ILLINOIS POLLUTION CONTROL BOARD
August 31, 1989

AMERICAN NATIONAL CAN CORPORATION,	)	
Petitioner,	)	
v.	)	PCB 89-68
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

MARK J. STEGER, OF McBRIDE, BAKER & COLES, APPEARED ON BEHALF OF THE PETITIONER.

LISA MORENO APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board upon an Alternate Control Strategy (ACS) permit appeal filed by American National Can Corporation (ANC) on April 18, 1989. ANC seeks review of an April 5, 1989 decision of the Illinois Environmental Protection Agency (Agency) to reject an ACS permit application for ANC's Hoopeston can body manufacturing facility. A hearing was held in this matter on June 27, 1989 in Hoopeston. Initial briefs were filed on July 14, 1989 by ANC and July 17, 1989 by the Agency. ANC's reply brief was filed on July 21, 1989 and the Agency's reply brief was filed on July 24, 1989.

ANC seeks an ACS permit for it's can-body manufacturing facility located in Hoopeston, Vermillion County. The facility is located in an attainment area for ozone ambient air quality standards. The "end" manufacturing process is the process which is the subject of the ACS. Volatile organic material (VOM) is emitted by "end-sealing" compounds which are applied to can ends before the ends are attached to the body of the can.

At the time of the application for the ACS, the ANC facility was operating under a variance from Section 215.204(b)(6). Section 215.204(b)(6) prescribes a coating VOM limitation of 3.7 pounds per gallon (lb/gal) for ANC's end sealing process.

ANC has operated its process under a number of variances. See American Can Company v. Environmental Protection Agency, PCB 80-213, 40 PCB 433 (February 5, 1981) and American Can Company v. Illinois Environmental Protection Agency, PCB 84-106, 62 PCB 399, (January 24, 1985). The most recent variance was granted on February 25, 1988 in PCB 87-67. National Can Company v. Illinois Environmental Protection Agency, PCB 87-67, (February 25,

1988). ANC was granted a variance from 215.204(b)(6), to allow emissions of 4.4 lb/gal of VOM. This variance expired on December 31, 1988.

During the term of that variance, ANC installed a thermal incinerator (TR12) to achieve compliance with 215.204(b)(6). The incinerator controls emissions from the single-die and double-die end presses. The incinerator provides for more stringent control of VOM emissions than what would be required under Section 215.204(b)(6).

ANC has constructed 2 gang end presses which are high volume end presses. These presses can make up to 12 can ends per stroke in contrast to the double-die end presses which make 2 ends per stroke. The emissions from the gang end presses cannot be controlled by the incinerator equipment currently installed in the facility.

The emission sources to be covered under the ACS permit include the single and double-die end presses as well as the two gang end presses.

ALTERNATE CONTROL STRATEGY

Section 39.1(a) of the Environmental Protection Act (Act) states:

> [O]wners or operators of emission sources may apply for and obtain from the Agency permits under this Section authorizing the construction and operation, or both, of a source or sources by use of emission control strategies alternative but environmentally equivalent to emission limitations required of such sources by Board regulations or by the terms of this Act.
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> The Agency shall issue such a permit or permits upon a finding that: 1) the alternative control strategy in the permit provides for attainment in the aggregate, with respect to each regulated contaminant, of equivalent or less total emissions than would otherwise be required by Board regulations for the sources subject to such permit; and 2) that air quality will otherwise be maintained consistent with Board regulations.

Pursuant to Section 9.3(c) of the Act, the Board has promulgated rules to implement the ACS program authorized by Section 31.1(a) of the Act. Those rules are found in 35 Ill. Adm. Code 202.

An ACS is defined by Section 202.110 as:

> [A] specific program of emissions limitations and requirements which is environmentally equivalent to that which would otherwise be required by applicable statutes or regulations, and under which the owner or operator of an emission source increases emissions of a regulated pollutant beyond the emission baseline at one or more emission sources and correspondingly reduces emissions of the same pollutant below the emission baseline at other emission sources. (emphasis added)
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> 35 Ill. Adm. Code 202.110.

Section 202.211 states that "a permit application under this Subpart (Part 202) shall provide a comparison of the baseline emissions and the emissions which would be permitted under the proposed ACS...." (emphasis added). The term "emission baseline" is defined by Section 202.116 as:

> "[T]he starting point or reference level from which increases and decreases are measured. The rules governing ... evaluation of ACS strategies specify the particular emission baseline that applies for that purpose."
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> 35 Ill. Adm. Code 202.116.

