ILLINOIS POLLUTION CONTROL BOARD
December 16, 1976

HYON WASTE MANAGEMENT SERVICES, INC., Petitioner,	)	
v.	)	PCB 76-166
ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

Mr. Robin Lunn, Attorney, appeared for the Petitioner;
Mr. Peter E. Orlinsky, Attorney, appeared for the Respondent.

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

This matter is before the Board on a Permit Appeal filed on May 26, 1976 by Petitioner Hyon Waste Management Services, Inc., (Hyon). In that petition, Hyon appealed from conditions in a permit issued by Respondent Environmental Protection Agency (Agency) on May 20, 1976 (Permit No. 03031508). Hyon's Permit Appeal is brought under the provisions of Rule 103(a) of the Board's Air Pollution Regulations, which provide for the appeal of conditions in any permit issued by the Agency as if such conditions constituted a permit denial. Ill. PCB Regs., Ch. 2, §302(k)(1976). Cf., Ill. Rev. Stat., Ch. 111-1/2, §1040(1975).

Hearings were held in the matter on September 29, 1976, and again on October 13, 1976. No public comment was received in the matter. It should also be noted that no Agency record of permit application was filed in this case, as required under Rule 502 of the Board's Procedural Rules. Ill. PCB Regs., Ch. 1, §502(1974). The Agency stated that because of the nature of the case, no such filing was required, (R. 9, Sept. 29, 1976).

The subject matter of this case is Hyon's waste treatment facility in Chicago, which has been before the Board in several previous cases. Even more surprisingly, however, this case is before us for decision on a permit application record identical to that in a case decided only recently. Hyon Waste Management Services, Inc. v. EPA, PCB 75-413 (April 8, 1976).

Because of discussion in prior cases, we shall not repeat a complete description of Hyon's Chicago facility. Hyon Waste Management Services, Inc. v. EPA, PCB 75-457 (April 8, 1976); Hyon Waste Management Services, Inc. v. EPA, PCB 75-433, 15 PCB 605 (1975), (Supplemental Statement by Mr. Dumelle, 15 PCB 609). It is enough to note that Hyon describes that facility as an "integrated waste treatment facility," where industrial wastes may be treated chemically, biologically, or by incineration. The specific subject matter of this case is the liquid waste incinerator, an operating permit for which was also the specific issue in PCB 75-413.

The Agency originally issued an experimental open burning permit for Hyon's incinerator system on August 19, 1971. After construction and testing under that permit and another subsequently issued on September 18, 1973, which expired on September 18, 1974, the Agency refused applications for further permit renewal. On November 20, 1974, Hyon filed its initial Permit Appeal, and asked as alternative relief a limited variance for testing purposes. On February 27, 1975 the Board dismissed Hyon's Permit Appeal, but granted variance from Rules 103(a), 103(b), 202(b) and 203(e)(2) of the Air Pollution Control Regulations until June 30, 1975, subject to certain conditions. PCB 74-433, supra, 15 PCB at 607, 608.

On October 22, 1975, Hyon filed another Permit Appeal concerning its incinerator, PCB 75-413. That case was based on the Agency's October 15, 1975, refusal to issue a permit applied for by Hyon on July 18, 1975. That denial was based on the Agency's determination that, at an operating rate of 4,500 pounds per hour of liquid waste, Hyon's incinerator would violate the particulate emission limitations in Rule 203(e)(2) of the Air Pollution Regulations.

The Board's decision on that case (April 8, 1976) found that Hyon's liquid waste incinerator is not subject to any presently existing particulate limitation emissions. Our Order was that,

> ...The decision of the Environmental Protection Agency, dated October 15, 1975, denying Petitioner ...an Operating Permit for its liquid waste incinerator, be reversed, and that said Petitioner is entitled to an Operating Permit therefor.

