ILLINOIS POLLUTION CONTROL BOARD
March 3, 1977

ENVIRONMENTAL PROTECTION AGENCY, Complainant,	)	
v.	)	PCB 75-388
CLARK OIL AND REFINING CORPORATION, Respondent.	)	

ORDER OF THE BOARD (by Mr. Young):

This matter is before the Board on Respondent's Motion for Reconsideration of our Opinion and Order in this matter. The Agency filed an Objection to the grant of this Motion and both parties have additionally filed certain affidavits and material in response to our Order of December 16, 1976.

In the instant Motion, Respondent argues three reasons why the Board should reconsider this matter. First, Respondent argues that the Board erred in finding that Respondent had options available to it other than ceasing operations. In explanation why Clark did not choose to file a variance petition, Clark cites four cases in support of its contention that such application would have been a useless act. Mt. Carmel Public Utility v. EPA, PCB 71-15, 1 PCB 469; York Center Comm. Coop v. EPA, PCB 72-7, 3 PCB 485; EPA v. Holland Ice Cream and Custard Co., PCB 71-319, 3 PCB 587; Loesch Dairy Co. v. EPA, PCB 72-93, 4 PCB 69. The Board believes, however, that all of the cited cases are readily distinguishable. In the instant matter, unlike any of the cited cases, the variance petition would have involved a request to employ new technology. In each of the cited cases, the petitioner simply wanted a license to continue to pollute but was unwilling to enter into any program to achieve compliance. This inaction the Board will not condone, but petitions involving experimental technology stand on entirely different grounds. As a matter of fact, it is only through the variance procedure that a person can obtain authorization to utilize such technology if its use is expected to violate existing regulations. The Board realizes full well that advances in both production and control technology will continue to occur, but expects at the same time that persons employing such technology will do so only under a variance granted by the Board. To allow any other procedure, such as employed by Clark in this matter, will lead to general chaos in the State's pollution control program.

In addition to utilizing the variance procedure, the Board believes Clark could have operated within the law by following a much simpler course of action. In the fall of 1972, when Clark decided to install the experimental technology, Clark could have avoided all its difficulties if it had decided instead to install a carbon monoxide boiler. Having deliberately and unilaterally decided to utilize untested technology, Clark is not now in a position to argue that it had no options available. Options were available to Clark, but they were rejected.

Respondent once again argues in this Motion that all of its problems occurred because the Agency acted arbitrarily and unreasonably with its permit application. On page three of its Reply of December 17, 1976, Respondent states:

> What the Respondent has presented to this Board in its Motion pursuant to Procedural Rule 334 is evidence, the permit, which conclusively demonstrates that the Agency's failure to issue a permit with the same data before it as was before it when it did issue the permit in August, 1976, was arbitrary, unreasonable and contrary to the Illinois Environmental Protection Act. All information was supplied to the Agency before the hearing on this cause. The facts affied to by Mr. Keith J. Conklin are not to the contrary. In fact, the Agency does not contest that it had all the pertinent information before it prior to the hearing on this cause. (Objection, Para. 3.) What the Agency did was to wait until long after the hearing on this matter to do what it was required by law to have done prior to the hearing: issue a permit.

The Board finds this statement at variance with the facts; Respondent's own Memorandum of January 24, 1977, Exhibit #3, indicates that not only stack testing data, but other information as well, was submitted to the Agency after the hearing in this matter. In addition to this, Clark's correspondence to the Agency dated August 20, 1976, indicates there has been a change in Clark's operating conditions. (Agency Affidavit of January 25, 1977, Exh. A.) The permit finally issued by the Agency reflects this change as the permit was conditioned upon the FCC unit operating with a generator bed level not exceeding 90 inches of water.

As in our Opinion, the Board is once again unable to find that the Agency acted either arbitrarily or unreasonably with this December 1975 permit application. Whatever the case, the

Board reminds Clark that the operating permit was required by February 1, 1973, not December of 1975 when the application was filed.

Thirdly, Respondent argues that the Board should reconsider and reverse its assessment of a penalty. In support of this, Respondent sets forth the two issues discussed above and, in addition to this, Respondent submits no penalty should be assessed because compliance with the regulations has finally been achieved some 30 months after it was required. Although no authority for this position was cited, the decision of the Supreme Court in Mystik Tape v. PCB (1975) 60 Ill. 2d 330 does lend some guidance. In that case, the Court upheld a $3,500.00 penalty which was assessed because Mystik installed and operated certain equipment despite Agency denial of permits for the equipment. The Board sees no reason why Clark should stand on any better ground than Mystik. Clark's violation resulted directly from its own unilateral and deliberate decision not to install the approved and existing technology or to seek a variance to utilize experimental technology. An additional aggravating factor in this matter, not present in Mystik, is that the violation was for a very extended period of time.

The Board has consistently held that the permit system is a cornerstone of the environmental protection effort. See, e.g., In the Matter of Emission Standards, R71-23, 4 PCB 298, 303 (4/3/72); EPA v. Hoffman & Sons, PCB 71-300, 12 PCB 413, 414 (1974); Borg-Warner v. EPA, PCB 74-115, 12 PCB 585 (1974). Cf., EPA v. E & E Hauling, PCB 74-473 (3/26/75) (Solid Waste Permits). The use of the penalty power as an economic incentive for compliance with the permit requirement has been upheld in Mystik Tape, supra, and other cases; e.g., Baker v. PCB, 32 Ill.App.3d 660, 336N.E.2d 325, 328 (5th Dist., 1975), aff'g. PCB 72-23 (Sept. 12, 1972). Without the availability of that incentive, a recalcitrant offender is left in a position superior to similarly situated emitters who have complied. In light of the length of the violation, the penalty here is minimal.

For the reasons set forth herein, Respondent's Motion for Reconsideration is denied.

IT IS SO ORDERED.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Order was adopted on the 3rd day of March, 1977 by a vote of 5-0.

Christan L. Moffett, Clerk
Illinois Pollution Control Board