Section 202.201(a) further expands upon the emission baseline concept for ACS proposals:

> The baseline for reviewing decreases or increases of emissions from emission sources which are the subject of an ACS shall be the lesser of the actual emissions or the allowable emissions prescribed by this Chapter. (emphasis added)
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> 35 Ill. Adm. Code 202.201(a).

Section 202.104 defines "actual emissions" as:

> [T]he actual rate of annual emissions of a pollutant from an operational emission source for a particular date equal to the mean rate at which the emission source actually emitted the pollutant during the two-year period which immediately precedes the particular

date and which is determined by the Illinois Environmental Protection Agency (Agency) to be representative of normal emission source operation; however:

a) The Agency shall allow the use of a different time period upon a determination that it is more representative of normal emission source operation. The burden shall be on the applicant to demonstrate that another time period is more representative. Actual emissions shall be calculated using the emission source's actual operating hours, production rates, and types of materials processed, stored or combusted during the selected time period.

b) If the Agency determines that there is inadequate information to determine actual emissions as indicated in the preceding paragraphs, the Agency shall use the potential to emit of the emission source.

35 Ill. Adm. Code 202.104.

Section 202.107 sets forth the definition of "allowable emissions":

a) "Allowable emissions" means the emission rate of an emission source calculated using the maximum rated capacity of the emission source (unless the emission source is subject to permit conditions or other enforceable limits which restrict the operating rate, or hours of operation, or both) and the more stringent of the following:

1) The applicable emission standard or limitation contained in this Chapter, including those with a future compliance date; or

2) The emissions rate specified as a permit condition including those with a future compliance date.

35 Ill. Adm. Code 202.107

Finally, Section 202.306, Standards for Issuance, states in part:

> The Agency shall issue a permit containing an ACS if, and only if, the permit applicant demonstrates that:
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> a) The ACS provides, in the aggregate with respect to each regulated pollutant, equivalent or less total emissions than would otherwise be required.
>
> b) The impact of the ACS is environmentally equivalent to that which would otherwise be achieved and maintained under existing requirements.
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> 35 Ill. Adm. Code 202.306.

AGENCY'S REJECTION OF THE PROPOSED ACS

The Agency and ANC agree that for the purposes of evaluating ANC's proposed ACS, it is the "actual emission" level, not the "allowable emission" level which should be used as an emission baseline. (Ag. Brief, p.4-5). That is, the "actual emissions" (whether calculated according to the Agency's method or ANC's) are less than the "allowable emissions". The sole issue of this case is whether the Agency's calculation of ANC's actual emissions is correct.[1]

ANC's proposal is equivalent to what ANC calculates as the "actual emission" levels during 1988. The Agency agrees that 1988 is a representative time period for calculating ANC's actual emissions in terms of source operations factors such as end size production and end seal compound application weights. However, according to the Agency, pure emission data from 1988 does not represent "normal" operations because ANC was operating under a variance from Section 215.204(b) during 1988. (Ag. Reply, p.1-2). The Agency takes the position that the 1988 emission values for ANC should be adjusted to reflect an amount of VOM which would have been emitted had ANC complied with Section 215.204(b) during 1988.

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[1] The Agency denial letter asserts that ANC has incorrectly calculated annual and daily allowable emissions. However, the Agency has stated that the method of such calculations is no longer an issue in this appeal. (Ag. Brief, p.3).

In its denial letter the Agency states:

> It is inappropriate[2] to use actual emissions for the annual emissions baseline for this ACS, as it overstates the VOM emissions which would be discharged to the environment if ANCC [American National Can Corporation] end coating lines complied with §215.204(b), as they would be required to do in the absence of an ACS. In particular, if ANCC were not operating under a Variance or an ACS it would be required by rule to bring all its operations into compliance with §215.204(b), reducing actual emissions of 227.9 tons/year during the selected baseline period to at least 134 tons/year (227.9 multiplied by a compliance ratio of 0.588, equals 134). If the ACS were to allow emissions of 227.9 tons/year as requested by ANCC, it would not require equivalent emissions (§202.306(a)). As environmental impact is directly related to the amount of emissions, the ACS also would not provide environmental equivalence (§202.306(b)).
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> (Ag. Record, Exh. #1).

The Agency states that ANC's position concerning the baseline and "actual emissions" improperly focuses "narrowly on the literal terms of the definition of 'actual emissions'". The Agency states that the "underlying assumption in the definition of 'actual emissions' must necessarily be that the source is operating in compliance with the applicable emission limitations during the 'representative' period". It is the contention of the Agency that a contrary reading of the definition of "actual emissions" would result in a situation with "a baseline and proposed emissions under the ACS which are greater than 'compliant' emissions". (Ag. Reply, p.4).

