ILLINOIS POLLUTION CONTROL BOARD
May 8, 1975

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 73-372 through
	)	PCB 73-379
	)	
COMMONWEALTH EDISON COMPANY,	)	
	)	
Respondent.	)	

Mr. Kenneth J. Gumbiner and Mr. Marvin I. Medintz, Assistant Attorney Generals, appeared for the Complainant;
Mr. Richard E. Powell, Isham, Lincoln & Beale, appeared for Respondent.

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

These consolidated enforcement actions were filed August 31, 1973. Commonwealth Edison (Edison) is charged, in each of these cases, with failure to obtain necessary operating permits as required by Rule 103(b)(2) of Chapter 2, Part I of the Rules and Regulations Governing Air Pollution and Section 9(b) of the Environmental Protection Act. The Regulation requires that the permits be obtained by April 1, 1973. The published deadline for submittal of permit applications was February 1, 1973. The Environmental Protection Agency (Agency) granted Edison an extension of the date to file until March 1, 1973 (R. 74, 90). In all, nineteen generating units located at eight different facilities are involved in the proceedings. More specifically, the units involved are:

Case No.	Units
73-372	Kincaid 1 and 2
73-373	Sabrooke 1 through 4
73-374	Powerton 4 and 5
73-375	Waukegan 5 through 8
73-376	Dixon 5
73-377	Crawford 8
73-378	Joliet 5 through 8
73-379	Fisk 19

At the first day of hearings, October 15, 1973, Edison stipulated that it had not obtained permits up to that date. On December 6, 1973 the Pollution Control Board (Board) denied Edison's Motion For Stay and Related Relief pending judicial resolution of its appeal of the Board's adoption of numerous rules of Pollution Control Board Regulations, Chapter 2 (Air Pollution Regulations). 10 PCB 257. In that Order we indicated that the variance procedure was available as the means to raise the issue of substantial hardship. Edison filed a petition for variance, PCB 74-16, for many of the units involved herein on January 11, 1974. A motion to consolidate the enforcement and variance cases was denied on January 17, 1974 (10 PCB 667). However, on March 7, 1974 we granted a motion to postpone hearings in this matter until after the receipt of transcripts in the variance proceeding (11 PCB 461). Accordingly, the hearings in this matter resumed, and concluded, on November 6, 1974.

Edison initially filed permit applications, including compliance plans, for all of these units with the Agency on March 1, 1973. Notice of rejection of these applications by the Agency was received in early April, 1973 (R. 74-74). Edison cites two reasons why operating permits were denied. First, with respect to three units (Fisk 19, Crawford 8 and Dixon 5), it claims the Agency was not "satisfied with either the amount or type of data submitted...and required the filing of addition information" (Respondent's Brief, p. 2). Permits were subsequently issued for these units on the dates indicated in the discussion below. Second, with respect to the remaining sixteen units, Edison claims that the permits were denied because the compliance plans extended beyond the May 30, 1975 deadline for the new particulate and sulfur dioxide emission standards in Rules 203 and 204. Edison's inability to meet this deadline has been the subject of other proceedings before the Board. In PCB 74-16, decided on January 3, 1975, we granted Edison variances from either or both SO_2 and particulate standards for many of the units involved herein. The extensive record in that variance proceeding was incorporated in full in these proceedings by stipulation of the parties (R. 61). We refer the reader to our opinion in PCB 74-16 for a discussion of the control technology and compliance difficulties.

For purposes of clarity we will first consider the generating units for which permits were subsequently issued. These units include Dixon 5, Fisk 19 and Crawford 8. Edison's contention that the initial permit denials resulted from Agency dissatisfaction with either the amount or type of data submitted is over-simplified and misleading. In the case of Dixon 5, Edison claims that the permit was denied for the simple reason that numerical limits were not expressed in pounds per million BTU, as required by the Agency (R. 77). More importantly, however, the data submitted show

compliance with the 1975 standards in only two of eight tests (R. 77-78). Edison had intended to achieve compliance by use of a special Illinois coal. By late 1973 it was determined that this coal was not available and in March 1974 tests were run using an Illinois coal of higher sulfur and ash content. Results indicated compliance with the 1975 standards. Edison resubmitted its application on April 17, 1974 and a permit was granted on May 25, 1974.

In the case of the Fisk 19 and Crawford 8 units, Edison had intended to burn low sulfur coal, but feared that this would result in precipitator degradation. Thus, rather than the initial permit denials being a result of Agency dissatisfaction with the data submitted, it is clear that the original applications did not in fact demonstrate compliance within the required deadline. A test at Fisk 19 in April, 1974, however, indicated that the coal proposed for use would not result in such degradation, and that this would allow Edison to achieve compliance with both the particulate and sulfur dioxide standards (R. 78-79). This was confirmed by a test at Crawford 8 in August, 1973 (R. 78, 98). Transmittal of these test results to the Agency, however, did not occur until new permit applications were filed on October 1, 1973 (R. 98). Permits were issued for these units in November, 1973.

Although Edison was subsequently able to amend its compliance plans for these three units, enabling it to obtain permits, substantial delays beyond the required permit date were involved.