On May 11, 1976 Hyon filed a Petition for Writ of Mandamus against the Agency in the Circuit Court of Cook County, based on our April 8, 1976 Order in PCB 75-413. Hyon Waste Management Co. v. Briceland, et al., No. 76 L 8684 (Cir. Ct. Cook Co., Ill.). Before any hearing in that case, however, the Agency on May 20, 1976 issued an Operating Permit to Hyon.

Because Hyon felt that the conditions in that permit were unduly restrictive and constituted a permit denial, Hyon went to hearing on the mandamus matter on May 26, 1976 (the same day that the instant case was filed). The Circuit Court Order of that date remanded the entire matter to this Board for "a hearing to determine the legality and propriety of the conditions contained in the Operating Permit ...dated May 20, 1976." The Circuit Court retained jurisdiction in the matter and ordered that Hyon be granted an Operating Permit, (the conditions of which were to be negotiated between Hyon and the Agency), during the pendency of this Board's consideration.

After negotiations, the parties reached an agreement with regard to an Operating Permit to be issued during the pendency of this case, (Hyon, Ex. 6). The Agency then issued an Operating Permit on May 28, 1976, (Hyon, Ex. 7). The provisions of that Permit are somewhat similar to those of the May 20, 1976 Permit which is before us for review in this case.

Before resolving the substantive issues in this case, we feel that certain procedural issues require discussion and resolution. First among these is the Circuit Court of Cook County's "remand" of this matter to the Board. It is not clear that the Circuit Court has such remand authority. See, Ill. Rev. Stat., Ch. 111-1/2, §1041(1975). See, also, id., §§ 44, 45(a), 45(b). We feel that the Circuit Court's action may be treated as a stay pending concurrent resolution by this Board of matters properly brought for its determination under the Environmental Protection Act (Act). Although the Board has held that we will not concurrently decide issues being resolved in a judicial forum, we do not feel that such a prohibition is applicable under these circumstances.

As a final procedural matter, we note that the procedure for permit condition appeals set up under Rule 103(k) of the Air Pollution Regulations leaves open the issue of various burdens on the Permit Appeal. Section 39 of the Act provides that, when a permit is denied by the Agency, the Agency must reply to the permit applicant with a detailed statement showing the reasons for permit denial. Neither the Act nor our Rules provide for the filing of any similar statement by the Agency with regard to any conditions imposed. This raises some difficulties at hearing. Although a Permit Appeal petitioner -- even in cases where it is a condition rather than a denial being appealed -- unquestionably has the burden of proving the Agency's determination wrong, it is apparent that the lack of a stated Agency basis for the imposition of permit conditions adds considerably to that burden. Because there was some confusion in this record as to the reasoning for the Agency's imposition of some conditions, we shall deal with each condition in the May 20, 1976 permit individually.

Permit Condition 2(c)

Condition 2(c) in Hyon's permit of May 20, 1976 reads as follows:

> "The permittee shall burn only Type 5 liquid industrial wastes as defined in ATP-1A Incinerator Particulate Test Procedure attached to this permit as Exhibit A. Such wastes shall contain less than 2.7 percent (by weight) chloride at any time, less than 1 ppm of heavy metals (e.g. lead, cadmium) at any time, and less than 1 ppm of beryllium at any time. The Type 5 liquid industrial wastes shall contain less than 0.4% ash and non-combustible solids at any time and have a heating content of not less than 18,700 btu/lb."

Hyon's position is that, "The majority of hazardous wastes which should be burned, incinerated, are halogenated wastes, chlorinated wastes, and they contain a great deal more chloride than this," (R. 42, Sept. 29, 1976). In addition, Hyon testified that 18,700 btu/lb. is the heat value of most types of fuel, including the fuels used by Hyon to provide additional heat when the wastes being destroyed do not contain sufficient heat value for destruction, (R. 146, Sept. 29, 1976). Hyon further claims that there is no justification for the 0.4% ash and non-combustible solids limitation. These conditions, Hyon claims, render its business economically impractical, and have no sound basis, (R. 43, Sept. 29, 1976).

