

ILLINOIS POLLUTION CONTROL BOARD

October 1, 2015

NACME STEEL PROCESSING, L.L.C.,)	
)	
Petitioner,)	
)	
v.)	PCB 15-153
)	(Permit Appeal – Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by G.M. Keenan):

NACME Steel Processing, L.L.C. has appealed conditions imposed in an air permit issued by the Illinois Environmental Protection Agency (IEPA). In turn, IEPA filed the record of its permitting determination and a motion for summary judgment. This Board order denies IEPA’s motion. The order proceeds as follows: introduction, legal background, procedural history, undisputed facts, discussion, and conclusion.

INTRODUCTION

NACME owns and operates a steel pickling facility at 429 West 127th Street in Chicago. Generally, pickling removes impurities such as rust or stains from the surface of metal. NACME, in particular, pickles coils of thin, flat steel to remove oxide scale. Some customers ask NACME to coat the pickled steel with rust preventative oil or lubrication oil. In these cases, NACME applies the appropriate oil, winds the steel into a coil, and ships the coil while still wet with oil.

IEPA issued an operating permit to NACME containing conditions requiring compliance with the New Source Performance Standards (NSPS) for metal coil surface coating operations, found at 40 C.F.R. Part 60, Subpart TT. Subpart TT regulates metal coil surface coating operations because the process emits volatile organic compounds in many instances. NACME and IEPA dispute whether Subpart TT’s requirements apply to NACME’s steel coil coating operation. Subpart TT applies to “affected facilities in a metal coil surface coating operation.” 40 C.F.R. § 60.460(a) (2014). These affected facilities include “each finish coat operation.” *Id.* The dispute centers on whether coating steel coils with rust preventative or lubrication oil fits Subpart TT’s definition of finish coat operation.

This Board order finds that the NACME’s coating operation does not meet Subpart TT’s definition of finish coat operation and therefore denies IEPA’s motion for summary judgment. Because NACME did not move for summary judgment, whether NACME is entitled to judgment as a matter of law is not before the Board. However, today’s order does not preclude NACME from moving for summary judgment in the future.

LEGAL BACKGROUND

Section 111 of the federal Clean Air Act authorizes the U.S. Environmental Protection Agency (USEPA) to develop NSPS rules for specific categories of emission sources. 42 U.S.C. § 7411 (2014). Subpart TT contains the NSPS rules for metal coil surface coating operations. USEPA delegated administration of NSPS, including Subpart TT, to IEPA. The Illinois Environmental Protection Act (referred to here as the Act) authorizes IEPA to issue state operating permits containing federally enforceable provisions, including provisions to enforce Subpart TT. 415 ILCS 5/39.5 (2014). NACME's operating permit with Subpart TT conditions is this kind of permit.

A permit containing conditions may be appealed. 415 ILCS 5/40(a)(1) (2014). In a permit appeal, the Board must determine whether the disputed conditions are necessary to accomplish the purposes of the Act.¹ Section 9.1(b) of the Act states that its provisions are intended to be consistent with the federal Clean Air Act, which includes the NSPS program. So the Board must determine whether IEPA appropriately included Subpart TT requirements in the NACME's operating permit.

IEPA moved for summary judgment. The Board grants summary judgment when the record demonstrates that there is no issue of material fact and the moving party is entitled to judgment as a matter of law.² Below, the Board finds that there is no issue of material fact but that IEPA is not entitled to judgment as a matter of law.

PROCEDURAL HISTORY

NACME petitioned for hearing on Jan. 26, 2015 (Pet.), which the Board accepted on Feb. 5, 2015. IEPA filed the administrative record (R.) on Mar. 10, 2015 after being granted a motion to extend the time allotted for filing. IEPA then moved for summary judgment (Mot. for S.J.) on May 4, 2015. NACME responded (Resp. Br.) on July 8, 2015. IEPA replied (Reply Br.) on July 31, 2015. With leave of the Board, NACME filed a sur-reply (Sur-Reply Br.) on Aug. 11, 2015.

UNDISPUTED FACTS

The parties do not dispute the facts pertaining to NACME's production process. At its facility, NACME pickles steel to remove oxide scale. R. at 252, 712. After pickling, NACME often applies rust preventative oil or lubrication oil to the steel. *Id.* The steel coils are transferred to the customer while coated in the oil and the customer removes the oil before use. R. at 97-104. There is no curing or quenching equipment at NACME's facility and the steel coils are not dried before shipment. R. at 119-125.

