ILLINOIS POLLUTION CONTROL BOARD
December 30, 1982

MOBIL CHEMICAL CO.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 79-209
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

EUGENE W. BEELER AND S. KEITH COLLINS (MANGUM, BEELER, SCHAD & DIAMOND) APPEARED ON BEHALF OF PETITIONER; AND

E. WILLIAM HUTTON APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board on the October 3, 1979 petition for review of certain conditions of NPDES Permit No. IL0032182 filed by Mobil Chemical Co. (Mobil). This permit concerns discharges from two outfalls located at Mobil's De Pue, Bureau County, fertilizer manufacturing plant. As to Outfall 001, Mobil challenges imposition of a 15 mg/l total suspended solids (TSS) limitation because of Agency denial of background credit pursuant to Section 304.103* [formerly Rule 401(a) of Chapter 3], imposition of a 6.0-9.0 pH limitation "at all times", failure to identify all discharge constituent streams, and a requirement of semi-annual monitoring for contaminants listed in Section 304.124 [formerly Rule 408 of Chapter 3], and a prohibition of discharge of "other contaminants" not listed in the permit. As to Outfall 2, Mobil challenges the choice of water quality sampling locations (on the basis that it discharges into an industrial ditch rather than a "water of the State"), the failure to include a compliance schedule with interim standards for this outfall, and a prohibition of discharge of "other contaminants" not listed in the permit. Pursuant to the Board's Order of October 18, 1979, these conditions have been stayed during the pendancy of this appeal.

On February 23, 1982 Mobil petitioned for variance from the 15.0 mg/l TSS standard for Outfall 001, and for interim effluent limitations for Outfall 002. On March 4, 1982 the Board denied a motion to consolidate this permit appeal with the variance request. (The requested variance was granted in PCB 82-18, November 12, 1982, which Opinion will be referred to herein as appropriate.)

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*All section numbers reference 35 Ill. Adm. Code.

Hearings were held in this matter on February 26 and March 12, 1982.* At the brief first hearing, at which no members of the public were present, the Agency presented the testimony of Helen Lai and tendered its Group Exhibit 1, a copy of its record, and Exhibit 2, a topographical map. At the March hearing, at which members of the public were present, Miss Lai was present for cross examination and De Pue area residents Donald Bosnick, Kathryn Zawacki and Eileen Baily presented testimony on behalf of the Agency concerning the stream receiving Mobil's discharge. Mobil presented no evidence, but moved to continue the hearing and made an offer of proof as to what its witnesses (not then present) would testify. The motion and offer were denied.

The Hearing Officer also ruled upon Mobil's March 9 Motion to Admit and to Exclude Materials from Agency Record. Following the arguments of counsel, the motion was denied as to all but one document, and Agency Group Ex. 1 was admitted (as was Ex. 2).

Mobil did not file an opening brief. In response to the Agency's May 24, 1982 brief, Mobil sought review of various Hearing Officer rulings and arguably for the first time raised the issue of the Agency's lack of compliance with Section 309.108 [formerly Rule 905 of Chapter 3], citing Olin Corp. v. IEPA, PCB 80-126, February 17, 1982. Pursuant to leave granted by the Board August 18, 1982, the Agency's supplemental brief was filed September 1 and Mobil's September 13.

Prior to deciding the contested issues, the Board notes that the Agency has agreed to revise the "other contaminants" condition concerning each outfall in accordance with the Board's decision in Caterpillar Tractor Co. v. IEPA, PCB 80-3, February 5 and June 10, 1981.

THRESHOLD ISSUES

Agency Record As Filed

Agreement having been reached at hearing as to most items specified in its March 9, 1982 motion, Mobil contends that four items should be stricken from the Agency record. The first two are letters of November 6, 1978 and January 19, 1979 indicating that lime was being added to the cooling water stream. These were admitted, over relevancy as well as general objections noted below. The next is a memorandum dated February 23, March 23, and May 12, 1977 regarding an inspection of Mobil's facility and that of the New Jersey Zinc Corp. This was excluded as it predated Mobil's application for the instant permit. The final item is a list of names of persons present at a July 11,

*As the transcripts were not sequentially numbered, the February hearing transcript is referred to as "1R.", and the March are as "2R.".

1979 meeting between Mobil and the Agency. No specific ruling was made as to this item. Mobil's general objections are that 1) existence of these items were not disclosed prior to permit issuance, 2) there is no indication as to when specific items were included in the Agency record, and 3) there is no indication of the extent to which the Agency relied on a particular document.

