ILLINOIS POLLUTION CONTROL BOARD
February 17, 1977

ASHLAND CHEMICAL COMPANY, Petitioner,	)	
v.	)	PCB 76-186
ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

Mr. James Gladden and Ms. Percy Angelo, of Mayer, Brown & Platt, appeared on behalf of Petitioner;
Mr. Ernest Nielsen, Environmental Protection Agency, appeared on behalf of Respondent.

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

On June 30, 1976, Petitioner Ashland Chemical Company (Ashland) filed a permit denial appeal before the Pollution Control Board (Board) appealing the Environmental Protection Agency's (Agency) denial of its application for an operating permit for two coal-fired boilers at its Mapleton, Peoria County, Illinois plant. A hearing was held in this matter on December 14, 1976. Ashland has filed a waiver of the 90-day rule until February 17, 1977.

At the plant in question, Ashland manufactures a number of chemicals from beef tallow and vegetable type oils. The boilerhouse at the Mapleton plant contains two coal-fired and one gas-fired boilers. The coal-fired boilers have a combined input of 147 million BTU's per hour (Petitioner Exhibit 1, p.6; Tr.10) and a steam output of 60,000 pounds of steam per hour each or 120,000 pounds per hour total (Petitioner Exhibit 7 and 15; Tr.10-11).

In April, 1975, Ashland applied for an operating permit for its boilers. That application was denied by the Agency on June 10, 1975, for failure to meet the particulate and sulfur dioxide regulations then in force, Rules 203(g)(1)(B) and 204(c)(1)(A) of the Air Regulations (Chapter 2 of the Board's Rules and Regulations) as well as

Rule 203(e)(3). On April 25, 1975, Ashland filed a Petition for Variance (PCB 75-174) before the Board seeking variance from Rules 203(g)(1)(B) and 204(c)(1)(A). Pursuant to Board order, Ashland subsequently filed additional information on the Mapleton plant's impact on air quality. The Board granted the variance until June 1, 1976, holding that Ashland had met its burden under Train v. NRDC, as the Board interpreted the impact of the Train decision at that time. Chairman Dumelle filed a dissenting opinion. Ashland's compliance plan included installation of fabric baghouse filters for the control of particulate emissions and the use of low sulfur western coal for the reduction of SO_2 emissions.

On January 20, 1976, the Illinois Supreme Court, in Commonwealth Edison Company v. Pollution Control Board, 62 Ill.2d 494(1976), reversed the Board's adoption of Rules 203(g)(1) and 204(c)(1)(A) and remanded those rules to the Board. On March 24, 1976, Ashland informed the Agency that it intended to continue its fabric baghouse filter installation but that it would postpone entering into any contract for low sulfur coal pending resolution of the sulfur dioxide emission regulations applicable to the Mapleton plant (Petition, pp.6-7).

On April 23, 1976, Ashland resubmitted an application to the Agency for the operation of its coal-fired boilers. Along with its application, Ashland submitted a copy of the Board's Order in PCB 75-174, the variance case. On June 10, 1976, the Agency denied Ashland's application, stating that Rules 102, 303, 307 and 308 may be violated if the permit were granted. The Agency indicated that the application failed to provide sufficient information to prove that the source's emissions would not prevent the attainment or maintenance of applicable ambient air quality standards for particulates and SO_2. The Agency indicated at the hearing that its current policy is that sources may demonstrate acceptable air quality impact in one of two ways: either by an extensive modelling and monitoring program in accordance with Agency Guidelines or, as an alternative, by showing compliance with the remanded rules. The Agency has since withdrawn its contention that Rule 303 was applicable to the Mapleton plant. The Board concurs with the conclusion that Rule 303 is inapplicable.

Ashland indicates in its Petition that, upon completion of the baghouse filter installation, particulate emissions from its plant will be substantially less than the limit previously imposed by Rule 203(g)(1)(B). The average sulfur content of the Illinois coal presently used on the boilers is 2.9% by weight, resulting in average sulfur dioxide emissions of 5.7 lbs/MBTU.

The issues raised in this permit appeal are primarily legal

rather than factual in nature. Ashland's primary contention is that the Board and the Agency are bound by the principle of res judicata to the Board's holding in the variance case that emissions from the Mapleton plant do not cause or contribute to a violation of the ambient air quality standards. The Agency, on the other hand, argues that the prior Board variance decision is not binding in the permit review process and that in its application Ashland did not meet its burden of proving that the facility would not cause a violation of the Act or Regulations.

