ILLINOIS POLLUTION CONTROL BOARD
May 20, 1999

PANHANDLE EASTERN PIPE LINE COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 98-102
	)	(Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by K.M. Hennessey):

This matter comes before the Board on the motion to reconsider (Motion) of petitioner Panhandle Eastern Pipe Line Company (Panhandle). Panhandle moves the Board to reconsider its decision of January 21, 1999, in which the Board affirmed the Illinois Environmental Protection Agency's (Agency) denial of Panhandle's application to revise an air permit. See Panhandle Eastern Pipe Line Company v. Illinois Environmental Protection Agency (January 21, 1999), PCB 98-102 (Opinion). The Board denies the Motion.

BACKGROUND

The Board's findings of fact and conclusions of law are set forth in the Opinion and are incorporated by reference. Below, the Board highlights the facts and proceedings relevant to the Motion.

Panhandle is a natural gas pipeline transmission company. It operates a compressor station in Glenarm, Sangamon County, Illinois (the Glenarm Station). Compressor engines at the Glenarm Station recompress natural gas to ensure it continues to move along the natural gas pipeline that Panhandle operates.

The compressor engines emit nitrogen oxides (NO_x). NO_x is a pollutant for which the United States Environmental Protection Agency (USEPA) has established a National Ambient Air Quality Standard (NAAQS) to protect public health and welfare. The area in which the Glenarm Station is located meets the NAAQS for NO_x and thus is considered an attainment area. Under Section 165 of the federal Clean Air Act, 42 U.S.C. § 7475, sources in attainment areas are subject to "Prevention of Significant Deterioration" (PSD) requirements, which are intended to prevent the degredation of air quality. The Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.* (1996), requires all sources in Illinois to comply with Section 165 of the Clean Air Act and the regulations thereunder. See 415 ILCS 5/9.1(d) (1996).

The PSD program imposes various requirements on sources that construct and operate new and modified stationary sources of pollutants. These requirements apply to modifications that are "major;" generally, a modification that will increase NO_x emissions by 40 tons per year or more is considered major. If an existing major stationary source undertakes a major modification, PSD requirements compel it to demonstrate, among other things, that it will use the best available control technology (BACT) to control emissions.

This case arose out of Panhandle's application to revise a construction permit that the Agency issued to it in 1988 (the 1988 construction permit). That permit allowed Panhandle to retire twelve compressor engines and to add four compressor engines. Illinois regulations required Panhandle to obtain a construction permit for these changes. In order to avoid PSD requirements, however, Panhandle sought a "minor source" or "PSD avoidance" permit from the Agency. That permit would limit to 39.9 tons per year the increase in NO_x emissions from the changes that Panhandle sought to implement.

To determine the PSD avoidance permit limit, the Agency had to calculate Panhandle's existing or baseline NO_x emissions. The Agency did so on the basis of certain standard "emission factors" and Panhandle's gas usage in 1987, the most recent one year period. The 1988 construction permit limited Panhandle's NO_x emissions to its baseline plus 39.9 tons per year (a total of 461.3 tons per year). The Agency issued Panhandle an operating permit containing the same emission limit in 1988, and renewed that permit in 1989, 1990, and 1991.

In 1997, Panhandle filed with the Agency an application to revise the 1988 construction permit. Panhandle sought to increase the emission limit in its permit and to add emission controls to two compressor engines. Panhandle's application revealed that it had exceeded the emission limit in the 1988 construction permit each year between 1989 and 1996.

In the permit application, Panhandle stated that the emission limit in the 1988 construction permit should be revised for two reasons. First, Panhandle believed that in calculating Panhandle's baseline, the Agency should have considered more than one year of gas usage and should have used data from 1985 and 1986. Panhandle considered those years more representative than 1987, the year the Agency used to establish the baseline in the 1988 construction permit. Second, Panhandle believed that the Agency should use more accurate (and now updated) emission factor data to calculate Panhandle's baseline.

