ILLINOIS POLLUTION CONTROL BOARD
January 26, 1984

ILLINOIS POWER COMPANY (VERMILLION POWER PLANT),	)	
Petitioner,	)	
v.	)	PCB 82-103
	)	PCB 82-104
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

MR. SHELDON A. ZABEL AND MS. CAROLYN A. LOWN, ATTORNEYS (SCHIFF, HARDIN & WAITE) APPEARED ON BEHALF OF ILLINOIS POWER COMPANY.

MS. MARY V. REHMANN AND MS. BOBELLA GLATZ, ATTORNEYS, APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

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

On August 20, 1982 Illinois Power Company (IPC) filed with the Board appeals from the Illinois Environmental Protection Agency's (Agency) July 28, 1982 denials of two permit renewal applications. The first appeal, PCB 82-103, involved the renewal of the operating permit for Unit 1 at IPC's electric generating facility near Oakwood, Illinois known as the Vermillion Station. The second appeal, PCB 82-104, involved renewal of the operating permit for Unit 2 at the same facility. Each Unit is equipped with an individual electrostatic precipitator to control total suspended particulates (TSP), but they share a common 277 foot stack. Pursuant to Section 39 of the Environmental Protection Act (Act) the Agency separately denied the renewal applications, but the language in the two denial letters was identical. Consolidated hearings were held on July 26, and August 16, 1983 after an Interim Order of the Board allowing discovery. Both parties submitted briefs which treated the matters as consolidated. On its own motion the Board consolidates these appeals for decision.

On May 21, 1982 IPC reapplied for both operating permits. Under one cover letter it submitted two Agency standardized renewal forms, and stack tests for each Unit, as required by prior permits, and coal analyses. The letter stated that these tests indicated a weighted average full load emission rate for both Units through a single stack to be 0.131 lbs/mBtu. It further stated "Preliminary modeling analyses of both units at

full load, which is indicated to be the worst case, reveals that no ambient air quality standard will be exceeded." (Ex. 4 of the Permit Appeal).

The Agency denied both operating permits citing possible violations of 9(a) of the Act, and 35 Ill. Adm. Code Sections 201.141 and 243.121 (Rules 102 and 307 of Chapter 2: Air Pollution before codification). The Agency stated that the applications failed to provide sufficient information that operation of both Units, alone or in combination, would not prevent the attainment of maintenance of the TSP air quality standard contained in Section 243.121. The Agency outlined the air quality analysis it felt necessary to prove Sections 201.141 and 243.121 would not be violated. In lieu of such analysis the Agency stated that proof that these sources would meet the applicable remanded TSP emissions limit might suffice to demonstrate that air quality would not be jeopardized. (Agency Records in PCB 82-103 and PCB 82-104, Items 1)

As stated above IPC had submitted stack tests. In analyzing whether these were satisfactory the Agency considered a weighted average emission rate of 0.13 presumably relying on the cover letter and a combination of the tests' results. The Agency then offered two reasons why the stack tests submitted were not sufficiently representative to demonstrate compliance with the remanded limitation of 0.10 lbs/mBtu. First, sootblowing was not performed during tests on either Unit, and secondly, the ash content of the coal burned during Unit 2's tests had a lower ash content than the range of daily average compiled over a recent two month period.

Given the Agency's denial letters, there appear to be two alternate methods for demonstrating that sources should be permitted for TSP. The first involves using air quality studies which demonstrate that the TSP air quality standard will not be jeopardized. The second alternative involves a demonstration that the sources comply with the applicable TSP emission limits which were found at Rule 203(g)(1) which were remanded by the Courts. As further delineated below, both parties relied upon and utilized both alternatives. The Board will examine both denials to determine whether this approach is acceptable; and whether the information submitted is sufficient to grant or deny the permits. For reasons which will become apparent, the second alternative will be considered initially.

I. REMANDED EMISSION LIMITATION

On December 30, 1977 the Agency filed with the Office of the Secretary of State "Rules for the Performance of Air Quality Analysis to be used in Support of Permit Applications" as emergency rules. According to Paragraph 2.0 the intended purpose of

these rules was to provide guidance for solid fuel combustion sources seeking operating or construction permits while applicable emission limitations are subject to judicial remand. Specifically the rules required:

> Thus for any period that Rules 203(g)(1)... are not effective, construction and operating permit applications for solid fuel combustion sources will be evaluated on the basis of comprehensive air quality impact evaluations performed by the applicant and designed to enable the Agency to determine the status of compliance with respect to the air quality provisions of Section 9(a) and Rule 102 [Section 201.141]. "In lieu of performing comprehensive air quality impact evaluations in accordance with these rules, the applicant may elect to show compliance with emission limitations contained in Rule 203(g)(1)... even if those Rules are not currently effective. Compliance with these emission limits will usually be deemed by the Agency to be sufficient to assure compliance with the air quality provision of Section 9(a) of the Act and Rule 102.
>
> [Agency Brief, Attachment 1]

The records filed by the Agency in these matters indicate that the Agency reviewed the applications in the context of the second method. Those records show that the Agency considered the applications as one, considering the weighted average emission limit for the two Units to be 0.132 lbs/mBtu (Agency Record for Unit 1, Item 6; Agency Record for Unit 2, Items 2 and 3). Based on that the Agency concluded that IPC had not made the necessary demonstration and furthermore, that the stack tests were not representative for the aforementioned reasons.