Although both Petitioner and the Agency argue the applicability or non-applicability of res judicata to decisions of the Board, the Board finds that it need not address the question of whether or not that principle applies to its decisions. A basic premise of res judicata is that the subsequent proceeding involve identical claims and issues, including identical factual issues, to those in the prior proceeding. However, the Board and Agency in the permit review process herein are faced with a different set of circumstances than the Board faced in the variance proceeding. The Board's determination that Ashland's emissions did not cause or contribute to a violation of ambient air quality standards can only be construed to apply at the time the decision was written and for the period of the variance. Surely Ashland would not claim that such a determination on air quality would be binding upon the Board for an indefinite period of time. The variance decision was based on a set of dynamic, rather than static, facts, and once the variance expired, the legal force of the Board's holding on air quality impact also expired. Because the permit would extend well beyond the variance period, the determination of air quality impact pursuant to the variance does not apply to the permit consideration.

Section 39 of the Act places the burden upon the applicant to submit proof that its facility will not cause a violation of the Act or the Rules. In the present case, Ashland merely submitted its application and the Board's Opinion and Order in PCB 75-174. Ashland did not submit any of the background data from the variance case nor did it submit any information as to its current impact on air quality or the projected impact for the period of the applied-for permit. Ashland, therefore, failed to meet its burden under Section 39 of the Act, and the Agency was correct in denying the permit based on a lack of information.

Ashland in its brief raises several other issues, which we will briefly address herein. First of all, the Board notes that matters such as the Powerton SCS construction permit and permits granted or denied other facilities are not before the Board in this matter and are wholly irrelevant to the question of whether Ashland has substained its burden under Section 39. Other issues Ashland raises are

that the Agency withdrew the air quality impact issue as to particulates in its answers to interrogatories, that prior to the September, 1976, Agency issuance of "Guidelines for the Performance of Air Quality Impact Analyses to be Used in Support of Permit Applications" an applicant would have no way of knowing what kind of air quality showing would be acceptable, and that the Agency's motive in denying the application was to keep a potential enforcement action alive and to continue to enforce the remanded regulations.

In its Answers to Interrogatories the Agency listed only sulfur dioxide as the contaminant emitted from Ashland's boilers that could cause a violation of Rule 102 (Petitioner Exhibit No. 19, p.1). The Agency indicated in its Brief that the omission of particulates from the answers to interrogatories was an error based on a misunderstanding on the part of the Agency attorney, and testimony at the hearing revealed that Ashland's attorney had been informed prior to hearing that the Agency still intended to pursue the air quality issue as related to particulates (R.5). The issue facing the Board in a permit appeal is whether the Agency's action in denying a permit was proper at the time of denial, and a subsequent change of opinion on the Agency's part is irrelevant once the case is under the Board's jurisdiction. The Petition has not been amended. Furthermore, Ashland has not been prejudiced by the inclusion of particulates as an issue because its attorney had notice prior to hearing that the Agency still considered particulates an issue and because the hearing officer, rather than removing the issue, reserved such ruling to the Board.

As to the other issues raised by Ashland, the Board recognizes that there was to some degree a lack of guidance for sources applying for a permit between the time of the Commonwealth Edison decision and the Agency's issuance of Guidelines in September, 1976. However, applicants were on notice that they would have to prove compliance with all regulations still in force, including Rules 102, 307 and 308. Furthermore, the Board again notes that Ashland has submitted no air quality impact information in support of its permit application.

The Board finds the Agency's motives in denying the permit to be irrelevant in that the denial has a clear and justifiable basis in law. The Board notes that the showing of compliance with the remanded rules is only offered by the Agency as an alternative to a monitoring and modelling program as a means of demonstrating acceptable air quality impact. The Board, however, need not herein reach the question of the reasonableness of the Agency's current policy or the acceptability of the Guidelines. The issue before us is whether Ashland met its burden of proof. Having submitted no information whatsoever on air quality impact, Ashland has clearly failed in its burden, and the permit was properly denied.

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

ORDER

It is the Order of the Pollution Control Board that the permit denial appeal submitted by Ashland Chemical Company, Inc., on June 30, 1976, be and is hereby denied.

Mr. Zeitlin concurs.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 17th day of February, 1977 by a vote of 4-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board