The Agency denied the application. Panhandle appealed the denial to the Board and asked the Board to order the Agency to issue the requested permit. On January 21, 1999, the Board affirmed the Agency's denial of the permit on two grounds. First, the Board found that Panhandle was subject to the requirements of the PSD program and that Panhandle's application failed to meet those requirements—in particular, the requirement to show that it would use BACT to control emissions. Second, the Board found that Panhandle failed to support adequately the revised emission factor data that it proposed for ten of the retired engines. The Board also found that the Agency should not be estopped from requiring Panhandle to obtain a PSD permit.

On February 25, 1999, Panhandle moved the Board to reconsider its Opinion on the grounds that the Board misapplied the law. On March 12, 1999, the Agency filed a Response to the motion. The Agency opposes the Motion and argues that the Board did not err.

DISCUSSION

A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside County (March 11, 1993), PCB 92-156, slip op. at 2, citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (lst Dist. 1991). In this case, Panhandle argues that the Board erred in its application of existing law. The Board already addressed many of these arguments in the Opinion and the Board will not revisit them here. Panhandle raises several arguments, however, that warrant further consideration.

Specifically, the Board will address Panhandle's arguments that (1) the Board misinterpreted Section 39(a) of the Act; (2) the Agency could and should address Panhandle's exceedences of the 1988 construction permit limit through an enforcement action; (3) the Agency could revise the permit as requested; (4) the Board's ruling leaves Panhandle unable to defend itself in subsequent enforcement proceedings; (5) the Agency took inconsistent positions; and (6) the Agency should be estopped from requiring Panhandle to apply for a PSD permit.

The Applicability of PSD

Panhandle argues that the Board erred in upholding the Agency's determination that Panhandle was subject to PSD requirements. Before turning to Panhandle's arguments, the Board will reiterate the basis for its conclusion that the Agency properly found Panhandle subject to PSD requirements.

In concluding that Panhandle was subject to PSD requirements, the Board first found that the 1988 construction permit was valid and enforceable. Opinion at 13-14. Second, the Board found that Panhandle's application showed that it had exceeded the limit set forth in that PSD avoidance permit. *Id.* at 15. Third, the Board found that these exceedences showed that the changes that Panhandle made in 1988 increased its emissions by 40 tons or more per year, and that Panhandle therefore had made a major modification in 1988. *Id.* Fourth, the Board found that as a result of this major modification, Panhandle had triggered PSD requirements. *Id.* Finally, the Board found that the Agency appropriately denied the permit application on the grounds that Panhandle had failed to meet PSD requirements, particularly the requirement to show that it would use BACT to control emissions. *Id.* at 15-16.

The Board's Interpretation of Section 39(a) of the Act

In the Motion, Panhandle argues that under Section 39(a) of the Act, 415 ILCS 5/39(a) (1996), the only relevant issue is whether the proposed action will, in the future, violate the Act or Board regulations. Motion at 6. Specifically, the Agency is obligated to issue a permit (or a revised permit) "upon proof by the applicant that the facility, equipment, vehicle, vessel, or aircraft will not cause a violation of this Act or of regulations hereunder." 415 ILCS 5/39(a) (1996). Panhandle argues that contrary to Section 39(a), the Agency denied the permit application on the basis of past violations. Motion at 7.

The Board disagrees. Section 9.1(d) of the Act prohibits anyone from operating a source in violation of Section 165 of the Clean Air Act. Panhandle's application showed not only that it had exceeded the 1988 construction permit limit in the past, but that it had triggered PSD requirements under Section 165 of the Clean Air Act. The application further failed to demonstrate that Panhandle would meet PSD requirements, particularly the requirement to show that it would use BACT to control emissions in the future. The Agency therefore properly denied the permit application.

