ILLINOIS POLLUTION CONTROL BOARD
March 5, 1987

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| SCHROCK/A TAPPAN DIVISION, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | PCB 86-205 |
| | ) | |
| ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, | ) | |
| | ) | |
| Respondent. | ) | |

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes to the Board on a November 20, 1986, petition for variance filed by Schrock/A Tappan Division (hereinafter "Schrock"). The petition requests a two-year variance from the particulate emission limitations of 35 Ill. Adm. Code 212.204, as those regulations might apply to Schrock. Schrock asserts that the correct resolution of this matter is to deny the variance as unnecessary, after a determination that Section 212.204 does not, in fact, apply to Schrock's boiler when using wood fuel. The Illinois Environmental Protection Agency (hereinafter "Agency") filed a variance recommendation on January 8, 1987, asserting that Section 212.204 does apply to Schrock's facility and that Schrock's petition for variance should be denied for failure to demonstrate an arbitrary or unreasonable hardship as required by Section 35 of the Environmental Protection Act (hereinafter "Act"). Hearing was held on January 22, 1987. Final briefs were filed by Schrock on February 13, 1987, and by the Agency on February 17, 1987. On February 17, 1987, the parties filed a joint motion for expedited consideration. That motion is granted to the extent that the Board has attempted to expeditiously decide this matter.

Schrock owns and operates a manufacturing plant located in Arthur, Illinois, in the County of Moultrie where it manufactures wooden cabinets. Schrock employs approximately 600 employees, making it the largest single employer in Moultrie County. An 8 million BTU per hour ("8 MBTU/hr or 8 mmbtu") Kewanee water tube boiler is used at the plant to provide building heat during the heating season. This boiler is capable of burning oil, gas or wood residue. Normal firing practices are to start the boiler with either gas or oil, and after the boiler is brought up to operating temperature, fire the boiler with wood residue. Approximately one-half ton of wood residue is burned per hour. The boiler was originally installed in 1978 and was modified to burn wood residue pursuant to a construction permit issued on October 22, 1979. An operating permit was issued on February 19,

1981, which expired on February 11, 1986. Schrock experienced severe firing upset problems when firing the boiler with wood residue. As a result, Schrock determined that it was necessary to rebuild the boiler. Schrock applied for a construction permit which was issued on September 3, 1985. The construction permit authorized the reconstruction of the boiler and the removal of the original fabric filter. The permit required that Schrock conduct a stack test prior to applying for an operating permit. A new mechanical particulate collection system consisting of a multicyclone was installed to replace the fabric filter. This multicyclone was designed to meet a particulate level of 1.0 pound per MBTU ("lbs/mmbtu"). A stack test conducted on January 21 and 22, 1986, demonstrated a particulate emission rate of 0.2775 lbs/mmbtu. Schrock applied for an operating permit on February 11, 1986, when it submitted these stack test results (Pet., PP 1-4).

On May 7, 1986, the Agency denied the requested operating permit. Schrock requested that the Agency formally reconsider this denial on September 10, 1986. The Agency issued Schrock a permit on October 17, 1986, authorizing operating with No. 2 fuel oil or natural gas and denied operation on wood or sawdust fuel. The stated basis for both the May 7, 1986, and October 17, 1986, denials as to wood residue is that 35 Ill. Adm. Code 212.204 establishes an emission limitation of 0.10 lbs/mmbtu and that the boiler stack tests show that the emission rate is 0.28 lbs. of particulate matter per million BTU. On November 20, 1986, Schrock filed this petition for variance and an appeal of the operating permit denial (PCB 86-204; no hearings are presently scheduled in the permit appeal; a decision is presently required by May 30, 1986). Thus, the first issue the Board must consider is whether variance is, in fact, necessary. The Board must decide whether the particulate emission limitations of Section 212.204 apply to the Schrock boiler when it is fired with sawdust fuel.

