

ILLINOIS POLLUTION CONTROL BOARD
March 8, 1984

IN THE MATTER OF:)
) R81-20
ALTERNATIVE CONTROL STRATEGIES,) (Docket B)
FINAL RULE (Docket B))

ADOPTED RULE. FINAL ORDER.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

I. Procedural History

On June 2, 1983 the Final Rule in the proceeding captioned R81-20, Alternative Control Strategies was divided into two dockets. Docket A was adopted on that date and filed with the Secretary of State. Docket B, pertaining to Section 202.401: Duration (formerly Section 202.145), was published in the Illinois Register on July 8, 1983 to obtain additional public comment on the "useful life" issue. A hearing was held on Docket B on October 28, 1983. Subsequent to that hearing, an additional public comment period was allowed to enable hearing participants to summarize their views. The record which forms the basis for this rulemaking is the following: the public comment, testimony, exhibits, Economic Impact Study, (EcIS) and Orders and Opinions of the Board in R81-20 (Interim Rule) and R8120 (Final Rule, Docket A), the public comment received following the July 8, 1983 Register publication of Docket B, the transcript of the October 28, 1983 hearing, and the public comment received following that hearing.

Notice of this rulemaking was filed with the Joint Committee on Administrative Rules (JCAR) for Second Notice pursuant to Section 5.01(b) of the Administrative Procedure Act. JCAR reviewed this rulemaking at its February 23, 1984 meeting and had no objections. The Second Notice period expired on March 5, 1984.

II. Introduction to the Useful Life Issue

The Opinion accompanying Docket A of this proceeding explains the evolution of the useful life limitation in this proceeding. Briefly, the initial proposal for the Interim Rule did not address shutdown emission sources at all. However, the adopted Interim

*The Board appreciates the efforts of administrative assistant Pat Sharkey, who acted as Hearing Officer and provided assistance in drafting this rule and Opinion.

Rule did allow credit for shutdowns and also stated that an Alternative Control Strategy (ACS) permit "may not be issued for a period of time which is greater than the useful life of an emission source which contributes an emission reduction to the ACS" and noted that the burden of proof on this issue is on the applicant. Docket A of the Final Rule adopted the additional limitation that "a shutdown emission source shall be deemed to have a useful life of no more than five years."

The Board has maintained, since the adoption of the Interim Rule, that the crediting of emission reductions from shutdowns will not threaten the "environmental equivalence" goal of the ACS so long as such credits are limited in duration to the life expectancy of the emission source. (See the June 2, 1983, Opinion and Order of the Board, R81-20 (A), pp. 21-23.) However, the Board has also recognized the need to provide standards for the determination of useful life. In Docket A, the Board adopted the five year maximum limit as a "reasonable temporary solution" which would provide a definite, limited duration until a more flexible and realistic standard could be developed. This rule-making is designed to provide such a standard.

In the Docket B comment periods, two commenters reiterated their position that the "useful life" limit should be omitted entirely. (P.C. 48 and 50.) However, they do not refute the Board's finding in Docket A that absent the useful life limit air quality degradation would be allowed to occur. The Board once again notes the Economic Impact Study finding that the useful life provision will avoid air quality degradation costs of between \$6.7 and \$33.4 million. (See ECIs pp. xvi-xvii, pp. 86-126.) To eliminate the useful life provision while allowing the use of emission reduction credits from shutdowns would undermine the "environmental equivalence" standard established in the Environmental Protection Act (Ill. Rev. Stat. ch. 111 $\frac{1}{2}$, par. 1009.3) because existing pollution levels would linger on in the form of emission reduction credits beyond the normal lifetime of the emission source. Thus, the Board cannot eliminate this provision even if we accept the lower estimate of economic damages, as suggested by one commenter. (P.C. 48.)

Moreover, linking the duration of an emission reduction credit to the expected useful life of the equipment producing the credit is an equitable solution to the shutdown problem. One witness stated that the assigning of a useful life to an emission source would require complex, subjective and speculative decision making. (R. 1054-1060.) While the determination of useful life does involve prediction, the planning processes of most businesses involve making similar predictions. (P.C. 54, R. 1067.) Furthermore, the mechanism for reevaluation established in this regulation will allow the Agency and applicant to verify their original

estimates of useful life. (R. 1110-1112) The Board also notes that a clear statement of the duration of such credits should be of benefit to business planning, emission reduction "trading", and air quality management. (R. 1055, 1110.)