These facts also distinguish this case from those cases in which the Board found that the Agency improperly substituted permit denial for an enforcement action. See Illinois Environmental Protection Agency v. Illinois Pollution Control Board, 252 Ill. App. 3d 828, 830, 624 N.E.2d 402, 404 (3d Dist. 1993) and Centralia Environmental Services, Inc. v. Illinois Environmental Protection Agency (October 25, 1990), PCB 89-170, slip op. at 10-13. In those cases, the Agency expressly denied a permit application because the applicant had not corrected various violations of the Act and regulations. Here, by contrast, the Agency's denial letter did not state that it denied the application on those grounds. More importantly, Panhandle's application showed that it had triggered a different set of requirements—the PSD requirements—than those under which it had been operating. Panhandle's failure to meet those requirements precluded the Agency from finding that Panhandle would not cause a violation of the Act if its permit were revised. See ESG Watts, Inc. v. Pollution Control Board, 286 Ill. App. 3d 325, 335-336, 676 N.E.2d 299, 306 (3d Dist. 1997) (rejecting claim that the Agency impermissibly used permitting process as an enforcement tool when the Agency's denial letter offered sufficient and proper reasons for denial).

The Agency's Ability to Seek Enforcement

In the Motion, Panhandle also argues that the Agency could have and should have revised the 1988 permit as requested, while addressing Panhandle's exceedences of the limit in that permit through an enforcement action. Motion at 8-13. Panhandle asserts that both the consent decree that it attached to its Petitioner's Reply Brief of November 17, 1998 (Pet. Reply Br.), and the USEPA guidance that the Board cited, establish that this would have been a permissible course for the Agency to have taken. *Id.*

The Board finds the consent decree unpersuasive. First, the terms of the consent decree provide that it is not an "admission of any issue of fact or law," and therefore it cannot

be considered USEPA guidance. Pet. Reply Br., Attachment at 2. In any event, it appears to involve a situation in which the USEPA alleged that the source had constructed a major source without a PSD permit. As part of the settlement, the source agreed to adhere to a limit that would render it a minor rather than a major source. *Id.* By contrast, Panhandle now seeks a permit limit that, given its baseline, would not have allowed Panhandle to avoid PSD if Panhandle had sought that limit in 1988.

The Board also disagrees with Panhandle's reading of USEPA guidance. USEPA guidance discusses what an administering agency may do when a source exceeds an emission limit in a minor source permit. The guidance provides that an agency may enforce a minor source permit, instead of requiring the source to get a PSD permit, if the source intends to adhere to the original permit limit. See 54 Fed. Reg. 27274, 27280 (June 28, 1989). But Panhandle does not intend to adhere to the original permit limit; Panhandle seeks to substantially increase its permit limit. The portion of the guidance that Panhandle relies upon is therefore inapplicable.

The portion of the USEPA guidance that does apply requires the Agency to apply PSD requirements to Panhandle. That guidance provides that when a source has a "belated realization that its original plans cannot accommodate the design or operational limitations reflected in" its minor source permit, it is proper for the administering agency to "treat the source as major by requiring it to obtain a PSD . . . permit" under 40 C.F.R. § 52.21(r)(4). See 54 Fed. Reg. 27274, 27280 (June 28, 1989).

Panhandle argues that this portion of the guidance means that "a source may become a major stationary source or major modification solely by virtue of a relaxation in an enforceable limit, but is subject to the PSD requirements only after the permit relaxation takes place." Motion at 8-9. It is not clear if Panhandle means to argue that such a source may obtain a revised PSD avoidance permit for a relaxation in an enforceable limit and <u>later</u> obtain a PSD permit for the same changes; alternatively, Panhandle may be arguing that such a source would become subject to PSD requirements only if it undertook a major modification in the future.

Neither course of action is sensible or permissible. Section 52.21(r)(4) provides that "<u>At such time</u> that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation . . . <u>then</u> the requirements of paragraphs (j) through (s) of this section [*i.e.*, PSD requirements] shall apply to the source or modification as though construction had not yet commenced." 40 C.F.R. § 52.21(r)(4) (emphasis added.) This language requires that the relaxation and the application of PSD requirements be simultaneous rather than sequential.

<u>The Agency's Ability to Revise the Permit</u>

Panhandle argues that the Board erroneously concluded that the Agency could not revise the permit as requested. Motion at 3-6. Panhandle argues that 35 Ill. Adm. Code 201.167(a) grants the Agency the ability to revise a permit and does not limit the revisions that the Agency may make. *Id.* at 4-6.

