

ILLINOIS POLLUTION CONTROL BOARD  
December 1, 1983

ILLINOIS POWER COMPANY, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 83-53  
 )  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondent. )

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

On April 18, 1983 Illinois Power Company (IPC) filed this permit appeal pursuant to Section 40 of the Environmental Protection Act (Act) (Ill. Rev. Stat. 1981, ch. 111½, par. 1040) contesting a special condition contained in an air operating permit issued by the Illinois Environmental Agency (Agency) on March 5, 1984. That permit covers the coal handling and storage equipment at IPC's Wood River Station which includes a track hopper, a reclaim hopper, a coal breaker, coal conveyors, coal bunkers and a coal storage pile. IPC is not arguing the necessity of a permit for this equipment, it is only challenging the authority of the Agency to include Special Condition No. 1 which states:

The permittee shall implement and follow the fugitive dust operating program required by Rule 203(f)(3)(f). Upon notice by the Agency of any deficiency in the program, the permittee shall promptly submit the necessary changes to the Agency for review.  
(IPC Ex. 1)

The Agency is not arguing that IPC's fugitive dust program pursuant to Rule 203(f)(3)(F) is inadequate. Rather the Agency contends that it may include this condition as a part of IPC's operating permit pursuant to its authority under Section 39(a) of the Act (Ill. Rev. Stat. 1981, ch. 111½, par. 1039(a)).

The Agency submitted the record of this permit on May 9, 1983 and a hearing was held in this matter on June 21, 1983. At hearing no testimony was given since the parties agreed that the only issue in this appeal is the legal ramifications of Rule

203(f)(3)(F) upon the permittee and the Agency. [Rule 203(f)(3)(F) has been renumbered since the initiation of this appeal and is now contained in Sections 212.309, 212.311 and 212.312. The remainder of this Opinion will so reference the fugitive dust control program rules.] Both parties, however, did summarize their legal positions at hearing and submitted posthearing briefs and reply briefs setting out their arguments.

IPC submitted a fugitive dust control program to the Agency on December 30, 1982 pursuant to Section 212.309 of the Board's regulations. (Agency Ex. 13). The Agency reviewed the program and found it to be satisfactory. (Agency Ex. 14). This confirms that the submission or the adequacy of the program by IPC under Sections 212.309, 212.311, or 212.312 is not at issue in this proceeding. As stated before, both parties agree the issue before the Board is the Agency's authority to include Special Condition No. 1 as a part of IPC's air operating permit. The Board agrees with this assessment.

IPC argues that the Agency has exceeded the authority granted it by the Board when the fugitive dust control program regulations were adopted. In support IPC advances three arguments. First, IPC contends that by including the program as a condition to the permit, and by including therein language that the Agency can compel the permittee to revise its program should the Agency subsequently find it to be deficient, the Agency has empowered itself to approve IPC's program, rather than just exercising its power to review the program. This is contrary to the language of the relevant rules, and to the Board's intent in R78-11: Fugitive Particulate Emissions from Industrial Sources. Citing the Board's adopting Opinion (36 PCB 61, November 1, 1979) IPC emphasizes that the Board distinguished the right to review and the right to approve these programs, and chose to only give the Agency the right to review. IPC acknowledges the Agency's right to approve permit applications and to administer permit programs under the Act. However, IPC argues that the permit programs must be based on Board rules, and in the absence of Board rules, upon the Act. In this instance the Board has declined to include the fugitive dust control programs in the permitting process. The correct method to insure compliance with these rules is enforcement actions.

IPC's second argument is premised on the Agency testimony in the R78-11 rulemaking. Quoting the Agency, IPC contends that the Agency itself did not intend the proposed fugitive dust control program to be a part of the permitting process. Rather than permit appeals, the Agency envisioned enforcement proceedings for failure to have an approved program. IPC recognizes that the testimony was in support of an "Agency approved" program, which was rejected by the Board. IPC argues that the Agency's testimony and its intent are still relevant since the Agency wanted more flexibility than a permit program could facilitate.