III. Specific Provisions of this Proposal

As stated earlier, this rulemaking will delete the five year maximum useful life for shutdown emission sources. The comments, testimony and EcIS all indicate that the useful life of emission sources vary greatly, and, furthermore, that a high percentage of the emission sources involved would have more than a five year useful life remaining upon entering an ACS. (See Exhibit No. 1, Economic Hearings, pp. 4-15.)

Instead of specifying a maximum duration, this rule provides that useful life shall be determined on a case by case basis after the consideration of "all factors which [the Agency] reasonably construes as bearing upon the useful life." Minimally, the five factors listed in subsection (b) must be considered. Other categories of considerations must be justified by the Agency as bearing upon the useful life question.

Where a shutdown emission source is providing an emission reduction for use in an ACS, the ACS permit must contain the Agency's determination of the useful life as a permit condition.* It should be noted that the useful life may be determined to be longer than the period for which a particular permit is issued. By requiring that this determination be contained in a permit condition, the Board intends that it may be appealed by the permit applicant either upon issuance of the permit or upon any renewal. Upon initial permit issuance, the applicant may prefer to accept a shorter useful life determination than it believes to be correct, and hope to persuade the Agency to extend the useful life when it comes up for review at renewal time. Since there is no advantage in forcing the applicant to appeal this condition until it actually restricts the operation of the ACS, and since there may be an advantage in allowing more information to develop over time, an opportunity for appeal of the permit condition will be available at either issuance or renewal without prejudice to the petitioner. While the mechanism of requiring the useful life determination as a permit condition was not specifically addressed, the testimony at hearing presumed that useful life would be treated as an "operating condition." (R. 1067-1088.) Furthermore, potential disagreements over useful life can best be resolved through the usual permit appeal process.

*Subsection (b) states that the Agency shall consider the useful life of all emission sources which contribute an emission reduction to the ACS. This follows from the subsection (a) limitation that "an ACS permit may not be issued for a period of time which is greater than the useful life of an emission source which contributes an emission reduction to the ACS." However, the Agency need not specify the useful life as a permit condition unless an emission reduction from a shutdown is involved.

As noted above, this rule requires that useful life be considered both upon initial issuance of the permit and upon any renewal. A great deal of the October 28, 1983 hearing focused on the "reevaluation" issue. (See R. 1048-1116.) Most witnesses at that hearing agreed that a reevaluation of useful life upon application for renewal was appropriate, if not implicit. (R. 1049-1050, 1081.) At such time, new information or a change in circumstances may indicate that the actual useful life of the emission source involved has turned out to be either longer or shorter than originally predicted. Where a shutdown emission source is involved, the applicant and the Agency will look at comparable emission sources when reevaluating the predicted useful life of the now shutdown and long-gone equipment. (R. 1115-1116) Clarifying the fact that an opportunity for reevaluation is available should alleviate some of the concern about under or over predicting useful life. It provides an ongoing mechanism for linking the duration of credits to what is actually occurring in the industry involved.

Five factors are listed in subsection (b) which the Agency must consider as a minimum. Generally stated, the Agency's review will begin by looking at the anticipated useful life of the emission source and then add or subtract from that original projection based upon the physical condition, technological acceptability, and economic viability of the emission source. It will also test this projection against the demonstrated useful life of other similar emission sources, particularly where the emission source itself is shutdown. Subsections (b)(1) and (5) were proposed in the Illinois Register publication and have been retained as they are necessary components of the review process. Subsections (b)(2), (3), and (4), as adopted here, were developed in response to comments received following the Illinois Register publication.

Subsection (b)(2) focuses on "the physical condition of the principal components." The Illinois Register publication specified that the age, level of use and wear, and operating efficiency of the principal components were to be considered by the Agency. (See former subsections (b)(2), (3), and (4).) These considerations all relate to the physical condition of the emission source. (P.C. 49, R.1070.) However, rather than list these specific points, the Board has chosen to use the more general term "physical condition" in subsection (b)(2) in order to provide a focus on the actual underlying concern with how well and how long the equipment can physically be expected to operate.

Subsection (b)(3) and (4) focus on technology and economics, respectively. Witnesses at the October 28, 1983 hearing, pointed out that considerations other than the physical condition of an emission source may also dictate its useful life. (R. 1068-1147.)