Edison argues that these cases, involving units now in compliance are essentially moot and ought to be dismissed. This argument is without merit. We have consistently held in the past that late compliance with regulations requiring permits to be obtained does not moot the issue of violation of the regulation. EPA v. Iowa-Illinois Gas and Electric Co., PCB 72-216, 5 PCB 67,69 (July 25, 1972); EPA v. Procter & Gamble Manufacturing Company, Inc., PCB 72-210, 5 PCB 165,166 (August 15, 1972). To hold otherwise would effectively undermine the heart of a permit program. As we indicated in our opinion accompanying the new emission standards in the Air Regulations, "we cannot be content simply to set a future compliance date and to wait until then before taking any action to assure that something is being done" (In The Matter of Emission Standards, R71-23, 4 PCB 298 at 304, April 13, 1972). In this instance the present enforcement action was required as a catalyst to precipitate Edison's

compliance plans. Without such action there could be no assurance that compliance with deferred standards would be timely achieved. We impose a monetary penalty in cases such as this as an aid to the enforcement of the Act. In EPA v. Handschy Chemical Company, PCB 74-477 (April 4, 1975) we assessed a $500 penalty where the respondent abandoned its efforts to obtain an operating permit after two rejections, even though a subsequent grant of the permit indicated compliance with emission standards. We consider similar penalties of $500 for each of these three units to be appropriate here, for a total of $1,500. Here, where compliance of emission standards was ultimately achieved before the date required, we consider it a mitigating factor that no actual damage to the public, in the form of lower ambient air quality, resulted from the delays in obtaining the necessary permits.

In Southern Illinois Asphalt Co. v. Pollution Control Board (1975), _____ Ill. 2d _____ (Docket No. 46334) the Illinois Supreme Court struck down the Board's imposition of fines against two companies -- one that had failed to apply for a permit and one that was in violation of a substantive standard. The Court noted, however, that in both instances the violations had ceased long before the Agency instituted its enforcement action. In the case of one company, Southern Illinois Asphalt, the Court noted that the failure to obtain a permit was mere inadvertance, resulting from the company's assumption that its supplier had filed the necessary application forms for it. Moreover, the court also noted that as soon as the company learned of this situation, it immediately took steps to remedy it, and had actually ceased operations long before the complaint was filed. Unlike those cases, the instant enforcement action was filed before the violations had ceased. (In the case of Dixon 5, the complaint was filed as much as 7-1/2 months prior to the date Edison even refiled its permit application.) Furthermore, Edison's failure to obtain the necessary permits was not a matter of mere inadvertance, but rather the result of a failure to propose a compliance plan capable of bringing its facilities within the standards to be applied. We are of the opinion that the instant case more resembles the facts in Mystic Tape v. Pollution Control Board (1975), ____ Ill. 2d _____ (Docket No. 46543), in which the Supreme Court upheld a $3,500 penalty against a company that installed and operated equipment after the Agency had denied its applications for permits.

With respect to the other sixteen units involved in this proceeding, Edison claims technical inability to meet the May 30, 1975 deadline. At the outset it should be noted that one of these units, Powerton 4, was not involved in the variance proceeding - PCB 74-16. The initial permit application for this unit (March 1, 1973) had contemplated its future use as a test bed for Edison's coal gasification project.

The compliance plan submitted extended beyond mid-1975 and the permit was thus denied (March 29, 1973). Consequently Edison reconsidered and elected to show the unit retired from coal-fired service in October, 1974. The application was refiled on October 1, 1973 and a permit was granted on January 9, 1974. Here again, failure to timely obtain the necessary permit is not a matter of inadvertance but is rather the result of a failure to show an adequate compliance plan. Also, we note that the refiling did not occur until the day after the instant action was filed. We thus elect to treat this unit in the same manner as the three discussed above. A penalty of $500 for this violation is also assessed.

Of the remaining 15 units involved in this action, eight were involved in variance proceedings previous to PCB 74-16. An earlier variance request, filed January 30, 1973, (and consolidated with an enforcement proceeding filed on December 14, 1972) for Waukegan 5, 6, 7, and 8 and Sabrooke 1, 2, 3, and 4 was granted by the Board on October 4, 1973 and amended November 29, 1973 (PCB 73-40; 9 PCB 367; 10 PCB 143). In that Opinion we assessed a fine of $1,000 for the Sabrooke station for violation of the Act, the particulate standards of the Rules and Regulations Governing the Control of Air Pollution. We also granted the Sabrooke units variance from the particulate standards until oil conversion could be accomplished on various dates ranging between September 30, 1973 and September 30, 1974. We assessed a fine of $30,000 for similar violations at the Waukegan station and we granted a variance from the particulate standards until April 4, 1974. With respect to the Waukegan station we noted that Edison had not given us a definitive time schedule for compliance -- a serious omission in its variance petition. Rather than deny the petition, necessitating institution of the variance process all over again, we granted a six month variance subject to a megawatt output restriction and the submittal of a program listing specific dates within which compliance could be achieved.

