). It is not necessary to the applicability of the visual standard to a source for an emission limitation to be applicable to that source, as they are two different environmental standards. The Board, for the reasons above stated, upholds the Agency's permit denial.

On October 16, 1980 Celotex filed a motion to strike the hearing officer's statement as to credibility of witnesses, which is required by the Board's Procedural Rule 319(d). The purpose of the rule is to allow the hearing officer to indicate to the Board his or her opinion of the credibility of witnesses as indicated by demeanor, etc., since the Board itself cannot physically be present at hearings of this kind. In this case the hearing officer indicated to the Board that one Celotex witness' responses were "evasive." Whether or not the witness was evasive in his testimony is irrelevant in this case to Celotex' contention in the motion that the hearing officer was biased since the few facts the witness testified to were already in the record, and since his opinion, in the light most favorable to Petitioner, was not of such matters as would constitute prejudice or irreparable harm even were the hearing officer biased. In a thorough review of the record, the Board finds no evidence of incompetency on the part of the hearing officer, as the motion alleged. Indeed, considering the conduct of both parties, all hearings were handled in a calm, fair and unbiased manner. The Board denies Celotex' motion to strike the statement.

One last procedural matter remains. Under Section 40 of the Act, the Board has 90 days within which to act on a permit appeal filed before it. Under certain conditions, petitioners historically will waive this right if they find that it is beneficial for them to do so. On July 2, 1980 Celotex filed a motion to allow an interlocutory appeal of the hearing officer's discovery orders (dating back to 1979) and a motion to continue the hearing set for July 11, 1980 pursuant to Procedural Rule 311. At the same time Celotex filed a waiver of time for decision purporting to grant the Board until October 29, 1980 to issue its Order. Rule 311(b) states, "no continuances shall be granted to the Petitioner for any variance or permit appeal proceeding unless the deadline for final Board action, whenever applicable, is extended by the Petitioner for a like period, as a minimum." On July 10, 1980 the Board granted Celotex' July 2, 1980 motion to continue the hearing set for July 11, 1980 and ordered the hearing officer to set hearing within 45 days of the date of the Board's future Order deciding the issues of the interlocutory appeal. The third paragraph of that July 10, 1980 Order stated that grant of the appeal "constitutes a waiver pro tanto of the deadline for the decision date. That date is [hereby] extended from October 29, 1980 through and including December 31, 1980." Celotex did not appeal this Order.

On August 21, 1980 the Board entered an Order disposing of the arguments raised in Celotex' interlocutory appeal; the Order reiterated the decision date of December 31, 1980. Although Celotex filed a motion for reconsideration of the August 21, 1980 Order, that motion did not address the December 31, 1980 decision date. On October 16, 1980, the day before the last scheduled Board meeting prior to the October 29, 1980 date, Celotex filed its 32-page final brief in this matter, which alleged that failure by the Board to act before October 29, 1980, i.e., the next day, would result in a permit being issued to Celotex by operation of law. The Board rejects this evaluation of the statutory decision date under §40 of the Act. When Celotex requested pursuant to Procedural Rule 311 that the Board delay the proceedings herein in order to consider an interlocutory appeal, and accepted the Board's grant of the continuance, Celotex agreed to an extension of the time for decision to a date beyond that stated in its prior waiver for a like period, as a minimum, as that required by the Board to decide the appeal. Because of the uncertainty of when the Order regarding that appeal would issue, the Board notified Petitioner of a date certain by which the entire proceeding would be decided.

Even if Rule 311(b) itself were not so explicit, to allow any party before the Board to ignore the specific contents of two separate Board Orders, one of which was appealed on other grounds, would constitute an intolerable surprise both upon the other party and upon the Board.

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

ORDER

The May 18, 1978 denial by the Illinois Environmental Protection Agency of the Celotex Corporation permit application is upheld in accordance with the Opinion herein.

Mr. Werner dissents.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order were adopted on the 4th day of December, 1980 by a vote of 4-1.

Christan L. Moffett, Clerk
Illinois Pollution Control Board