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[2] While this may imply that the Agency takes the position that "allowable emissions" are the appropriate baseline for evaluating ANC's proposed ACS, the Agency asserts in its brief:

> The Agency does not disagree that the appropriate baseline is actual rather than [allowable] annual emissions, inasmuch as the information supplied by ANC indicates that its actual emissions were less than its allowable emissions, and 35 Ill. Adm. Code 202.201(a) provides that the baseline for an ACS shall be the lesser of the actual or allowable emissions. (Ag. Brief, p.4-5).

ANC asserts that "it is the emission baseline calculated in accordance to Sections 202.201, 202.104 and 202.107 which drives the evaluation of the ACS under 202.306, rather than Section 202.306 driving the calculation of the emission baseline". (ANC Reply Brief, p.2). ANC states that the Agency's interpretation directly conflicts with Section 202.104 and undermines the flexibility of an ACS system. ANC urges that the appropriate baseline should be the amount of VOM which was actually emitted from the plant, notwithstanding the fact that such emissions occurred during a time period when ANC was operating under a variance.

Moreover, ANC asserts that the Agency has recognized that ANC has complied with Section 202.104 when calculating its actual emissions. (ANC Reply, p.1). Specifically, ANC cites to the hearing transcript (R. 59-60) and the Agency's brief (p.6).

FINDINGS

In evaluating an ACS the Agency must compare the emissions under the proposed ACS with the emissions as as defined by an emission baseline. 35 Ill. Adm. Code 202.110. Section 202.201 prescribes that the emission baseline is the lesser of the actual emission level or the allowable emissions level. As stated earlier, the parties agree that the allowable emissions are greater than the actual emissions; therefore, the actual emissions should be used as the emission baseline. The controversy lies in how "actual emissions" are computed.

The Agency takes the position that the appropriate "actual emissions" level is equivalent to the amount which would have been emitted if ANC were in compliance with the 3.7 lb/gal standard during the 1988 representative time period. In essence, such a figure would be hypothetical and obviously not reflect the reality of ANC's 1988 emissions.

Yet, ANC was operating pursuant to a variance during 1988. As a result, it was not utilizing compliant coatings or controls which would afford compliance. A variance temporarily relieves a person from complying with regulations or Orders of the Board while that person takes actions to ultimately achieve compliance. Variances are not to be utilized in sucession indefinitely as a means of attaining defacto permanent relief. Department of Army v. Illinois Environmental Protection Agency, PCB 87-38, 81 PCB 257, 266 (September 17, 1987). Container Corporation v. Illinois Environmental Protection Agency, PCB 87-183, slip op. at 3 (June 2, 1988). Compliance with Board regulations is an ultimate goal of the Act. Monsanto Co. v. Illinois Pollution Control Board, 67 Ill. 2d 276, 367 N.E. 2d 684, 688 (1977). Therefore, under the Illinois regulatory scheme, a variance period represents a period of emissions which is atypical with respect to what is contemplated by the Act and regulations promulgated thereunder.

In calculating actual emissions as an emission baseline, a "representative" time period may be utilized. This period must be "representative of normal emission source operations". (emphasis added). 35 Ill. Adm. Code 202.104(a).

When the Board adopted its ACS rules, it discussed the issue of the "representative time period". It is clear from that discussion that the representative time period is intended to reflect a historical level of production. The parties agree that 1988 is a representative time period with respect to ANC's level of production. However, the Agency asserts that 1988 is not a representative time period with respect to ANC's emissions, because ANC was operating under the terms of a variance.

The Board agrees with the Agency's position. Emissions during a variance period should not be utilized as a baseline by which one evaluates a proposal in terms of environmental equivalence with what would otherwise be required. A variance period is not normative in terms of emissions from a source. While having reached such a conclusion, it does not necessarily follow that the 1988 period needs to be rejected as not being representative of ANC's production levels. The "representative period" must reflect a time of normal production levels. To that extent, 1988 is representative for ANC. However, the emissions resulting from ANC's 1988 production cannot be utilized since they were extraordinary and only temporarily allowed. Because ANC was operating under a variance during this time frame, 1988 emissions need to be adjusted to reflect a level of emissions, based upon 1988 production, which would have existed if ANC had been in compliance. The resulting emission value may then be used as an emission baseline without frustrating the very purpose of the Act -- compliance with prescribed emission limitations. If ANC were not operating under a variance and had been in compliance during the representative time period, an adjustment would not be necessary. That is, in such a situation, the pure emissions values resulting from a representative level of production could be used as a baseline in evaluating an ANC.

