

ILLINOIS POLLUTION CONTROL BOARD
March 26, 1992

PEOPLE OF THE STATE OF)	
ILLINOIS,)	
)	
Complainant,)	PCB 91-192
)	(Enforcement)
v.)	
)	
PRAIRIE MATERIAL SALES, INC.,)	
)	
Respondent.)	

ORDER OF THE BOARD (J. Anderson):

This matter comes before the Board on motions for summary judgment filed by both parties. Prairie Material Sales filed its motion for summary judgment on October 9, 1991. The People responded and filed their motion for summary judgment on January 8, 1992. Prairie Material Sales responded on March 2, 1992. The Board granted extensions of time to file and leave to file instant on November 7, 1991, January 9, 1992, and January 23, 1992.

As a preliminary matter, the Board must dispose of a March 6, 1992 motion to strike filed by the People. The People request that the Board strike Prairie Material Sales' March 2, 1992 "Response to Complainant's Motion for Summary Judgment and Reply to Complainant's Response to Respondent's Motion for Summary Judgment." The People assert Section 103.140(c) of our procedural rules as a basis for striking this filing. That provision allows the filing of a reply only with leave of the Board. The Prairie Material Sales March 11, 1992 response to this motion basically contends that the only basis that the People assert for striking the filing is the caption of the filing--i.e., the use of the word "reply".

Without downplaying the importance of selecting the proper wording of captions on all filings so the Board can readily ascertain the nature of the pleading, and without downplaying the importance of obtaining leave to file a reply brief, the Board hereby denies the People's motion to strike. This matter has taken on a unique posture since the People requested summary judgment on the same issue as did Prairie Material Sales. First, Prairie Material Sales filed its motion for summary judgment. Then the People filed their response, which included a counter-motion for summary judgment--on one of the very two bases for summary judgment raised by Prairie Material Sales. This means that any responsive filing to the People's motion would almost inevitably take on some character of a reply: it would necessarily argue that summary judgment is appropriate, but on the basis originally asserted, rather than on the basis asserted by the People. A review of the challenged Prairie Material Sales

"response and reply" further supports this conclusion. There is no "bright line" delineating responsive and reply arguments in this filing. Rather, it basically posits that summary judgment is inappropriate in favor of the People because it is appropriate in favor of Prairie Material Sales.

For these reasons, the Board hereby denies the People's motion to strike the March 2, 1992 filing by Prairie Material Sales. The Board hereby grants leave to file that document instantaneously to the extent it can be considered a reply and not a response. The Board will now turn to the more substantive aspects of the motions for summary judgment.

As stated in Williamson Adhesives, Inc. v. EPA, No. PCB 91-112 (Aug. 22, 1991), "Summary judgment is appropriate where there is no genuine issue of material fact based on the affidavits, admissions, pleadings, and other items in the record." Williamson Adhesives at 1-2 (citing Caruthers v. B.C. Christopher & Co., 57 Ill. 2d 376, 380, 313 N.E.2d 457, 459 (1974) and Ill. Rev. Stat. 1989 ch. 110, par. 1005(d)). It is necessary to examine the nature of the complaint and the facts presented by the pleadings in order to dispose of the motions for summary judgment.

The October 9, 1991 complaint includes two counts. The first count alleges that Prairie Material Sales constructed an emissions source without a permit, in violation of Ill. Rev. Stat. 1989 ch. 111½, par. 1009(a) and (b) and 35 Ill. Adm. Code 201.142. The second count alleges that Prairie Material Sales operated an emissions source without a permit, in violation of Ill. Rev. Stat. 1989 ch. 111½, par. 1009(a) and (b) and 35 Ill. Adm. Code 201.143.

A careful review of the admissions, pleadings, and other items in the record in this matter discloses that some material issues of fact exist on many of the issues raised. Therefore, summary judgment is warranted only in part, and a denial is warranted in part.