Edison claims that that variance should have cleared the way for the issuance of permits by the Agency in this matter except for two problems: plans to convert the Sabrooke station to the use of distillate oil were stymied by the White House Energy Policy Office; and it could still not get permits for the Waukegan units because compliance prior to the May 31, 1975 deadline was not indicated (R. 81-82). Although Edison alleges that the way should have been cleared, the record does not indicate that any effort was in fact made to obtain the permits at that time. Furthermore, from the time the permits were originally denied, in April, 1973,

Edison made no attempt to request a permit appeal or to file for variance from the permit requirements on the basis of the variances granted in PCB 73-40. Rather, it merely waited until January 11, 1974 to file a new variance petition -- PCB 74-16 --for most of the units involved herein, including the Sabrooke and Waukegan units. That date was 1-1/2 months subsequent to our modification of the Order in PCB 73-40 and 4-1/2 months subsequent to the filing of this complaint. Edison's lethargy in this regard is exemplified by the situation involving Sabrooke Units 3 and 4. These units received authorization from the Energy Policy Office on June 18, 1974 to proceed with oil conversion. As a result they are now in compliance and the petition for variance for these units was dismissed in PCB 74-16. By the date of the final hearing in this case on November 6, 1974, however, almost five months after the authorization, Edison could only claim that "permit applications for these two units are now being prepared" (R. 82). In light of this history of delay we remain rather incredulous at Edison's additional assertion that if variances are issued in PCB 74-16 it would expect to "resubmit promptly permit applications for those stations." (R. 83-84).

Except for Waukegan 8, (which was judged to be capable of compliance), the remaining units, including Waukegan 5, 6, and 7, and Sabrooke 1 and 2, received variances from the substantive requirements of either or both the particulate or sulfur dioxide standards of Rules 203 and 204 in our recent decision PCB 74-16. That variance petition was not filed until January 11, 1974, long after the permits were originally denied and subsequent to the initiation of this enforcement action. In addition, it appears that Edison does not accept some of the terms of that variance. A Petition for Modification or For New Variance, filed on February 18, 1975, indicated that Edison may not be able to meet the sulphur dioxide limits imposed with respect to the Waukegan Units 5, 6, and 7, and Joliet Units 7 and 8, and that the coal gasification plans for Powerton 5 and Kincaid 1 and 2 have now been abandoned. In an Opinion issued February 27, 1975 the Board ordered clarification of Edison's position and determined that the Petition would be considered as a new variance petition which was subsequently assigned a new docket number -- PCB 75-100.

Edison contends that the granting of variances in PCB 74-16 serves as an absolute defense to this enforcement action. This argument relies on Section 33(c) of the Environmental Protection Act which requires the Board to consider the technical practicability and economic reasonableness of

reducing emissions. What the Board determines with regard to these factors in a variance case certainly bears upon our considerations in an enforcement case involving the same emission sources, but only insofar as the enforcement case involves alleged violations of the substantive standards a respondent claims it is technically and economically unable to meet. One of the functions of a permit program, however, as we said in In The Matter of Emission Standards, is "to aid in obtaining emission information necessary for an evaluation of the control program..." (4 PCB at 302).

Had Edison here filed a permit appeal or variance petition from the permit requirements immediately after the initial denial, and raised such issues as technical and economic feasibility, such an evaluation would have occurred long before it finally did in PCB 74-16, and saved that much time in any compliance schedule finally agreed to by the Board. Again we note that these violations are not the result of inadvertance. Nor were they ceased prior to the filing of this action. Edison was aware of the permit requirement from the beginning, but failed to institute compliance plans adequate to qualify for the necessary permits. Edison neither appealed the permit denials nor sought a variance from the permit requirement on the grounds of technical infeasibility. Such an issue was not raised until PCB 74-16 was filed -- nearly 9-1/2 months after the initial permit denials, 8-1/2 months after the date on which permits were required, and 4-1/2 months after this complaint was filed. For Edison's continued delay discussed herein, and as an aid to enforcement of the Act, we feel that more substantial penalties of $1,000 each are warranted for these fifteen generating units, for a total of $15,000.

Having considered the entire record in this matter, it is the finding of the Board that Edison violated Rule 103(b)(2) of the Regulations and Section 9(b) of the Act for each of the nineteen generating units involved herein. A civil penalty in the total amount of $17,000 is appropriate.

This Opinion constitutes the Board's findings of fact and conclusions of law.

Mr. Goodman dissents.

ORDER

It is the Order of the Pollution Control Board that:

1. Commonwealth Edison shall apply for permits required by Rule 103(b)(2) of Chapter 2, Part 2 of the Rules and Regulations Governing Air Pollution and Section 9(b) of the Environmental Protection Act.

2. Commonwealth Edison shall pay, within 35 days of this Order, the sum of $17,000 as penalty for the violations of Rule 103(b)(2) of Chapter 2, Part 2 of the Rules and Regulations Governing Air Pollution and Section 9(b) of the Environmental Protection Act. Penalty payment by certified check or money order payable to the State of Illinois shall be made to: Fiscal Services Division, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62706.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 8th day of May 1975 by a vote of 4-1.

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board