For example, the useful life of an emission source may be cut short when advances in technology or in the field make it obsolete or technologically unacceptable to the industry. In addition, the physical useful life may be shortened when the operation of an emission source becomes economically unviable, e.g. the product line is phased out. These considerations are valid because the duration of an emission reduction credit should parallel the operating lifetime that an emission source would have had had it not been used in a ACS.

Examples were presented in the record of technological and economic conditions which may affect the useful life of an emission source. (R. 1068-1070.) Simply stated, although an emission source may be technologically current and viable at the outset of an ACS, conditions in the industry may be anticipated to change during the term of the ACS. Where this is foreseeable at the outset, the useful life may be geared to these anticipated changes. Where these changes were not foreseen at the outset, but are foreseen or have actually occurred by the time of renewal, the useful life may appropriately be shortened or lengthened to reflect these changes. *

Subsection (b) has been revised to reflect the factors discussed in the preceding paragraphs. However, the Board has declined to include some of the detailed language on these points which was proposed in comments and the hearing testimony. (P.C. 46,49, and 51; R. 1149-1179.) Where such detail merely provides examples, (R. 1137-1143.) the Board is not persuaded that it is helpful, and, in fact, believes it might unduly focus the review on what, in practice, may turn out to be inapplicable or ineffective predictors of useful life. (R. 1043.) It may also imply that other predictors are less valid. (R. 1166.) There is not enough information in this record for the Board to determine whether "profit margins," "product quality," "corporate marketing strategies" or other suggested "examples" of these factors are

*On a point related to the "economic viability" consideration, one witness raised a question as to whether the useful life provision should be clarified to insure that an emission source which is planning to eventually shutdown for solely economic reasons could not obtain an emission reduction credit for that period. (R.1149-1151.) This should not be necessary. Both the Act and ACS rules require the impact of the ACS to be environmentally equivalent to that which would otherwise be achieved and maintained under existing requirements. Therefore, under the existing language no credit is available in such a situation. (See June 2, 1983 Opinion and Order of the Board, R81-20, Docket A, pp. 15-16, 21.) The Board also notes that the shifting of production to another emission source outside the ACS would be prohibited by Section 202.306(b) in conjunction with 202.111(b).

valid predictors of useful life. Until more information is developed on these points, the Board believes it would be unwise to require the Agency to consider them in every situation, as would be required by the proposed amendments. Rather, those factors which the Agency "reasonably construes as bearing on the useful life" will provide the standard for review of appropriate predictors. As one witness pointed out (R. 1139), there is no right to third party appeals on these permit decisions; however, this is not unlike other permit decisions. Furthermore, as stated above, the Board does not believe the proposed detail would provide greater protection of the public interest than a comprehensive review of all relevant predictors.

Finally, this rule contains a new subsection (c) which explicitly requires the Agency to make an appealable record of what it has considered and the basis of its useful life determination. While this information would not appear in the permit, it would form a part of the permit file and provide a basis for Board review on appeal.

ORDER

Section 202.401: Duration

- a) A permit containing an ACS shall be issued for no longer than five years, or for such shorter period as the Agency may specify as necessary for periodic review of the ACS or to accomplish the purposes of the Act or of this Chapter. However, an ACS permit may not be issued for a period of time which is greater than the useful life of an emission source which contributes an emission reduction to the ACS. The burden of proving the useful life of the emission source is on the applicant. ~~For the purpose of this section, a shutdown emission source shall be deemed to have a useful life of no more than five years.~~
- b) Upon the initial issuance or renewal of an ACS permit, the Agency shall consider all factors which it reasonably construes as bearing upon the useful life of an emission source which contributes an emission reduction to the ACS. Where a shutdown emission source contributes an emission reduction to an ACS, the Agency shall specify the useful life of the shutdown emission source in a permit condition. Factors which the Agency considers shall include, as a minimum:
- 1) The anticipated useful life of the principal components of the emission source upon purchase;

- 2) The physical condition of the principal components of the emission source;
 - 3) The technological acceptability of the emission source;
 - 4) The economic viability of the emission source; and
 - 5) The demonstrated useful life of emission sources of the same category or functional type.
- c) The Agency shall make a record of the factors considered and the basis for its initial or modified determination of useful life made pursuant to subsection (b).

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 8th day of March, 1984 by a vote of 6-0.



Christan L. Moffett, Clerk
Illinois Pollution Control Board