ANC is asking the Board to take a position which would effectively reward noncompliance. In other words, ANC advocates an emission baseline which would be equivalent to a level of emissions during a particular time frame regardless of whether that source was operating in accordance with prescribed emission limitations at that time. When "actual emissions" are used as an emission baseline, that baseline should reflect a normal production level. Additionally, the intent of the Act dictates that such a baseline presume compliance with applicable regulatory emission limitations. Limitations set forth by a variance are only temporary in nature and are not consistent with such a presumption. See Monsanto, 367 N.E. 2d at 688.

Still, ANC states that emissions levels resulting from noncompliance with otherwise applicable emission limitations

should be counted in an emission baseline. Obviously the larger the emission baseline, the greater the amount of emissions which could be emitted pursuant to an ACS. Since during the "representative time period", ANC used coatings which exceeded VOM concentrations with respect to what would otherwise be required by Board regulations, the total emissions values for ANC during that period have been inflated, notwithstanding the assertion that the emissions occurred as a result of a normal level of production.

Correspondingly, the emissions under the proposed ACS would also be inflated and not reflective of the Act's mandate that an ACS represent "equivalent or less total emissions than would otherwise be required by Board regulations". Section 39.1 (a) of the Act.

For the above reasons, the Board will affirm the Agency's decision.

Petitioner's Exhibit B, which is a Federal Register notice of proposed rulemaking by the United States Environmental Protection Agency (U.S. EPA) was admitted by the hearing officer without objection by the Agency. At hearing, ANC stated that it propounded the notice to give the Board an indication as to how ANC's ACS would be evaluated by the U.S. EPA if the ACS were submitted to U.S. EPA as a State Implementation Plan (SIP) revision. ANC takes the position, though, that the ACS is not required to be submitted to the U.S. EPA as a SIP revision. (R. 43-44).

Specifically, Petitioner's Exhibit B is a notice of proposed rulemaking by which the U.S. EPA proposes to approve an ACS for Admiral Division of Magic Chef (Admiral) as a site-specific SIP relaxation. Admiral's ACS concerned a plant located in Knox County which is an attainment area. In the notice, the U.S. EPA states:

> This rulemaking relaxes a stationary source RACT emission limitation in an area that has been designated as attainment/unclassified for ozone. Originally, this RACT limitation was imposed by the State, not to satisfy an ozone nonattainment SIP planning requirement, but rather to allow the State to have an accommodative SIP. This action, when promulgated, will remove the accommodative SIP for Knox County for the duration of the variance....
>
> 54 Fed. Reg. 12653.

The notice also states that "an accomodative ozone SIP for areas classified as attainment/unclassifiable requires RACT-level controls on existing sources, in lieu of requiring new major

sources of VOC [volatile organic chemical] to do preconstruction monitoring [as required by U.S. EPA's Prevention of Significant Determination regulations]" Id.

More importantly, though, the U.S. EPA classifies Admiral's ACS as a "bubble" subject to the requirements of U.S. EPA's Emissions Trading Policy Statement, 51 Fed. Reg. 43813 (December 4, 1986). However, U.S. EPA concludes that Admiral's ACS is not approvable as a "bubble" SIP revision. 54 Fed. Reg. 12652, 12653. See also, Approval and Promulgation of Implementation Plans, Ohio 54 Fed. Reg. 335.31, 335.32 (Nonattainment area bubble is not approvable because it does not comport with US EPA's Emissions Trading Policy Statement).

Appendix B of the December 4, 1986 U.S. EPA policy statement provides definitions for the terms "actual emissions", "allowable emissions" and "emissions baseline". Specifically, the policy statement explains how an emission baseline for a "bubble" should be calculated when the bubble is proposed for an attainment area.