The Agency's position, as stated in its Brief, is that the types of wastes being incinerated by Hyon are particularly dangerous and that the Agency has a "need to keep a tight rein on Hyon in order to assure the maintenance of air quality. (Agency Brief at 6.) The Agency further contends: "Whose judgment is it that those wastes should be incinerated?" (Id.)

The Agency's justification for the 2.7 percent chloride limitation is that such a limitation indicates the content of the materials being burned by Hyon during its stack tests. The Agency stated at hearing that the ash and heat content limitations were chosen because they "provide an adequate margin of safety," (R. 93, Sept. 29, 1976). The Agency's Brief, at p. 7, states that, if Hyon could substantiate different figures, the permit might be amended.

The Agency's reasons for the imposition of these conditions, even in response on cross-examination at hearing, were simply insufficient to justify their imposition. A "margin of safety" implies protection from something. Although, with the chloride limitation for example, we have no limitation in our emission regulations on chloride, we can assume that the Agency imposed the

limitation to prevent a violation of the Act, and specifically §9(a) thereof. But the Agency's witnesses at hearing nowhere stated how a limitation on chlorides in Hyon's raw material would prevent a §9(a) violation. Although the materials to be burned at Hyon -- including chloride -- are indeed potentially dangerous, this is also true of a great many chemicals and materials commonly used in industry. The simple statement that the conditions are to "provide a margin of safety" from a potential danger, with no further explanation, is insufficient.

As written, the condition limiting chlorides is unreasonable. It may be, however, that some limitation on chlorides is necessary, so we shall remand this condition to the Agency for consideration.

With regard only to the heavy metals limitations imposed by the Agency, Hyon did not seriously or adequately challenge the Agency's decision. We agree with the Agency that because of the inherent dangers associated with these pollutants, these limitations appear to be necessary, and are upheld as reasonable.

The remaining provisions of condition 2(c), imposing additional limitations on the liquids to be incinerated, are found to be unreasonable.

Permit Condition 2(d)

Condition 2(d) provides that,

> "The burning rate of the Type 5 industrial wastes shall not exceed 650 gal./hr."

The Agency's justification at hearing for this condition is that the stack test provided in conjunction with Hyon's permit application indicated a burning rate of 650 gallons per hour for the material burned during that test. The Agency simply states that absent data showing that operations at a greater per-hour rate would not cause air pollution, the Agency may properly limit a permit to the circumstances under which an applicant has shown that no violation will occur. Hyon, on the other hand, argues that its operations are not economical at that rate, and that approximately 1,000 gals./hr. would be more reasonable.

Again keeping in mind the potentially dangerous nature of the material to be burned by Hyon, we still do not completely understand the reason for the imposition of this condition by the Agency. When adopting the emission regulations in 1972, the Board noted that, "an expensive stack test is not necessary in all cases to demonstrate a violation of numerical emission standards. Standard emission factors have been developed on the basis of prior testing that enable one to make fairly accurate calculations as to emissions..." (In the Matter of: Emission Standards, R71-23 (April 13, 1972), (Opinion at 9.)

This statement must apply, we feel, to permit applicants seeking a permit, as well as to the Agency when it seeks to enforce. Indeed, the Agency was willing to apply such calculations to Hyon's application with regard to particulates at 4,500 pounds per hour in PCB 75-413. We see no purpose in requiring that Hyon conduct extensive, and expensive, stack tests for every potential type of waste to be burned or for every rate of burning. The condition appears unreasonable.

Condition 2(e)

Condition 2(e) sets a minimum afterburner temperature in Hyon's incinerator of 2,500°F. This condition, one of the few for which the Agency provided any real rationale, was shown by Hyon at the October 18, 1976 hearing to be unnecessary, (R. 6, et seq., R. 18, et seq., Oct. 13, 1976; EPA Ex. 1-4).

Hyon showed that the complete destruction of the materials to be burned is determined by both residence time in the incinerator and turbulence, as well as by temperature. Hyon demonstrated that these factors, when combined, allow complete destruction in Hyon's incinerator of the materials in question.