The Board has consistently stated that, for its permit review to be meaningful, "the Agency record is to include all material and relevant facts upon which the Agency relied in making a determination" County of LaSalle et al. v. IEPA, et al., PCB 81-10, March 4, 1981. Error, if any, should be made on the side of inclusion of materials, rather than exclusion of them. The Board does not construe Section 105.102(b)(5) [formerly Procedural Rule 502(a)(5)] or Section 309.109(a) [formerly Rule 906(a) of Chapter 3] as a limitation of the items to be included in the Agency's record, if relied upon; rather these rules establish the minimum amount of information to be considered by the Agency and presented to the Board.

If Mobil's other arguments were to be accepted, and the Agency were to be required in every case to state specifically when (already dated) items are included in a record, to assign each document some sort of rating for degree of reliance, and then to disclose the entire file to an applicant prior to permit issuance, an already cumbersome permitting process would become a nightmare of useless bureaucratic paper shuffling. The Board finds that all of the above items were properly included in the Agency record. As to the relevancy of the 1977 inspection memorandum, the Board finds that the historical overview presented of the facility could properly have been relied upon.

Statement of Basis of Permit Conditions

After filing its permit renewal application on October 20, 1978, Mobil neither objected to, nor commented on the Agency's initial Proposed Draft Permit and Joint Public Notice/Fact Sheet sent out on December 12, 1978.* A second and quite different Proposed Draft Permit and Joint Public Notice/Fact Sheet was issued on April 6, 1979. Mobil responded on May 4, 1979, with written objections as to certain conditions the Agency proposed to include in the NPDES Permit, with inquiries as to why such conditions were being included, and with factual information supporting its objections (Agency Rec. 15). Mobil thereupon requested and the Agency agreed to an informal meeting involving

*Item 8 of the Agency's Index entitled "Summary of Agency Record (Agency Rec. 8) refers to this Proposed Draft Permit and Joint Public Notice/Fact Sheet, but this was omitted from the Agency Record on appeal filed with the Board on November 6, 1979. This should have been included in the Agency Record, but the Board finds that failure to do so does not ammount to prejudicial error.

representatives of both parties in order to discuss and attempt to resolve these objections (Id. 16). This meeting occurred on July 11, 1979 as reflected in the correspondence between the parties (Id. 17, 19); further, certain statements were made based upon this informal meeting regarding certain contested items, specifically:

> °pH would be deleted as a parameter upon installation by Mobil of the C.I.L. cooler to replace existing sulphuric acid cooling coil;
>
> °the Agency opposed in principle allowing Mobil credit for background TSS concentrations in its outfall 001 which are present in the intake water drawn from the Illinois River solely because of the presence of non-process incidental plant streams in the non-contact cooling water discharge irrespective of whether any measurable amounts of TSS are contained in such streams;
>
> °the Agency agreed to consider characterizing the unnamed ditch so as to require that Mobil comply with standards for purposes of its outfall 002, and to characterize Negro Creek as the "receiving water" for purposes of complying with applicable water quality standards (Id. 19).

The Agency then issued the final NPDES Permit on September 7, 1979 (Id. 2). This did not include the modifications. The permit reflected the Agency's subsequent determination that no qualification for equipment replacement was to be made concerning pH, that no TSS background credit should be given, and that the unnamed ditch should not be classified as an "industrial ditch". No accompanying statement for its actions was provided regarding these, or any other issues.

Section 309.108 (formerly Rule 905 of Chapter 3) provides in pertinent part that:

"Following the receipt of a complete application for an NPDES Permit, the Agency shall prepare a tentative determination. Such determination shall include at least the following:

a) ...

b) If the determination is to issue the permit, a draft permit containing:

1-2) ...

3) A brief description of any other proposed special conditions which will have a significant impact upon the discharge.

c) A statement of the basis for each of the permit conditions listed in Section 309.108(b).***"

As noted, the Agency has provided no such statement of basis for any condition contained in the permit.[1] Mobil therefore argues that this action should be remanded based on Olin, supra.

Olin involved a permit condition requiring a facility process evaluation to determine the presence or absence of any of 129 toxic pollutants. Olin contended that it could not determine the basis of the condition until after the appeal was filed, affording it access to the Agency Record and discovery. The Board found that:

> "Had the Agency included a statement of the basis of the special conditions with the draft permit, Olin could have refuted the basis in its comments on the draft. A proper record for Board review would have resulted. The Board holds that Rule 905(c) required a statement of basis of the FPE condition in this draft permit" (Id at 5).

The permit was therefore remanded.

The Agency argues that Olin is distinguishable, in that here a) a "statement of basis" was provided by information contained either in the Joint Public Notice/Fact Sheets or at the July 11 meeting, and b) because of this, Mobil had opportunity to submit any relevant information challenging these conditions prior to permit issuance.[2] (The Agency reviewed each of the contested conditions in its brief, which discussion will not be set forth here. See Agency Supp. Br. of Sept. 1, 1982 at 4-6).