The Board expressly held that the Agency may revise permits. Opinion at 14. Its ability to do so, however, is not unlimited. As noted earlier, Section 39(a) obligates the Agency to issue or revise a permit "upon proof by the applicant that the facility, equipment, vehicle, vessel, or aircraft will not cause a violation of this Act or of regulations hereunder." 415 ILCS 5/39(a) (1996). As noted earlier, the Agency properly found that proof lacking in this case.

The situation is analogous to that in Hawaiian Electric Company v. United States Environmental Protection Agency, 723 F.2d 1440 (9th Cir. 1984). In that case, the USEPA had issued Hawaiian Electric Company (Hawaiian Electric) a PSD permit that required Hawaiian Electric to burn oil with a 0.5% sulfur content. Hawaiian Electric later realized that the model upon which the original permit was based was faulty. It then petitioned the USEPA to reconsider this provision and allow Hawaiian Electric to use a fuel with a higher sulfur content. The USEPA stated that while Hawaiian Electric could use such fuel without adversely affecting air quality, the change in fuel would be a major modification requiring a PSD permit. The USEPA denied Hawaiian Electric's petition because it did not meet PSD requirements. *Id.* at 1441-1442.

Hawaiian Electric argued "that it is challenging the premises under which the permit was originally granted and that therefore application of the major modification definition in particular and PSD review in general is incorrect." Hawaiian Electric, 723 F.2d at 1445. The court rejected this argument, holding that Hawaiian Electric's challenge to the original permit was untimely. *Id.* at 1445.

Panhandle argues that Hawaiian Electric is distinguishable because "no statutory or regulatory provision existed which might allow the [USEPA] to reconsider its original position" and the Hawaiian Electric court therefore rejected such reconsideration on "public policy grounds." Motion at 6. Here, Panhandle argues, the Board's regulations do allow the Agency to revise a permit and it is inappropriate to disallow that revision on public policy grounds. *Id.* at 6.

Panhandle misconstrues both Hawaiian Electric and the Board's ruling. If Panhandle had demonstrated compliance with PSD requirements, it would have been entitled to a revised permit, just as Hawaiian Electric would have been entitled to a new PSD permit for the change it sought to implement had its petition met PSD requirements.[1] What neither the USEPA nor the Agency can do, however, is ignore PSD requirements when they are plainly triggered.

Furthermore, the Agency cannot ignore PSD requirements on the grounds that they were triggered, in part, as a result of an alleged defect in a permit that is final and valid. That would amount to a reconsideration of its original decision, which the Act does not allow.

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[1] Similarly, a source that has complied with a PSD avoidance permit may seek revision of a condition of the permit without meeting PSD requirements, provided that revision will not trigger PSD requirements.

Panhandle argues that the decision that sets forth this principle, Reichhold Chemicals, Inc. v. Pollution Control Board, 204 Ill. App. 3d 674, 561 N.E.2d 1343 (3d Dist. 1990), is distinguishable because in that case the Agency sought to reconsider its decision on a permit application even though the source had not filed a revised application. Motion at 5. Panhandle further argues that Reichhold "merely clarified when the Agency has authority to consider a matter and when the Board has such authority." *Id.*

The Board does not agree; Reichhold addresses the Agency's authority to reconsider decisions, and concludes that it does not have that power. See Reichhold, 204 Ill. App. 3d at 678, 561 N.E.2d at 1345 ("In view of the case law denying administrative agencies the authority to change or modify decisions once announced, we conclude that the Agency here had no authority to reconsider or modify the decision . . . ."); see also Waste Management of Illinois, Inc. v. Pollution Control Board, 231 Ill. App. 278, 299, 595 N.E.2d 1171, 1184-1185 (1st Dist. 1992) (striking down a Board rule that would have allowed the Agency to reconsider permit decisions, noting that Reichhold held that "the Act does not grant the Agency any authority to modify or reconsider its decisions."). It follows, therefore, that while the Agency may revise a permit, it cannot ignore the consequences that flow from the original permit—in this case, the PSD requirements that Panhandle triggered when it exceeded the emission limit in its minor source permit.