In part, IPC anticipated the Agency's reliance on this second alternative. At hearing, the Air Quality Manager at IPC testified that when applying for the permits in question IPC had anticipated that for a permit on Unit 1 to be granted, the Agency would request an air quality analysis, and that a permit for Unit 2 would be granted since the stack tests demonstrated compliance with the remanded limit. (R.148)

Underlying this second alternative are two fatally flawed presumptions. First, it is premised on emission limits remanded at least thrice by the Illinois courts. Commonwealth Edison Co. v. Pollution Control Board (1974), 25 Ill. App. 3d 271, 323 N.E. 2d 84, aff'd in relevant part, 62 Ill. 2d 494, 343 N.E. 2d 459 (1976); Ashland Chemical Co. v. Pollution Control Board (1978), 64 Ill. App. 3d 169, 381 N.E.2d 56; Illinois State Chamber of

Commerce v. Pollution Control Board (1978), 67 Ill. App. 3d 839, 384 N.E. 2d 922, appeal dismissed, 78 Ill. 2d 1, 398 N.E. 2d 9 (1979). To remedy this judicial voidance, the Board initiated the currently ongoing rulemaking R82-1 which is intended to establish TSP emission limit for sources, such as IPC, burning solid fuel exclusively. Although it is often more convenient and less costly for both the Agency and permit applicants to assess and demonstrate compliance with an emission limitation, as opposed to an air quality standard, the parties cannot ignore the judicial remand, albeit grounded on procedural infirmities.

Secondly, although the Agency's emergency rules providing this alternative demonstration are on file with the Office of the Secretary of State, they are not currently in effect. Pursuant to Section 5.02 of the Administrative Procedure Act (Ill. Rev. Stat. 1981, ch. 127, par. 1005.02) these rules expired 150 days after they were filed with the office of Secretary of State. Furthermore, the language providing for the alternative is arbitrary. There are no standards as to when and when not the Agency will "deem" such a demonstration adequate for purposes of Section 9(a) of the Act and Sections 201.141 and 232.121 of the Board's rules. For these reasons, the Board finds this alternative demonstration unacceptable, unlike IPC and the Agency. The denials, as premised in the failure to demonstrate compliance with a remanded emission limit, were incorrect.

There is yet another problem with the Agency's permitting analysis under the second alternative. Although the Agency separately analyzed the Units' stack tests, it denied the permits based on the weighted average emission rate, which it believed to be greater than the remanded limit. The Board can speculate as to why the Agency treated these two sources as one; however, it cannot ascertain the Agency's authority for doing so. Nevertheless, since the underlying permitting process has been found invalid, the Board will not address the question of separately permitting these sources and the Agency's two aforementioned reasons for finding the stack tests unrepresentative.

II. AIR QUALITY DEMONSTRATION

Since the alternative method is stricken, the Board returns to the Agency's first reason for denying the permits: insufficient information to determine whether, alone or in combination with other sources, IPC's emissions could cause air quality violations and thereby be in violation of the Act and Board regulations concerning the same.

When filing its appeals, IPC contended that the Agency improperly denied the permit renewals based on insufficient information because neither Board regulation nor Agency rule require air quality analysis. IPC further argued that the Agency should have notified it of this deficiency within thirty days of

the renewal applications' submissions pursuant to Section 201.158 (Rule 103(b)(4) before codification). IPC argues that this rule is intended to protect the applicant's due process rights, and should have been implemented since the air quality analysis was an unknown requirement.

The first part of the emergency rule quoted above required an air quality demonstration to satisfy the mandate of Section 9(a) of the Act and Section 201.141 while the applicable TSP emission limits were on remand. Although the Board has held that expired rule to be inapplicable, that Section of the Act and that Board rule coupled with the air quality standard contained in Section 243.121 mandate that the permit applicant submit sufficient information to the Agency for it to determine that the same will not be violated. This information can be provided in the form of an air quality demonstration. Recalling IPC's Air Quality Manager's testimony, IPC was aware that an air quality demonstration might be necessary.