The Board finds that the intent, if not the letter, of Section 309.108 was satisfied in this case, that the record before the Board has not been adversely affected, and that Mobil has suffered no prejudice. Accordingly remand of this action on this ground would not be in the interests of administrative economy.

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[1] Mobil also cites federal NPDES permit regulations found at 40 CFR §124.17(a). In summary this requires states issuing a final permit decision to state reasons for change between draft permits and final permits, and to respond to significant comments on draft permits. The federal regulation has no direct analog in Board regulations, and so is not controlling.

[2] The Board also notes that the lack of a statement of basis was raised by Olin in its initial appeal for review, whereas Mobil has raised this issue for the first time by way of response brief.

De novo Hearing Issues

Mobil cites 35 Ill. Adm. Code 105.102(a)(8) [formerly Procedural Rule 502(a)(8)] and Borg-Warner Corp. v. Mauzy, 427 N.E.2d 423, 100 Ill. App.3d 962 (5th Dist. 1981) in support of the proposition that it should receive a de novo adjudicatory-type hearing at which

> "to submit additional evidence, including test data, engineering investigations and reports, and further witness testimony and exhibits which were not previously submitted at the Agency level and, indeed, which were not available or had not been developed until after the Agency's 'final' permit was issued on September 7, 1979 (2R. 34-40)" (Pet. Br. at 5).

Borg-Warner does not support this contention, as it does not focus on the de novo vs. review of the Agency record issue. Olin, however, does interpret Section 105.102(a)(8):

> "The hearing de novo provisions must be construed narrowly; otherwise permit applicants will be tempted to withhold facts at the Agency level in hopes of a more friendly reception before the Board. This would encourage appeals and would place the Board in a position of being the first agency to evaluate the factual submissions. This would distort the separation of functions in the Act.
>
> The fourth sentence allows a hearing de novo only with respect to 'any disputed issues of fact.' This refers only to an Agency factual determination which was disputed before the Agency" (p. 4).

No issues of fact, as opposed to issues of law, were disputed at the Agency level. Failure to submit data does not amount to a factual dispute. Therefore the Board finds that Mobil is not entitled to a de novo hearing.

THE CONDITIONS

Outfall 001
Section 304.103 and TSS Background Credit

Section 304.103 "Background Concentrations" states that

> "Because the effluent standards in this Part are based upon concentrations achievable with conventional treatment technology which is largely unaffected by ordinary levels of contaminants in intake water, they are absolute standards that must be met without subtracting background concentrations. However, it is not the

> intent of these regulations to require users to clean up contamination caused essentially by upstream sources or to require treatment when only traces of contaminants are added to the background. Compliance with the numerical effluent standards is therefore not required when effluent concentrations in excess of the standards result entirely from influent contamination, evaporation, and/or the incidental addition of traces of materials not utilized or produced in the activity that is the source of the waste."

In the second draft permit, the Agency did not provide background credit for TSS as it did for fluoride and ammonia. Mobil's permit data showed influent concentrations of 59.2 mg/l, but effluent concentrations of 39.7 mg/l based on monthly grab samples (Agency Rec. 4, p. II-6). At the July 11, 1979 meeting the Agency indicated that its disallowance of background credit was based on the addition of internal plant waste streams to non-contact cooling water (Agency Rec. 19, p. 2). Mobil argues, first, that the Board must define "traces", and then that Mobil must be allowed to submit evidence of the quantity of TSS involved in each added waste stream.

The Agency cites a few cases involving background credit rulings: two in which background credit was denied, East St. Louis and Interurban Water Co. and Alton Water Co. v. IEPA, PCB 76-297, 298 (consolidated), February 17, 1977 and Texaco, Inc. v. IEPA, PCB 77-154, December 8, 1977, and one in which background credit was allowed even though materials were being added to cooling water Central Illinois Public Service v. IEPA, PCB 74-145, 148, 149 (consolidated). The Agency argues that CIPS should be abandoned, for reasons not entirely clear.

The Agency further argues that it would, in any case, have been unable to make a determination based on the information provided by Mobil as a) no evidence was presented indicating the amount of suspended solids added relative to background levels, and b) it has questions concerning the sampling methodology used in producing the influent/effluent concentrations provided.

The Board need not reach the questions of further defining "traces", or of repudiating CIPS. Based on the lack of information at the time of permit issuance, the Agency's denial of background credit was proper. (The Board notes that much of the lacking data was provided in PCB 82-18, p. 2-5, in which a TSS variance was granted.)

pH Limitation

The pH limitation itself is that requested by Mobil. As it relates to the operation at the time of application, Mobil is apparently concerned about the "limited at all times" language,

but does not explain the source of its problem. The Agency notes that Mobil did not object to inclusion of this language in its draft permit. It further notes the words "as follows" appear after the limitation language, and that "as follows" refers to specific limitations and the sampling frequencies by which compliance is judged.