> For bubbles, a source's "baseline" emissions are equal to the product of its 1) emission rate ("ER"), specified in terms of mass emission per unit of production or throughout (e.g., pounds SO_2 per million BTU or pounds of VOC per weight of solids applied); 2) average hourly capacity utilization ("CU") (e.g., millions of BTU per hour or weight of solids applied per hour); and 3) number of hours of operation ("H") during the relevant time period. I.e., baseline emissions = ER x CU x H. Net baseline emissions for a bubble are the sum of the baseline emissions of all sources involved in the trade.
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> In attainment areas and nonattainment areas with approved demonstrations of attainment, a source's baseline emissions for bubble purposes must generally be determined using the lower of "actual" or "allowable" values for each of the three baseline factors.
>
> Actual values for these factors are determined based on the source's average historical values for the factors for the two-year period preceding the source's application to bank or trade emissions reduction credits. As discussed above, another time period may be deemed more representative of typical operations, but the emissions for that other period must be shown to be consistent with air quality planning for the area. A source's allowable values for the three baseline factors are determined

> based on its lowest federally enforceable limit for those factors (i.e., the lowest limit specified in an applicable SIP, PSD or other NSR permit issued under an EPA-approved program, compliance order, or consent decree), including those with a future compliance date.
>
> The actual values for any of the three baseline factors, when higher than corresponding allowable values, may not be used by a source in calculating baseline emissions (i.e., reductions down to compliance levels cannot qualify for emission reduction credit).
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> 51 Fed. Reg. at 43855.

Consequently, in the case at hand the Agency's calculation of an emission baseline - adjusting for excess emissions due to the 1988 variance - is consistent with the U.S. EPA's policy in calculating an emission baseline for a bubble. During the 1988 variance period, ANC's actual emission rate (4.4 lb/gal VOM for its coatings) exceeded the allowable emission rate (3.7 lb/gal VOM). As a result, under U.S. EPA's policy, the emission baseline would be based upon a 3.7 lb/gal emission rate. The Agency's adjustment of the 1988 emission values, in calculating "actual emissions" for ANC, effectively achieves the same outcome as that dictated by U.S. EPA policy.

Therefore, the Board's decision today upholding the Agency's own decision is supported by U.S. EPA policy as well as by the Act.

The Board notes that at the Board hearing the parties jointly introduced emission data different from that which was before the Agency when the Agency made its permit decision. Given the controlling legal issues of this case, these specific data have not been determinative of the outcome of this case. However, the Board must base its permit appeal decisions upon information which was before the Agency when the Agency made its permitting decision. New information may not be considered in a permit appeal proceeding. Alton Packaging Corporation v. Pollution Control Board, 162 Ill. App. 3d 741, 516, N.E. 2d 275, 279, (5th Dist. 1987); See also Illinois Power Company v. Illinois Pollution Control Board, 100 Ill. App. 3d 528, 426 N.E. 2d 1258, 1261, (3rd Dist. 1981) and Illinois Environmental Protection Agency v. Pollution Control Board, 118 Ill. App. 3d 772, 455, N.E. 2d 188, 194, (1st Dist. 1983). Therefore, any information which the Agency considers regarding a permit application must be made a part of the Agency's record. Then, if the Agency's decision is appealed, the Board will be able to properly consider all data upon which the Agency based its decision.

Finally, there is a controversy between the parties as to whether the Agency should submit the ACS to U.S. EPA as a SIP revision. Since the Board has affirmed the Agency's denial of ANC's requested ACS the Board need not address the issue. Nonetheless, the Board notes that Section 4(l) of the Act designates the Agency as the air pollution agency for the State for the purposes of the federal Clean Air Act. That provision further explains the Agency's role as follows:

> The Agency is hereby authorized to take all action necessary or appropriate to secure to the State the benefits of such federal Acts, provided that the agency shall transmit to the United States without change any standards adopted by the Pollution Control Board pursuant to Section 5(c) of this Act.
>
> Ill. Rev. Stat. 1987, ch. 111½, par. 1004(l).

With regard to ACS permits in particular, Section 39.1(f) of the Act further states:

> At the request of the applicant, permits approved pursuant to this Section shall be submitted by the Agency to the U.S. Environmental Protection Agency as revisions to the State Implementation Plan required by Section 110 of the Clean Air Act if and when necessary to comply with the Clean Air Act.
>
> Ill. Rev. Stat. 1987, ch. 111½, par. 1039.1(f).

Given the authority granted to the Agency under Section 4(l) of the Act, Section 39.1(f) does not necessarily dictate the conclusion that the Agency is prohibited from submitting an ACS to the U.S. EPA if the applicant has not requested such a submittal.

Moreover, the Board is not aware of a provision in the Act which would provide for Board review of a decision by the Agency to submit standards to the U.S. EPA for review as a proposed SIP revision.

ORDER

The April 5, 1989 decision of the Illinois Environmental Protection Agency which denied a request by American National Can Corporation for an Alternative Control Strategy permit is hereby affirmed.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987 ch. 111 ½ par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 31st day of August, 1989, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board