¹ Sherex Chem. Co. v. IEPA, PCB 91-202, slip op. at 2 (July 30, 1992), *citing* Joliet Sand & Gravel Co. v. IPCB, 163 Ill. App. 3d 830, 837 (3d Dist. 1987).

² Clayton Chem. Acquisition, L.L.C. v. IEPA, PCB 98-113, slip op. at 3 (Mar. 1, 2001), *citing* Outboard Marine Corp. v. Liberty Mut. Ins. Co., 154 Ill. 2d 90 (1992).

Nor do the parties dispute the facts pertaining to the permitting process. In October 2005, NACME applied to IEPA for a permit to operate its facility. Nearly seven years later, on April 26, 2012, IEPA issued a draft operating permit. The draft permit's conditions required compliance with Subpart TT. NACME asked IEPA to remove these requirements from the draft permit shortly after it was issued.³ It also attempted to appeal the draft permit in August 2012, but the Board ordered NACME to wait for the final permit before appealing.⁴ IEPA issued the final operating permit on December 22, 2014. Exh. A to Pet. It contained the same Subpart TT requirements as the draft permit, so NACME petitioned the Board again. This time, because NACME appealed a final permit, the Board accepted the petition for hearing.

DISCUSSION

Issue of Material Fact

IEPA argues that there is no issue of material fact. Mot. for S.J. at 4-6; Reply Br. at 2. And NACME does not argue to the contrary, instead only taking issue with IEPA's legal arguments.⁵ The Board agrees that there is no issue of material fact in the record and turns to whether, on those facts, IEPA is entitled to judgment as a matter of law.

Judgment as a Matter of Law

Construing Regulatory Language

The legal dispute principally concerns how to interpret the definition of "prime coat operation" in Subpart TT. 40 C.F.R. § 60.461(a) (2014). Essentially, if NACME's operation is a prime coat operation, then the permit provisions implementing Subpart TT's requirements are necessary to accomplish the purposes of the Act.

Thus, the Board must determine how to construe Subpart TT's language. The Board can follow the rules for constructing statutes when constructing regulations: "Because administrative regulations have the force and effect of law, the familiar rules that govern construction of statutes also apply to the construction of administrative regulations." Kean v. Wal-Mart Stores, Inc., 235 Ill.2d 351, 368 (2009). The "fundamental principle" for statutory construction "is to ascertain and give effect to the legislature's intent." Town & Country Utilities, Inc. v. IPCB, 225 Ill.2d 103, 117 (2007). And the best way to give effect to intent is to construe the specific language, which is "the most reliable indicator of the legislature's objectives in enacting a particular law." *Id.*

³ NACME and IEPA corresponded about the permit before NACME began this appeal. For example, NACME emailed IEPA on June 27, 2012 and raised many of the arguments that NACME raised again in its petition. Exh. F to Pet.

⁴ NACME Steel Processing, L.L.C. v. IEPA, PCB 13-7 (Nov. 15, 2012).

⁵ For instance, NACME's response only attacks IEPA's interpretation of Subpart TT and use of persuasive authority. Resp. Br. at 3-9.

Likewise, when constructing a regulation, the Board looks first to its plain language. As explained below, the Board finds that the plain language of Subpart TT indicates the regulator did not intend to apply Subpart TT to a facility that does not dry or cure coatings.

Definition of Metal Coil Surface Coating Operation. First, we look to the provision titled “Applicability and designation of affected facility,” 40 C.F.R. § 60.460(a).⁶ It states that Subpart TT’s provisions apply to specific affected facilities “in a metal coil surface coating operation.” *Id.* If NACME’s operation is not a metal coil surface coating operation, then the provisions do not apply. Subpart TT’s definitions section states that the term “metal coil surface coating operation” means “the application system used to apply an organic coating to the surface of any continuous metal strip...that is packaged in a roll or coil.” *Id.* at § 60.461(a). The oils NACME uses are organic coatings and NACME applies them to a metal strip packaged in a coil. R. at 387-388. So NACME’s operation is a metal coil surface coating operation as defined in Subpart TT.

Definition of Finish Coat Operation. The next question is whether NACME’s operation meets the definition of any of the specified affected facilities. Subpart TT applies to three kinds of affected facilities, but IEPA only argues that NACME’s operation is a finish coat operation. Mot. for S.J. at 12. If NACME’s operation is a finish coat operation as defined in Subpart TT, its regulatory provisions apply and the permit conditions stand.