It would appear then that Mobil's concern relates to Agency failure to provide for deletion of the parameter upon installation by Mobil of the CIL cooler to replace existing sulphuric acid cooling coil (Agency Rec. 19). While deletion of the Chapter 3-based parameter would be a proper subject of a permit modification once replacement actually occurred, the Board finds that the Agency was justified in including the condition as it related to existing equipment.

Omission of Names of Waste Streams Contributing to Process Stream

Mobil does not address this, while the Agency agrees that the request to add names has merit. It notes that this does not, however, effect the validity of the permit as issued. The omission is upheld, as the Agency is technically correct, although the omission should be remedied.

Semi-Annual Contaminant Monitoring

The condition, requiring monitoring for contaminants listed in Section 304.124, was imposed as to both outfalls, and was contained in the draft permit. Mobil commented that many of these contaminants were not characteristic of its discharge, but provided no sampling data in support of the claim.

The Agency supports the conditions on the basis of its authority under §39(b) of the Act to impose conditions as "may be required to accomplish the purposes and provisions of this Act". It argues that such access to continuing monitoring data allows it to verify information in the permit application concerning the nature of the discharge, and to determine whether the nature of the discharge changes. As this condition lies within the Agency's authority, and as Mobil did not avail itself of an opportunity to support its general objection with data, the condition is sustained.

Outfall 002
Unnamed Tributary of Negro Creek

Ground seepage from Mobil's gypsum pond flows into an unnamed ditch tributary to Negro Creek, which is tributary to the Illinois River (see PCB 82-18, p.5). Were this ditch found to be an industrial ditch, effluent limits and hence sampling points would be established at the point where the ditch enters Negro Creek,

rather than at the point of Mobil's discharge. The unnamed ditch does not join Negro Creek within the limits of Mobil's property, but instead flows past two homes about a mile downstream of Mobil's discharge before flowing into the creek.

In determining whether a stream is an industrial ditch as opposed to a "water of the State", the Board looks to three criteria, as set out in IEPA v. Jobe, PCB 80-214, January 7, 1982:

1. Whether the stream or ditch is a natural depression or waterway or is instead artificially constructed or maintained:

2. Whether there is public acess to or use of the waters; and

3. Whether the waters support aquatic life.

Mobil does not argue that the criteria are not satisfied, arguing only that it had not been informed of the classification prior to issuance. The condition is sustained (Citizen testimony concerning the nature of the stream is set out in PCB 82-18, p. 7).

Compliance Schedule

No delayed compliance schedule concerning the gypsum pile discharge was included, based on the Agency's legal interpretation that Section 309.148(f) prohibited it from doing so. The section provides that:

> "The Agency may establish schedules of compliance in NPDES Permits pursuant to applicable federal requirements which may be earlier or later than deadlines established by otherwise applicable regulations of the Board, provided that all schedules of compliance shall require compliance at the earliest reasonable date. However, the Agency shall not issue an NPDES Permit containing a schedule of compliance beyond July 1, 1977, or any other compliance date established by federal law, to any applicant who is not in compliance with, or who has not obtained a variance from applicable Illinois Water Pollution Regulations, or who has not been ordered to apply for and obtain all necessary permits in an appropriate Board enforcement action, for which the deadline for compliance occurred before the effective date of these NPDES Regulations."

Section 301(a)(1)(A) of the Federal Water Pollution Control Act set forth a deadline of July 1, 1977 for compliance with the BPT standard set forth in 40 CFR §418.10. As this deadline had passed prior to the October 24, 1977 effective date of the NPDES regulations, the Agency determined that variance relief was necessary before a compliance schedule could issue, as no enforcement order was outstanding.

Mobil argues that a compliance schedule should have been issued, based on extension of BAT compliance deadlines by 1977 amendments to the Federal Clean Water Act.

While Section 309.148 is admittedly turgid, the Agency's interpretation is correct. Failure to include a compliance plan and interim standards was not in error. (Grant of variance in PCB 82-18 now allows for inclusion of interim standards and a compliance schedule.)

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

ORDER

The Board upholds the permitting decisions made by the Agency in granting NPDES Permit No. IL0032182. The permit is, however, remanded for modification as to the "other contaminants" condition consistent with Caterpillar Tractor Co. v. IEPA, PCB 80-3, February 5, and June 10, 1981, and as to the conditions affected by the variance granted in Mobil Chemical Co. v. IEPA, PCB 82-18, November 12, 1982.

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 30th day of December, 1982 by a vote of 5-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board