In its Brief, (at 8), the Agency admits that this condition may not be necessary to prevent air pollution. We find the condition unreasonable.

Condition 2(f)

Condition 2(f) provides as follows:

> "Prior written approval from the Agency shall be required for the burning of materials containing any of the following:
>
> (1). Toxic compounds of phosphorus, nitrogen and mercaptans.
>
> (2). Pathological biological wastes.
>
> (3). Pesticides and herbicides.
>
> (4). Polychlorinated biphenyl compounds (PCB's)."

Hyon argues, in contesting this condition, that it is, (a) unnecessary, and (b) not provided for in the Act or this Board's Regulations. The Agency's contrary argument is that Hyon agreed to a similar provision in the May 28, 1976 permit order negotiated by the Circuit Court, and that such a condition is necessary by virtue of the hazardous materials to be burned by Hyon.

Even though the condition assented to by Hyon in the May 28 permit issued by the Agency is in fact somewhat different (in that it sets a time limit for Agency action on such a request by Hyon), we nonetheless feel that the assent by Hyon to such a condition is immaterial to our consideration. What is material is the remaining basis put forth by the Agency to justify this condition.

Hyon argues that, without a permit, it cannot contract with its customers for the destruction of the very materials for which the Agency requires prior approval. It must be assumed, however, that the Agency will act in good faith and provide its approval -- on a timely basis within the framework of a generally applicable Permit -- for the destruction of such hazardous material. Hyon's incinerator is designed, at least in part, for the destruction of just such hazardous materials as are enumerated in this condition; we approved that concept in Hyon's variance case, PCB 74-433. 15 PCB at 606.

Although Hyon showed, in PCB 75-413 (the record of which was incorporated in the instant proceeding) that at least two Agency employees have publicly made statements indicating a possible prejudice towards Hyon's operations, such statements do not indicate that the Agency will not fulfill its statutory duty, or will act in a manner which is unnecessarily disruptive of Hyon's operations. Because of the potential dangers from the materials to be incinerated, (see e.g., Supplemental Statement by Mr. Dumelle in PCB 74-433, 15 PCB at 609), we find this condition reasonable.

Condition 2(g)

Hyon argues that condition 2(g), which requires temperature recording with an accuracy of 10°F. for the combustion chamber and afterburner chamber in Hyon's incinerator is not within the Agency's authority under Rule 103(b)(7) of the Air Pollution Regulations, which allows the Agency to require that a permittee adequately maintain its equipment. Although Hyon indicated that compliance with this condition may be difficult inasmuch as the recording device in question uses a recording pen whose lines span 10 degrees on the recording chart, and that an accuracy of 50°F. would be more reasonable, we feel that such a requirement is within the Agency's authority under the reporting requirements of Rule 103. However, the Agency agreed in its Brief that Hyon's position in this regard is reasonable.

Condition 2(h)

Condition 2(h) to the May 20, 1976 permit required that the water used in the Hyon scrubber contain no more than 1 ppm of hydrocarbons. Hyon argued that this condition is unreasonable. The Agency, in its Brief, stated that it is willing to go along with a less stringent standard, and we therefore feel that no further discussion of this matter is required.

Condition 2(i)

Hyon argues that condition 2(i), providing that the May 20, 1976 permit would not become effective until Hyon executed a Certificate of Acceptance, is not allowed by the Board's Order of April 8, 1976 in PCB 75-413. ("Petitioner is entitled to an Operating Permit...") We find this argument spurious, in that our Opinion and Order of April 8, 1976 was directed specifically to the issue of particulate emissions, and not to the issues raised in this case.

Permit Duration

The final issue contested by Hyon with regard to the May 20, 1976 permit is the period for which it was issued. That permit has an expiration date of December 1, 1976, a period of six months and 10 days from the date of issue. Hyon claims that the short duration of this permit precludes it from obtaining long term contracts with potential customers, interferes with its ability to obtain money from banks or other lending institutions and makes it difficult to retain employees.