The Prairie Material Sales facility is located in Batavia, in Kane County. Fox Valley Concrete (not a party to this proceeding) constructed it around 1979. Fox Valley Concrete filed for a construction permit for construction of the plant on June 27, 1979. Construction was to begin on about July 1, 1979 and end on about August 1, 1979. A five-year operating permit issued on February 11, 1981. Prairie Material Sales acquired the plant by purchase from Fox Valley Concrete on about May 17, 1982. Prairie Material Sales filed for construction and operating permits for the boiler on about March 8, 1991, and an operating permit issued on March 27, 1991. (Prairie Material Sales December 9, 1991 Answer at 1-2; Prairie Material Sales December 9, 1991 motion for summary judgment at 3-5 & attached affidavit;

People's January 8, 1992 motion for summary judgment and response at 1 & 6 & attached ex. 1, 2 & 4; Prairie Material Sales March 2, 1992 response 3, 5-7 & attached affidavit.)

The controversy of this proceeding involves a single piece of plant equipment. The offending equipment is a 4.18 Mbtu/hr boiler used to heat water and aggregate material. The June, 1979 permit application filed by Fox Valley Concrete does not mention the subject boiler. (Ex. 4 attached to People's response and motion of January 8, 1992.) Prairie Material Sales' assertions are inconsistent as to the construction of the boiler. Prairie Material Sales initially asserts in its pleadings that the boiler was "completely constructed and operational" prior to the date it purchased the plant from Fox Valley Concrete in 1982. (Prairie motion of December 9, 1991 at 2-3.) Prairie Material sales later asserts that the present boiler is "virtually identical" to the prior boiler that was in existence when it purchased the plant. Prairie Material Sales states that it retired the prior boiler from service in 1988. (Affidavit attached to Prairie response of March 2, 1992.)

The Prairie Material Sales motion essentially requests summary judgment on two bases. First, Prairie Material Sales contends that since construction of the boiler was complete prior to its purchase of the plant, it could not have violated the requirement for a construction permit. The People respond that corporate successor liability might lie, so summary judgment is inappropriate until after discovery is complete. Second, Prairie Material Sales contends that this boiler is exempt pursuant to 35 Ill. Adm. Code 201.146(c), the "residential or commercial establishment" exemption, from the construction and operating permit requirements. The People respond that this exemption does not apply because the Prairie Material Sales facility is not a "commercial establishment" as contemplated by that provision.

The People pray for summary judgment on the second count of the complaint (operating without a permit). In support of their motion, the People contend that the Prairie Material Sales facility is not a "residential or commercial establishment" within the meaning of 35 Ill. Adm. Code 201.146(c). Prairie Material Sales responds that it is engaged in the business of selling building materials, in that it merely sells the components of concrete, instead of manufacturing concrete. Prairie Material Sales contends that the concrete is actually manufactured off-site, on the transport vehicle after loading of the component materials by Prairie Material Sales. Prairie Material Sales maintains that the boiler is of the type contemplated by the regulatory "residential or commercial establishment" exemption. (Prairie response of March 2, 1992.)

Turning to the resolution of the issues relating to the date of boiler construction as they impact on the first count

(construction without a permit), the Board finds that genuine issues of material fact exist. As outlined above, it is unclear based on Prairie Material Sales' pleadings and affidavits when the allegedly offending boiler was constructed. Prairie Material Sales acquired the Batavia plant in 1982. Prairie contends in one place that the boiler was already constructed at that time. At another place, Prairie Material Sales states that the original boiler retired in 1988, and, therefore, makes it appear that the present boiler may have been constructed since Prairie Material Sales acquired the plant. Resolution of this factual issue is essential to disposition of count I. This divergence in the facts warrants a denial of summary judgment as to count I in favor of Prairie Material Sales of the complaint (construction without a permit). In so concluding, the Board does not need to address the issues relating to corporate successor liability.

On the issue of the "residential or commercial establishment" exemption of Section 201.146(c), there are no genuine issues of material fact. Therefore, partial summary judgment is warranted on count II (operating without a permit). This conclusion and the following supporting analysis also provides an alternative basis for the denial of summary judgment as to count I. Both parties rely on a single Board decision in arguing for summary judgment.