The regulation at issue in this proceeding has a long and complicated procedural history. On April 13, 1972, the Board first adopted regulations controlling the emission of air pollutants, including particulates (R71-23). Those regulations contained Rule 203(g)(1)(D), which, with minor semantic changes, is identical to the present 35 Ill. Adm. Code 212.204. Commonwealth Edison filed a petition to review those rules in the First District Appellate Court. Commonwealth Edison asserted that it was not technically feasible and economically reasonable for a coal-fired generating source to simultaneously comply with the particulate regulations of Rule 203(g)(1) and the sulfur dioxide emission limitations of Rule 204. The appellate court in Commonwealth Edison Company v. Pollution Control Board, 25 Ill. App. 3d 271, 323 N.E.2d 84 (1975), reversed the adoption of those rules and remanded them to the Board for further consideration with instructions either to validate them in accordance with Section

27 of the Environmental Protection Act (Act) or to prepare proper rules as substitutes. In its opinion, the appellate court was "unable to state that the Board took into account the technical feasibility of these rules," and that "there is no evidence that the Board took into account the economic reasonableness of these rules for a substantial number of the generating units in this state." The court concluded that the regulations were not promulgated in accordance with Section 27 of the Act and were, therefore, arbitrary and unreasonable. The court also instructed the Board to review any new evidence for the purpose of validating or modifying the rules.

The appellate court decision was appealed by the Board to the Illinois Supreme Court. Commonwealth Edison Company v. Pollution Control Board, 72 Ill. 2d 494, 343 N.E.2d 459 (1976). The Supreme Court, rather than reviewing the record and Board Opinion to determine whether the Board had complied with Section 27 of the Act in promulgating the regulations, declined "to determine the validity of Rules 203(g)(1)...on the basis of evidence adduced at hearings held in 1970, 1971 and 1972 and the Board Opinion of April 13, 1972." Instead, it affirmed the appellate court's reversal and remanded for further consideration, citing the appellate court's reference to the "wealth of new information" that had been gathered in the Board's inquiry hearings (R74-2 and R75-5, respectively).

On April 8, 1976, the Board entered an Order in R71-23, reopening the record for the purpose of validating Rule 203(g)(1) and ordering the record in the consolidated proceedings, R74-2 and R75-5, to be incorporated into the record in R71-23. Two subsequent hearings were held on R75-5 and R74-2, consolidated, in May, 1976. The Board took the position that further hearings were unnecessary in order to comply with the Supreme Court's mandate which invited the Board to validate the regulations in question in light of information gathered at the hearings held subsequent to the original proceedings. The Board reviewed the testimony and exhibits in the three proceedings and, based on the information available in these records, and taking into consideration the issues identified by the courts, validated Rule 203(g)(1) on July 7, 1977.

The validation of the rule was, however, unsuccessful. On September 27, 1978, the rule was again struck down when the Third District Appellate Court found that the Board had failed to consider intermittent control systems, had failed to have an economic impact study prepared and had improperly considered a report (the "Marder Report") which included references to material not of record, without affording an opportunity for opposing viewpoints to be presented. Ashland Chemical Company v. Pollution Control Board, (1978) 64 Ill. App. 3d 69. The Board did not appeal that decision. The Board did, however, attempt to appeal a similar decision in the First District, but was

precluded from doing so by the Supreme Court which held that the Board was estopped from such appeal because it had failed to appeal the Ashland decision which concerned the same issue. The Illinois State Chamber of Commerce, et al. v. The Pollution Control Board, 67 Ill. App. 3d 839, 384 N.E.2d 922 (1978).

Consequently, in 1982, the Board opened a new docket (R82-1), conducted hearings, received an economic impact statement and on July 2, 1986, finally adopted regulations governing particulate emissions. Those regulations were not appealed and have been in full force and effect since filed on July 9, 1986.

From this review, several factors are apparent. First, at all times pertinent to the September 10, 1986, request for reconsideration of denial, through the October 17, 1986, denial, the rules were in full force and effect. Second, the actual language at issue has not changed since originally promulgated in 1972. And finally, no court has ruled upon (or been asked to rule upon) the issue of the validity of that regulation as applied to wood fueled sources. Thus, the Board can properly evaluate this issue as a matter of first impression.