IPC's final argument focuses on the questions of burden of proof and possible duplicity of penalties. If the program is included as a permit condition and the program's adequacy is disputed then the means of review is a permit appeal under Section 40 of the Act. If it is not, then an enforcement proceeding under Section 32 of the Act is the proper avenue. In the former the burden of proof is on the permittee, in the latter it is on the Agency. IPC argues that since the Board declined to give the Agency approval power, i.e. to make these programs a part of the permitting process, the burden of proof should not be allowed to shift to the permittee. Likewise, if the programs become a part of the permit the permittee is subject to penalties under Sections 42(a) and 44(a) of the Act not just for violations of the Act or regulations thereunder, but also for violation of a permit condition. IPC contends that this was not the Board's intention.

The Agency premises its right to include this condition in the permit upon its statutory authority in Section 39(a) of the Act, which allows it to include permit conditions which are consistent with Board regulations and necessary to accomplish the purposes of the Act. The Agency states that the first sentence of Special Condition No. 1 only imposes an already existing legal obligation on IPC under Section 212.309, and that the second sentence is an exercise of its right to review and comment on whether the program submitted is adequate. Given its power to review, the Agency believes that it, as well as the permittee, can require a program modification, and that the permit process is appropriate for such review.

The Agency argues that the Board did not grant the Agency power of approval because this would have removed disputes on program adequacy from its jurisdiction. However, the Agency believes that since the Board explicitly gave it power to review, it implicitly gave it the power to comment on the adequacy and to notify the operator of possible inadequacies during the permitting process. The Agency interprets the Board's statement "If the Agency feels a program is inadequately designed and the source disagrees, an action before the Board will be necessary to resolve the dispute" (36 PCB 71) to envision permit appeals as well as enforcement actions. Otherwise, the Agency believes its review authority to be meaningless.

The fugitive dust control program rules were adopted by the Board in R78-11 to insure that sources would be operated in a manner which would significantly reduce fugitive particulate emissions. The minimum requirements for such operating programs are contained in Section 212.311. The Board gave the Agency authority to review the required operating programs on a case by case basis. Explicitly it did not give the Agency approval power over the programs or subsequent amendments to those programs. (36 PCB 71) The Board did not, in that adopting Opinion,

state why it limited the Agency's authority. Most likely it was to avoid delegating to the Agency its exclusive authority under Section 5 of the Act to set emission or equipment standards, and, as the Agency suggested, to retain jurisdiction over the review of these programs. Furthermore the language of the rules as well as the Opinion precludes Agency approval of the programs. Sections 212.309 and 212.312 only provide for submission to and review by the Agency of fugitive dust control programs by industrial sources described in Sections 212.304 through 212.308. Therefore, IPC is correct that the Agency does not have the power to include the requirements for a program and for revisions promptly upon the Agency's determination of a program's inadequacy.

The Agency's ability to review the program while reviewing the permit is not precluded. What the Agency cannot do is make the program or revision of the same a condition of the permit. This does not contravene the relevant portion of Section 39(a) of the Act which states:

In granting permits the Agency may impose such conditions as may be necessary to accomplish the purposes of the Act, and as are not inconsistent with the regulations promulgated by the Board hereunder.

(Ill. Rev. Stat. 1981, ch. 111½, par. 1039(a) emphasis added)

Deletion of Special Condition No. 1 from IPC's permit does not contravene the Board's statutory duty under Section 5 of the Act, or the Agency's under Section 39(a). The first sentence of Special Condition No. 1 is, as argued by the Agency, a restatement of an existing legal obligation. Therefore it is not contrary to a Board regulation, but also it is not necessary to accomplish the purposes of the Act. The second sentence is contrary to the Board's regulation and therefore neither proper nor necessary to further the Act's purposes.

In addition, apart from the issues specifically briefed by the parties, the condition inherently establishes an enforcement mechanism that conflicts with Title VIII of the Act. "Notice by the Agency of any deficiency in the program" cannot alone compel "necessary changes". This is tantamount to an administrative compliance order, which the Agency has no power to impose as a permit condition or by any other means. Only the Board has authority to issue compliance orders.

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


ORDER

The Illinois Environmental Protection Agency is ordered to issue the contested operating permit for Illinois Power Company's Wood River Station without Special Condition No. 1 and in accordance with this Opinion.

IT IS SO ORDERED.

Board Member B. Forcade abstained.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board hereby certify that the above Opinion and Order was adopted on the 15<sup>th</sup> day of December, 1983 by a vote of 6-0.

  
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Christan L. Moffett, Clerk  
Illinois Pollution Control Board