The Effect of This Ruling on Subsequent Enforcement Proceedings

Panhandle argues that it will now be unable to defend itself in a subsequent enforcement action because the Board "has already concluded that past violations have occurred." Motion at 11. Panhandle also argues that before the Board can find Panhandle in violation of the Act, the Board must take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, including the factors listed in Section 33[(c)] of the Act. *Id.* at 11-12. Panhandle argues that the Board failed to do so. *Id.*

Panhandle's concerns are unfounded. First, the Board found only that Panhandle's permit application showed that it had exceeded the limit in the 1988 construction permit. The Board did not find, however, that Panhandle violated its permit.

Furthermore, the Board's decision in this case will not be *res judicata* in a subsequent enforcement case. The doctrine of *res judicata* provides that once a cause of action is adjudicated, it cannot be retried between the same parties or their privies in a new proceeding. See Burke v. Village of Glenview, 257 Ill. App. 3d 63, 69, 628 N.E.2d 465, 469 (1st Dist. 1993). As the Board has previously held, a permit appeal and an enforcement action are not the same cause of action, and therefore a decision in a permit appeal has no binding effect in a subsequent enforcement action. See ESG Watts, Inc. v. Illinois Environmental Protection Agency (July 23, 1998), PCB 96-181, slip op. at 2. Therefore, the Board's finding that Panhandle's application showed that it exceeded the limit in the 1988 construction permit will not be *res judicata* in any subsequent enforcement action. If the State or any other complainant brings such a proceeding, Panhandle remains free to assert whatever defenses it may have to a claim that it has violated its permit.

The Consistency of the Agency's Positions

Panhandle asserts that the Agency's denial letter never articulated why the Agency believed PSD requirements were triggered, and that Agency witnesses offered three inconsistent reasons for this conclusion at the hearing. Motion at 12. Panhandle argues that the Agency had no reason to list more than one ground for the denial of the permit if revision of the NO_x limit was not possible. *Id.* Panhandle also argues that if PSD requirements were triggered once Panhandle exceeded the 1988 construction permit limit, then supplementing the record with the permit history of the 1988 permit application would not have been necessary. *Id.*

While Agency witnesses focused on several different reasons for applying PSD requirements, the Agency's denial letter clearly put Panhandle on notice that the Agency believed PSD requirements were triggered. It further put Panhandle on notice that Panhandle had to demonstrate that it would use BACT to control its emissions. In this appeal, it is Panhandle's burden to show why those requirements were not triggered. Panhandle failed to meet that burden, and the Board is therefore required to affirm the Agency's permit denial.

Estoppel

Panhandle argues that the Board incorrectly relied upon its decision in People v. Chemetco, Inc. (February 19, 1998), PCB 96-76, when it rejected Panhandle's claim that the Agency should be estopped from subjecting Panhandle to PSD requirements. Motion at 13. Panhandle argues that Chemetco is distinguishable because in that case the petitioner sought estoppel on the basis of oral statements that the Agency later contradicted in writing. *Id.* In this case, Panhandle notes that the oral statements that it relied upon followed, rather than preceded, Agency letters. Accordingly, Panhandle argues, estoppel should apply. *Id.*

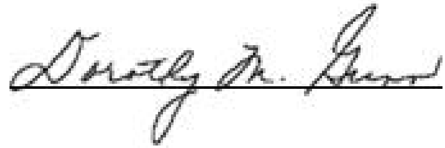
The Board disagrees. First of all, Panhandle did not prove that the Agency ever retracted the statements made in its letters of March 20, 1997, and June 18, 1997, in which the Agency stated that Panhandle must satisfy PSD requirements. Two Panhandle witnesses agreed that the Agency never specifically informed Panhandle that a PSD application would not be required. See Transcript of October 21, 1998 Hearing at 75-76, 148-149. In light of the letters and this testimony, Panhandle's reliance on any inconsistent statements by Agency staff was not reasonable.

CONCLUSION

The Board denies Panhandle's motion to reconsider.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 20th day of May 1999 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board