Schrock's arguments against the applicability of Section 212.204 to wood-fired sources can be distilled into three concepts. First, the regulation is "unclear" or "ambiguous" on its face. Second, where a rule is ambiguous, interpretation must rely on the intrinsic and extrinsic aids (context, word usage and administrative record) to disclose its meaning and those aids demonstrate the Board did not intend to regulate non-coal-fired sources. And third, if the regulation intends to regulate non-coal-fired sources, it is invalid as not supported by the record.

The Board rejects Schrock's argument that Section 212.204 is unclear or ambiguous. That section provides:

> **Section 212.204 New Sources Using Solid Fuel Exclusively**
>
> No person shall cause or allow the emission of particulate matter into the atmosphere in any one hour period from any new fuel combustion emission source using solid fuel exclusively to exceed 0.15 kg of particulate matter per MW-hr of actual heat input (0.1 lbs/mmbtu).

This section uses the words "solid fuel" to mean a fuel which is a solid; no other meaning is possible. In other portions of Part 212, the Board has regulated combustion emission sources using liquid fuel (Section 212.206), meaning a fuel which is a liquid. The terms solid, liquid and gaseous are used throughout the Board's regulations and the Environmental Protection Act (e.g., Section 3(d)) without further definition. They are terms

of common knowledge and a basic element of our language. Schrock has completely failed to show why the term solid fuel is ambiguous or unclear. Nor has Schrock argued that there is ambiguity regarding whether wood is a solid, as opposed to a liquid or gaseous material.

The Board notes that Schrock's arguments on ambiguity are somewhat circular. Schrock argues that the language in the Board's adopting Opinion provides the ambiguity for the regulatory language which then justifies looking beyond the regulatory language to the language of the Opinion. If the language of the regulation is clear on its face, as it is in this proceeding, there is no justification for looking beyond it.

While the Board does not concede that the regulatory language is unclear and ambiguous, an examination of the Opinion results in no ambiguity either. It is not surprising that the language of the Opinion discusses coal-fired sources at great length. The Board's solid fuel regulations had been challenged successfully twice by interests utilizing large coal-fired boilers. In such circumstances, it was appropriate for the Board to pay particular attention in the Opinion to the effect such regulations would have on those coal-fired boilers. The Opinion supporting large regulatory efforts seldom discuss all aspects of the regulatory action. Instead, they focus on discussing the issues which have been brought to the forefront by the testimony and exhibits in the proceeding. When clear regulatory language generates no controversy at hearings, it generally receives little discussion in the Opinion.

Schrock's last argument pertaining to the applicability of the regulations to wood-fired boilers is that Section 212.204 is invalid if interpreted to apply to wood-fired sources in that it lacks an adequate record to support it. Specifically, Schrock asserts the rule is invalid unless the record contains evidence that a substantial number of sources can comply. Commonwealth Edison v. PCB, 25 Ill. App. 3d 271, 287-288, 323 N.E.2d 84 (1974). Schrock asserts that the record in this proceeding demonstrates that there are seven wood-burning sources subject to the rule (as the Agency interprets the rule) and that only one is in compliance.

The validity of a regulation, as adopted, should be determined by the record that existed when the regulation was adopted. At the time the Board adopted Section 212.204, the record in that proceeding (R82-1) contained the Economic Impact Statement ("EcIS"). The EcIS evaluated the impact of the proposed regulations on a variety of solid fuel sources in Illinois. In particular, the EcIS evaluated the impact of the proposed regulations on two facilities using wood or sawdust as fuel (Lenc Smith Manufacturing Company and Ello Furniture; EcIS, pp. 70-74). In summarizing the impact of the regulations

(including the impact on the wood-fired facilities), the EcIS concluded:

> Because so few sources remain out-of-compliance, repromulgation of Rules 203(g)(1) and 202(b) is not expected to impact very noticeably on the Illinois economy. Hence, Board approval of R82-1 should have little effect on the overall availability of goods and services to the people of the state, nor should it have much impact on agriculture, local government, commerce or industry. Of course, if the avoidance of nearly $400 million in Clean Air Act penalties is assumed to result from revalidation, then it follows that all of those sectors will experience a significant benefit in the form of averted funding losses and the associated secondary effects (EcIS, p. vi).