Citing the Board's decision in Sherex Chemical Company v. IEPA, 39 PCB 527 (October 2, 1980) IPC argued that the Agency should have requested the preliminary air quality analysis mentioned in its cover letter rather than denying the permits. In Sherex the Board held that Section 201.158 addressed the completeness of the application, not the sufficiency of the information submitted. Had IPC's applications been premised solely on its statement that preliminary air quality analysis indicated no violations, then the application could have been considered incomplete.

However, IPC also submitted the stack tests required by its most recent permits which were issued on June 23, 1981. Each of those permits also contained a Condition No. 7 requiring that monthly coal analyses be submitted until IPC entered into a long term coal purchasing contract. (Permit Appeal for Unit 1, PCB 82-103, Ex. 2: Permit Appeal for Unit 2, PCB 83-104, Ex. 2) The record filed by the Agency for Unit 1 contains monthly coal analyses from December 1, 1982 (Items 2, 7, 8, 11, 13, 14, 15, 16 17, and 20). The record filed for Unit 2 included a coal analysis for the period for the period between December 31, 1980 through February 28, 1981 which predates the most recently issued permits. (Item 10) Therefore, this information and possibly more, was in the Agency's files at the time of the denials.

Under Section 39(a) of the Act, the Agency has a duty to issue permits

> ...upon proof by the applicant that the facility, equipment...will not cause a violation of the Act or regulations hereunder. The Agency

> shall adopt such procedures as are necessary to carry out its duties under this Section.
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> [Ill. Rev. Stat. 1981, ch. 111½, par. 1039(a)]

As discussed above, the Agency has failed to adopt valid permitting procedures for sources such as IPC. Furthermore, other than the nine guidelines contained in the permit denial letters, there are no Agency adopted procedures for the applicant to use in developing a satisfactory air quality demonstration.

Despite the lack of these procedures, the Agency retains its authority to permit upon proof by the applicant that its operation will not cause air quality violations. The Board cannot ascertain whether the information submitted by IPC, pursuant to permit conditions, would have been sufficient to prove this if it had been used by the Agency to integrate IPC's emissions into an air quality model for the area in order to determine the impact. The Agency may argue that the information submitted by IPC was not representative. Although the Agency found the stack tests not to be sufficiently representative to demonstrate compliance with the remanded limit, the whole of the information provided, the coal analyses and stack tests, could have been used to demonstrate IPC's worst operation conditions, thereby its impact on regional air quality.

The Board recognizes that an air quality analysis would be burdensome to the Agency. However, it must either perform the exercise or, as held in the Sherex decision, it has a duty to notify that petitioner of the application's insufficiency. In Sherex the petitioner had submitted a study with its application and asked that the Agency also consider specific information then in-house at the Agency. Nevertheless the Agency's denial was premised solely on the study submitted with the application, and the Agency failed to specify reasons for its denial pursuant to Section 39(a)(4) of the Act. In these cases the Agency also has a duty at least to request the preliminary study mentioned in the applicant's cover letter. In the absence of valid procedures and due to the Agency's decision not to return the applications as incomplete it must either perform the air quality analysis or inform the applicant, and not in the denial letters, that an air quality demonstration is the proof necessary to show compliance.

As in the Sherex holding, the Board again finds that under Section 39(a) of the Act the Agency may deny permits when it deems information submitted not sufficient. However, when the Agency chooses not to evaluate the information provided in terms of a valid rule and does not have procedures informing the applicant of what information is necessary, it shall notify the applicant of the specific additional information necessary for its determination. To quote Sherex, "[i]t would be a somewhat capricious exercise of its powers under the Act for the Agency to deny a

permit on its merits for insufficiency of information proving nonviolation while knowing that if specific additional data or information were provided or were considered it could make a better informed decision on the application." (Sherex Chemical Co. v. IEPA, October 2, 1980, 39 PCB 529)

IPC argued that the Board's scope of review in these matters should include air quality studies and stack tests performed subsequent to the Agency's denial of these permits. The Board does not reach that issue. The decision is based on information which was available to and before the Agency at the time of its denials. However, since there are no state procedures pertaining to the parameters of air quality analysis the parties are to utilize the federal guidelines contained in "Guidelines on Air Quality Models" EPA # 450/2-78-027, "Regional Workshops on Air Quality Modeling, A Summary Report", April, 1981, and any documents since developed by the United States Environmental Protection Agency pertaining to air quality analysis.

This Opinion and Order constitute the Board's findings of fact and conclusions of law in both matters.

ORDER

The Board finds that the Illinois Environmental Protection Agency incorrectly denied Illinois Power Company renewal applications for Unit 1 (PCB 82-103) and Unit 2 (PCB 82-104) at its Vermillion Power Plant. Those denials are reversed and the matters are remanded for review consistent with this Opinion.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 26th day of January 1984 by a vote of 7-0.

Christan L. Moffett
Christan L. Moffett, Clerk
Illinois Pollution Control Board