The Agency claims that Hyon has not detailed these claims with sufficient specificity. The Agency argues that the Act and Rule 103(b)(8) of the Air Pollution Regulations allow it full discretion in determining the proper duration of any permit, up to a limit of five years. We must, the Agency alleges, examine Hyon's failure to show with specificity the unreasonableness of the Agency's use of its discretion, and "[b]alance, on the other hand, the Agency's need to keep a tight rein on Hyon in order to assure the maintenance of air quality." (Agency Brief at 6.)

We find that the duration of this permit, as issued, (a) constitutes an appealable condition of the permit, and (b) is not justified.

While it is true that the Petitioner's case in this regard did lack specificity, the testimony which Hyon did present is of far more benefit to the Board in analyzing this case than is the Agency's unsupported statement that a short permit period will allow it to keep a "tight rein on Hyon." The justification offered by the Agency has no apparent connection with the "maintenance of air quality."

DISCUSSION

Finding that the period of the permit and certain conditions in it are unreasonable, does not mean that Hyon is entitled to a permit for five years with no conditions. We cannot, on the record before us, find that such a permit would be warranted.

It is the purpose of the permit system, as it applies to this case, to prevent air pollution, within either the meaning of the Act or this Board's Regulations. It is not the purpose of the permit system to regulate the capacity or operations of private industrial concerns, except insofar as those factors are directly related to the purposes of the Act and compliance with our Regulations.

While it may indeed be necessary for the Agency, upon occasion, to condition its permits on narrowly limited operational rates and parameters, such conditions may raise serious questions if not properly considered. The Agency cannot merely say, "as a condition to your permit, do not violate the Act or our Regulations." Because of the nature of Hyon's operations, the Agency must be reasonably assured in advance that Hyon's operations will not cause such violations.

But such conditions may not be such that they are tantamount to a permit denial. Although Hyon did not show conclusively in this case that the conditions of its permit amounted to a de facto denial, it did raise that possibility; and while Hyon has shown that some of the conditions imposed by the Agency in the May 20, 1976 permit were indeed unreasonable, it has not shown that the permit -- as requested by Hyon -- has been adequately justified, and should therefore be issued by the Agency.

Our Order shall reflect our findings on the individual permit conditions at issue in this case, and will remand the matter to the Agency for issuance of a permit in compliance with our findings. Should the Agency feel that any further information is required for final permit issuance, it shall communicate such need to Hyon within 30 days of the date of this Order, final permit issuance to take place within 60 days after such information has been submitted by Hyon.

It is hoped that this procedure will put an end to a long, and tortuous, history of litigation between Hyon and the Agency.

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

ORDER

IT IS THE ORDER OF THE POLLUTION CONTROL BOARD that:

Operating Permit No. 03031508 is remanded to Respondent Environmental Protection Agency. The Agency shall, within ninety (90) days of the date of this Order, issue to Petitioner Hyon Waste Management Services, Inc., an Operating Permit pursuant to Rule 103 of Chapter 2: Air Pollution, of this Board's Rules and Regulations, in conformity with the foregoing Opinion and Order. Any additional information required for such issuance shall be requested by Respondent Environmental Protection Agency within thirty (30) days of the date of this Order, final permit issuance to follow within sixty (60) days after the submission of such information by Petitioner Hyon Waste Management Services, Inc. In connection therewith, the Board finds,

a. Conditions 2(c) (except as it limits heavy metals concentrations), 2(d), 2(e), and the permit expiration date of Operating Permit No. 03031508 issued by the Environmental Protection Agency to Hyon Waste Management Services, Inc., on May 20, 1976, are found to be unreasonable and are therefore stricken therefrom.

b. The Petition for Appeal of Petitioner Hyon Waste Management Services, Inc., with regard to conditions 2(h) and 2(g), is dismissed as moot.

c. Said Petition with regard to conditions 2(f) and 2(i) of said Permit is denied.

Mr. James Young abstained. Mr. Jacob D. Dumelle concurred, separately.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 16th day of December, 1976, by a vote of 4-0.

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board