Subpart TT states:

“*Finish coat operation* means the coating application station, curing oven, and quench station used to apply and dry or cure the initial coating(s) on the surface of the metal coil. ...” 40 C.F.R. § 60.461(a).

NACME argued that that the definition “unambiguously states that a finish coat operation involves *three* physical attributes: a coating application station, curing oven, *and* quench station. The use of the conjunction ‘and’ leaves no doubt about this interpretation” and if only one attribute were required, the regulation would have used the word “or” instead of “and.” Resp. Br. at 5 (emphasis original).

IEPA argued that because the definition does not state that an operation “shall” have all the components listed, then not all three are necessary for Subpart TT to apply.⁷ In its reply, IEPA also argued that the language of the regulation is ambiguous. Reply Br. at 4-6.

⁶ Neither party addresses the relevance, if any, in the distinction between a stationary source (here, the metal coil surface coating operation) and an affected facility (here, the finish coat operation) outlined in the general provisions to the NSPS regulations, 40 C.F.R. §§ 60.1 *et seq.*

⁷ Mot. for S.J. at 12-13. IEPA also argues that because the definition notes the finish coat operation can be used to “apply and dry *or* cure,” implying that a curing oven may not be at a facility covered by Subpart TT. *Id.* (emphasis original). However, the definition of “curing oven” itself states that the curing oven may be used to “dry or cure.” 40 C.F.R. § 60.461(a). Thus, IEPA’s interpretation is clearly wrong.

But the Board need not address whether all three physical attributes listed in Subpart TT are required to constitute a finish coat operation. Instead, we only need to parse the latter part of the definition to conclude that the regulation does not apply to NACME's facility.

The components of a prime coat operation must be used to apply and dry or cure coatings. This is clear when examining the definition sentence, which states that the individual components ("the coating application station, curing oven, and quench station") are "used" specifically "to apply and dry or cure..." As NACME notes, "the definition of 'finish coat operation' requires that *some* drying or curing of the initial applied coating is necessary, and because NACME does no such drying or curing, the definition does not apply to NACME's facility." Resp. Br. at 5 (emphasis original).

This part of the definition is not trivial: a "statute should be construed, if possible, so that no word is rendered meaningless or superfluous." Kean, 235 Ill. 2d at 368. Drying and curing is an essential part of the definition of the facility. If no component is used to dry and cure, the operation is not an affected facility.

When customers ask NACME to coat the pickled steel coils with oil, the coils are delivered still wet. R. at 97-104. Subpart TT applies only to a finish coat operation that dries or cures the coating. Because NACME does not dry or cure the coating, Subpart TT's provisions do not apply. To reach this result, the Board does not address whether a curing oven must be present to constitute a finish coat operation.

Persuasive Authority

The Board relies on unambiguous language to find Subpart TT does not apply to NACME's operation. Illinois courts have stated that "where the language is clear and unambiguous, we must apply the statute [and, thus, regulation] without resort to further aids of statutory construction." Town & Country, 225 Ill. 2d at 117. The parties have provided persuasive authority to aid construction, but the Board can apply the regulation without it.

Nonetheless, if determinations by other environmental agencies starkly contrasted with the Board's interpretation, some explanation would be appropriate. However, the persuasive authority does not contradict the Board's interpretation of Subpart TT.

USEPA Region 5 Determination. IEPA cites an applicability determination from USEPA's Region 5 office in support of its interpretation of Subpart TT. Exh. E to Pet. In this determination, USEPA applied a performance testing provision in Subpart TT to a coating facility without a curing oven operated by a company named Olin. IEPA argued that this shows USEPA "determined that the subject facility met the applicability standard of...Subpart TT," thwarting NACME's argument that Subpart TT only applies to facilities with a curing oven. Mot. for S.J. at 13-14.

NACME argues that the determination has no bearing because it "focuses on an entirely unrelated issue, the alleged failure to appropriately measure VOC emissions from a plant in

conducting performances tests.” Resp. Br. at 7. However, applicability is not entirely unrelated to performance testing. USEPA deliberately required compliance with Subpart TT at a facility lacking a curing oven and it is not plausible to argue USEPA simply ignored applicability.

