

ILLINOIS POLLUTION CONTROL BOARD

February 14, 1975

CLEAN AIR COORDINATING COMMITTEE,)
)
 Complainant,)
)
 vs.) PCB 74-284
)
 ENVIRONMENTAL PROTECTION AGENCY,)
)
 Respondent.)

Richard M. Kates, Attorney for Complainant
Marvin Medintz, Assistant Attorney General for Respondent

OPINION AND ORDER OF THE BOARD (by Mr. Henss):

The Clean Air Coordinating Committee charged that the Environmental Protection Agency had violated Rules 403 and 406 of the Air Pollution Control Regulations by failing to call air pollution Watches and Yellow Alerts when ozone levels were elevated on four dates in the Summer of 1974. The Pollution Control Board found that Respondent had violated the Regulations on one of the dates, August 9, 1974 by failing to call a Watch but the Board did not find a violation on the first three dates in question. The EPA was ordered to cease and desist from violating the Regulations.

The Agency now moves that the Board reconsider its Opinion and Order and find that the Agency did not violate the Regulations on August 9, 1974. The Agency states that it requests reconsideration "Not for the purpose of undoing the unfair and incredible publicity barrage directed against it, but for the purpose of vindicating itself as a hard-working, diligent, environmentally concerned Agency seeking to properly discharge its lawful obligations".

At the outset we wish to say that we do not question the diligence, the environmental concern and the motives of the Agency. We are well aware of the fact that the EPA is a hard-working, diligent, environmentally concerned Agency seeking to properly discharge its lawful obligations. Our only finding adverse to the Agency was that it had failed to call a Watch on one date when the Regulation required that a Watch be declared. That error was not through any

lack of work, diligence, or concern, but was the result of an apparent misapprehension by the Agency of its duties under the Regulation.

The "publicity barrage" of which the Agency speaks is not a part of the record, but the Board is aware of the fact that unwarranted inferences may be conveyed to the public. We believe that it is important for the public to have confidence in both the purpose and the judgment of its public agencies. Therefore, although we do not disturb our basic finding that the EPA did violate the Regulation, we will amplify somewhat on the Opinion.

It is clear that the Agency did violate the Regulation by its decision not to call a Watch on August 9, 1974. At noon on that date the two hour average level for ozone did exceed the Watch standard of 0.07 ppm. The Stagnation Index for the northern area indicated:

- +1 - during the afternoon (marginal-moderate to poor dispersion)
- +2 - tonight (poor dispersion)
- 1 - Saturday afternoon (marginal - moderate to good dispersion)

The "moderate to good" dispersion conditions were forecast to exist on Saturday afternoon more than 24 hours later.

Mr. Jack Coblentz, Manager of the Technical Services Section in the Air Pollution Control Division of the EPA, did testify that in his opinion the weather forecast was for substantial improvement in conditions which cause atmospheric stagnation (R. 15). He did not say that the forecast was for improvement within 24 hours. A review of the document indicates that the improvement in conditions was forecast for the following afternoon and not within the 24 hours specified by the Regulation. In fact, from a comparison of the weather forecasts of August 8 and 9, 1974 one might expect that stagnation conditions would for 24 hours remain essentially as they had been for the past 24 hours, which was a period of extended high ozone levels.

We find in the words of Rule 406(2) that "the official National Weather Service forecast for the next 24 hours does not indicate substantial improvement of conditions which cause atmospheric stagnation".

The Hearing Officer found that Mr. Coblentz' testimony was "completely candid and forthright". We agree, and from our previous contact with him would not expect him to be otherwise. Mr. Coblentz did not testify, however, that the forecast "for the next 24 hours" was for substantial improvement of conditions and therefore we believe that his testimony was incomplete.