The Board found that the particulate standard was technically feasible and economically reasonable based on a record that evaluated 30 sources which were not then in compliance with the proposed regulation (which included the two wood-fired sources) (R82-1, Opinion and Order, July 2, 1986). Schrock has presented no information from the R82-1 record to show that the regulation is not supported by the record that existed at that time. The Board notes that at the time of the EcIS, Schrock seems to have been in full compliance with the regulation and, hence, was not one of the 30 sources evaluated. Since Schrock has not demonstrated that the record in R82-1 is inadequate to support application of the rule to wood-fired sources, that argument is rejected by the Board.

In a similar vein, it would be difficult for the Board to determine that Schrock is not capable of compliance in a technically feasible and economically reasonable manner. From February, 1981, until September, 1985, Schrock utilized a baghouse for pollution control of particulates and its opertions met the 0.1 lbs/mmbtu standard (Rec. p. 6). In 1985, Schrock changed its pollution control device to a multicyclone that was designed to meet a 1.0 lbs/mmbtu emission limit (R. 28). In other words, Schrock went from compliance to non-compliance by an intentional engineering change to its pollution control equipment. Regardless of who is responsible for the result, it is clear that the non-compliance is due to a planning error rather than a technological or economic restraint on Schrock's capacity to comply.

One aspect of Schrock's argument deserves particular attention. There are five wood-fired sources which are identified in this proceeding as being subject to a 0.1 lbs/mmbtu

limit; a sixth is still under construction*. One source (Bally Lynx Smith) is presumed to be in compliance based upon evaluation of the control equipment. One source (Caradco) has demonstrated compliance. Two sources (John Boos and Coppers) are presently out of compliance. And, one source (Schrock) was in compliance but is not presently in compliance (R. 144-149). The Board cannot make any determinations from these facts about whether compliance with a 0.1 lbs/mmbtu standard is technically feasible or economically reasonable for wood-fired sources. The Commonwealth Edison court did not invalidate the Board's regulations because a large number of sources were not in compliance; it invalidated the Board's regulations because the record did not demonstrate that the standard was "capable of compliance by a substantial number of individual units in this state." Id. at 323 N.E. 2d 95. The record here today demonstrates that three of the six sources (Schrock, Bally and Caradco) are "capable" of compliance and that two sources are not in compliance but may be capable of compliance.

In summary, the Board finds that the 0.1 lbs/mmbtu limitation of Section 212.204 was valid as applied to wood-fired sources when it was adopted in July, 1986, is valid as it exists today and is valid as applied to Schrock's facility.

Schrock's second attack on the applicability of Section 212.204 involves the definition of a new source. Schrock asserts that the definition of new source at Section 201.102 should not apply here because the regulations were only adopted in July, 1986, and the Schrock boiler was constructed before the effective date. Section 201.102 provides:

> "New Emission Source": any emission source, the construction or modification of which is commenced on or after April 14, 1972."

However, that is not the only provision of Illinois law having relevance. Section 3(qq) of the Act controls the distinction between new and existing fuel combustion emission sources:

> qq. "EXISTING FUEL COMBUSTION STATIONARY EMISSION SOURCE" means any stationary furnace, boiler, oven, or similar equipment used for the primary purpose of producing heat or power, of a type capable of emitting specified air contaminants to the atmosphere, the construction or modification of which commenced prior to April 13, 1972.

* Of the 7 sources asserted in Schrock's argument, one (Hearsch) is not subject to the 0.1 lbs/mmbtu limit (R. 146).

Since none of Schrock's construction or modification activities were commenced prior to April 13, 1972, the Board cannot override the statutory directive and determine that Schrock is an existing source.

Having determined that Section 212.204 applies to Schrock's facility, the Board must now evaluate whether a variance is appropriate.

It is axiomatic that a variance does not grant permanent relief from compliance with a regulatory requirement. One necessary aspect of a variance petition is that it describe how and when the facility will come into compliance. This concept is articulated at 35 Ill. Adm. Code 104.121(f):

> A detailed description of the existing and proposed equipment or proposed method of control to be undertaken to achieve full compliance with the Act and regulations, including a time schedule for the implementation of all phases of the control program from initiation of design to program completion and the estimated costs involved for each phase and the total cost to achieve compliance.