Yet, Olin’s operation is distinguishable from NACME’s in a manner consistent with the Board’s interpretation of Subpart TT. Olin applied and dried a coating through evaporation. In fact, Olin operated a carbon filter as part of the coating applicator to control the emissions generated when the coating dried. Exh. E at 2. The application station is used to dry, thus it meets the definition in Subpart TT. By contrast, NACME does not dry the coating; the coils are shipped still wet with oil. Resp. Br. at 2.

3M Determination. IEPA also cites an August 9, 2013 USEPA applicability determination analyzing a facility where a print station applied ink to steel coils and was subject to Subpart TT.⁸ IEPA says that this determination should persuade the Board because the print station lacked a curing oven, yet USEPA determined that Subpart TT applied.

But IEPA’s characterization is inaccurate: the print station included an oven. The determination notes that the operation includes “a print station with a small oven for making product markings.” *3M Determinations* at II, *supra* at n. 8. Thus the determination does not conflict with the Board’s interpretation of Subpart TT because the equipment is used to dry the ink.

IDEM Determinations. NACME provided three determinations made by the Indiana Department of Environmental Management. The determinations declined to apply Subpart TT to metal processing operations that apply oils similar to those NACME uses, finding in each case that the regulations are inapplicable because the operations do not use a curing oven or quench station.⁹ These determinations are consistent with the Board’s reading of Subpart TT. There is no drying or curing at the facilities in the IDEM determinations, so the regulation does not apply.

USEPA Background Information Document. NACME also presented a background information document written by USEPA in connection with a National Emission Standards for Hazardous Air Pollutants rulemaking applicable to metal coil coaters (excerpt at the end of Exh. D). It describes coating, oven drying, and quenching practices without discussing coating operations without curing ovens. It also lists several types of coating used, but does not mention rust preventative or lubricating oil. Nothing in this document contradicts the Board’s interpretation of Subpart TT.

Other Arguments

⁸ Reply Br. at 5, citing *Response to 3M Request for Several MACT/NSPS Applicability Determinations*, USEPA (Aug, 9, 2013), available at <http://cfpub.epa.gov/adi/pdf/adi-nsps-1400018.pdf>.

⁹ The Indiana determinations are presented as an attachment to a June 14, 2012 letter from NACME’s environmental consultant to IEPA, Exhibit D to the petition.

IEPA contended that NACME's construction permit application attested that Subpart TT applied to its operation. Mot. for S.J. at 14-15. However, NACME notes that it contested the special conditions in its permits less than a month after NACME received its first draft operating permit. Resp. Br. at 9. Regardless, IEPA does not explain whether this purported admission should outweigh the plain language of Subpart TT, inform the interpretation of Subpart TT, or otherwise alter the Board's analysis based in parsing the words of the regulation. The Board sees no reason to do so and thus accords this argument no weight.

IEPA's motion also responds to an argument NACME made in its petition about the solid content of the oil applied to the steel coils. Mot. for S.J. at 18. NACME argued that compliance with Subpart TT is measured in terms of pounds of volatile organic matter per pounds of solids. There are no solids in NACME's oil, thus Subpart TT does not apply. Pet. at 5. However, as IEPA notes, determining compliance with a regulation is distinct from determining applicability. Mot. for S.J. at 18. So this argument plays no role in the Board's finding on the applicability of Subpart TT.

IEPA also moved to strike Exhibit A to NACME's response brief, the Affidavit of John DuBrock. Reply Br. at 2-4. The Board grants this motion. But in NACME's sur-reply, it properly notes that the affidavit largely reiterates alleged facts already found in the record. Sur-Reply Br. at 4.

CONCLUSION

The Board denies IEPA's motion for summary judgment. Though the Board finds no issue of material fact, IEPA has not shown it is entitled to judgment as a matter of law. Because NACME made no motion for summary judgment, whether NACME is entitled to judgment as a matter of law is not a question before the Board. However, today's order does not preclude NACME from moving for summary judgment in the future. Absent such a motion, the Board directs the parties to proceed to hearing, as outlined in the Board's February 5, 2015 order.¹⁰

IT IS SO ORDERED.

I, Don A. Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 1, 2015, by a vote of 5-0.



Don A. Brown, Assistant Clerk
Illinois Pollution Control Board

¹⁰ NACME Steel Processing, L.L.C. v. IEPA, PCB 15-153 (Feb. 5, 2015).