Much of the Coblenz testimony related to the reluctance to call a Yellow Alert for ozone. When a Yellow Alert is declared then certain actions are taken which affect the economic life of the community. The public would be requested to avoid unnecessary use of automobiles and electricity; power generating stations and large facilities would reduce emissions; and some manufacturing facilities would curtail production. The Agency apparently questions, in the case of ozone, whether such curtailment of activity is the thing to do.

Coblenz testified that ozone is different from other pollutants (R. 30). He said there is much speculation on what is causing the high levels of ozone and one theory is that it comes into the area from elsewhere during conditions of instability (R. 33). Ozone appears to be higher on days with an average instability or moderate dispersion rather than higher on days with poor dispersion (R. 24). Mr. Coblenz said he was uncertain what caused the ozone and therefore was uncertain of the effect of closing down some industries. One of the theories is that a shutdown of industry might cause ozone levels to increase by removing other contaminants from the atmosphere which through their presence actually reduce the ozone impact. He testified that a change of Stagnation Index from "poor" to "moderate" indicates a substantial improvement in conditions, but ozone levels might go up rather than down (R. 22).

This testimony provides some insight into the debate which must have occurred within the Agency while the ozone Watch was under consideration. However, such uncertainty within the Agency does not justify the unilateral establishment of a new standard by the Agency, a procedure which apparently occurred while Coblenz was away on vacation. Any revision of the Regulation must be preceded by public hearings, pursuant to the requirements of the Statute, and appropriate findings of fact and law by the Pollution Control Board.

The Agency is not empowered to revise the Regulation through a policy decision of the type attempted here. In our first opinion we referred to the meeting at which the EPA formulated its ozone policy as a "backroom policy session". The term apparently carried unfortunate connotations. Our intent is merely to insist that Regulations and Standards be amended using the procedure established by law. That procedure calls for public hearings. No additional meaning was intended.

The record is inadequate for any reassessment of the Regulation itself and was, of course, not submitted for that purpose. If the Agency, upon further reflection, concludes that it is the Regulation which needs reconsideration then it should submit an appropriate Regulatory Proposal.

The Clean Air Coordinating Committee has also filed a Motion for Reconsideration and Clarification. CACC requests that we find a violation on each of the four dates in question and also find that the official national weather forecasts (used in determining Watch and Alert conditions) are not subject to expert interpretation. It is argued that the official weather forecast contains all of the weather factors which are to be considered, and, since these facts have been determined by the National Weather Service, there is no need for further interpretation by an Agency expert.

We do not accept this view. A Watch should be called only at the indicated pollution levels and if the National Weather Service forecast for the next 24 hours "does not indicate substantial improvement of conditions" which cause atmospheric stagnation. The written forecasts do not contain that particular quoted phrase, and, in some cases, there may be a need for expert interpretation of the language which is contained in the forecast.

At noon on August 9, 1974 the official National Weather Forecast for the next 24 hours indicated that conditions would be essentially the same as for the past 24 hours. This fact was not controverted by the EPA expert. It was known that the past 24 hours had been a time of extended high ozone levels. The decision to call a Watch should have been obvious.

CACC argues that the forecasts on the other three dates were similar, but we believe the decision was not so obvious on those three dates as it was on August 9, 1974. The fact that the next 24 hours will be substantially the same as the past 24 hours, a time of high pollution, should provide some certainty of judgment. Information of that type is missing on the three earlier dates.

We have carefully reviewed the testimony, the exhibits and all arguments and we find that the original decision was correct under the existing Regulation. We reaffirm our findings of January 9, 1975.

This Opinion constitutes the findings of fact and conclusions of law of the Illinois Pollution Control Board with regard to the Respondent's Motion to Reconsider and the Complainant's Motion for Reconsideration and Clarification.

ORDER

It is the Order of the Pollution Control Board that the Respondent's Motion to Reconsider be and it is hereby denied. It is the Order of the Pollution Control Board that the Complainant's Motion for Reconsideration and Clarification be and it is hereby denied.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order was adopted this 14th day of February, 1975 by a vote of 4 to 0.

Christan L. Moffett