Schrock's petition for variance requests relief for a two-year period (with a possible one-year extension) and the proposed method of compliance is to file, at some unspecified date in the future, a request for site-specific regulatory relief.

The Board has repeatedly held that in the context of a variance proceeding, an "intention" to file for site-specific relief does not represent a compliance plan justifying long-term variance relief. Modine Manufacturing v. IEPA, PCB 79-112, August 18, 1982; Modine Manufacturing v. IEPA, PCB 85-59, May 16, 1985; Borden Chemical v. IEPA, PCB 82-82, December 5, 1985. Consequently, Schrock's "intention" to file a site-specific regulatory proposal does not represent a compliance plan to support a multi-year variance.

At hearing, Schrock presented evidence on various methods that could be employed to secure compliance. Those methods included not burning its wood residue (landfilling it instead), a scrubber and an electrostatic precipitator. While these options are discussed generally, it is obvious that Schrock has not selected one of the options for implementation and has not provided a "detailed description of the equipment" and a "time schedule for implementation of the...program," that would represent a true compliance plan. Consequently, the Board finds that Schrock has not presented a "compliance plan" and that long-term variance relief must be denied.

While lack of a compliance plan precludes the Board from granting long-term variance relief, it does not preclude the Board from granting short-term relief, if exceptional circumstances are present (Lake County Public Works v. IEPA, PCB 86-75, August 14, 1986; see also Mendota v. IEPA, PCB 85-182, July 11, 1986). These short-term variances are specifically for the purpose of allowing the facility to develop an adequate compliance plan. The Board finds that exceptional circumstances are present in this proceeding and will evaluate granting a short-term variance.

Schrock operated for many years in compliance with the applicable air regulations. In order to address some internal firing problems, Schrock sought a redesign of its system. To accomplish this purpose, Schrock signed a contract with an engineering firm to design a system that would meet all applicable state and federal rules and regulations regarding air quality (R. 37). That system, when completed, did not meet those standards. The Board finds that Schrock had a reasonable expectation, based on the contract, that it would be in compliance and that the non-compliance represents a surprise that Schrock could not reasonably foresee. This situation justifies a short-term variance to develop a compliance plan where environmental consequences are minimal.

Schrock has provided some preliminary modeling studies based on its maximum potential to emit at a rate of 0.2775 lbs/mmbtu (R. 49). Those studies indicate that the environmental impact, for the short-term contemplated, would be minimal. The Agency agrees that there would be no serious environmental impact (Agency Brief, p. 6). Consequently, the Board will grant Schrock a short-term variance in order to develop a compliance plan. The Board will condition this variance on compliance with the 0.2775 lbs/mmbtu emission rate that was used in the modeling and grant variance until May 31, 1987, which should allow Schrock to continue operations through the normal close of this season's firing schedule (Rec., p. 2; R. 24). Should Schrock need relief beyond the term of this variance, they must file a new variance petition which contains an adequate compliance plan.

This Opinion constitutes the Board's findings of facts and conclusion of law in this matter.

## ORDER

Schrock/A Tappan Division is hereby granted a variance from 35 Ill. Adm. Code 212.204 for the use of wood fuel at its manufacturing facility in Arthur, Illinois, subject to the following conditions:

1. This variance shall commence on the date of this Order and shall expire May 31, 1987;

2. During the pendency of this variance, Schrock's emissions of particulate matter into the atmosphere shall not exceed 0.2775 lbs/mmbtu; and

3. Within forty-five days of the date of this Order, Schrock/A Tappan Division shall execute a Certification of Acceptance and Agreement to be bound to all terms and conditions of this variance. Said Certification shall be submitted to the Agency at 2200 Churchill Road, Springfield, Illinois, 62706. The form of said Certification shall be as follows:

CERTIFICATION

I, (We) _____, hereby accept and agree to be bound by all terms and conditions of the Order of the Pollution Control Board in PCB 86-205, March 5, 1987.

_____
Petitioner

_____
Authorized Agent

_____
Title

_____
Date

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 5th day of March, 1987, by a vote of 6-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board