The exemptions provisions from the permitting requirements state in significant part as follows:

No permit is required for the following classes of equipment:

. . . .

- c) Fuel burning emission sources for indirect systems and for heating and reheating furnace systems used exclusively for residential or commercial establishments using gas and/or fuel oil exclusively with a total capacity of less than 14.6 MW (50 [Mbtu/hr]) input;
- d) Fuel burning emission sources other than those listed in subsection (c) for indirect heating systems with a total capacity of less than 293 kW (1 [Mbtu/hr]) input;

. . . .

35 Ill. Adm. Code 201.146.

In National Marine Service, Inc. v. EPA, No. PCB 85-108, 66 PCB 293 (Nov. 7, 1985), the Board had an opportunity to construe the "residential or commercial establishment" exemption of subsection

(c). In that case, the respondent operated a river barge cleaning service. Some sales of barge equipment had occurred from the facility. The respondent used the boiler in question to produce hot water and steam to facilitate barge cleaning. It had a firing capacity of about 20 Mbtu/hr (5.9 MW), and the respondent fired it with no. 6 fuel oil and other (dirty and contaminated) hydrocarbons recovered from the barge cleanings. National Marine Service at 3, 66 PCB at 295.

The National Marine Service respondent argued that the "residential or commercial establishment" exemption applied to this boiler because the intent of the exemption was to "relieve the permit 'burden' from 'small sources'" It also argued that to narrow a construction of "commercial establishment" would defeat the purpose of the exemption. Id. at 5, 66 PCB at 297.

The Board concluded that the respondent's facility was "more in the nature of an industrial service establishment than a 'commercial establishment' within the commonly accepted meaning of the term." The Board held that the respondent's boiler did not fall within the exemption. Id. at 5-6, 66 PCB at 297-98. (Another basis for the determination that this exemption did not apply was that the fuel used was not exclusively fuel oil or natural gas. Id. at 6-8, 66 PCB at 298-300.)

In the course of distinguishing its operations from those involved in National Marine Service, Prairie Material Sales asserts that because all concrete mixing occurs in the truck, "the Batavia site is nothing more than a location that dispenses building materials." It continues as follows:

The Prairie Batavia site produces no concrete, as such. It is a series of large dispensers, cooperatively situated to allow the combination of materials in a manufacturing device which produces concrete off site. The concrete is then transported to a purchaser's site.

(Prairie response of March 2, 1992 at 7.)

Prairie Material Sales also distinguishes its boiler in that it is fired exclusively by natural gas, unlike the mixed and contaminated fuel of National Marine Service.

Whatever the appeal of Prairie Material Sales' arguments, the Board cannot conclude that a concrete mixing facility is a "commercial establishment" within the meaning of 35 Ill. Adm. Code 201.146(c). Initially, the Board cannot lose sight of the "commercial" requirement while focusing on the type of fuel and small size of the boiler. This would render a nullity the subsequent subsection of the exceptions provision. Subsection (d), quoted above, exempts from the permit requirements all small indirect heating systems, without regard to fuel type or

industrial nature. The primary limitation is the very small (1 Mbtu/hr, or 0.29 MW) size of the boiler. Thus, the "commercial" nature of the facility is important for the purposes of the "commercial establishment" exemption.

The language of the "residential or commercial establishment" exemption has not changed since its initial adoption as Chapter 2, Rule 102(i)(3) in 1972. The purpose of this exemption is to relieve the burden of issuing permits to small entities. In re Emissions Limitations, No. R71-23, at 7, 4 PCB 298, 304 (Apr. 13, 1972). Houses and shops are numerous in Illinois, and those burning fuel oil or natural gas are not the principal sources of air pollutants in this state. Requiring every residence and shop burning natural gas or fuel oil to acquire a permit would severely burden the permitting system and confer little environmental benefit. Industrial facilities are far less numerous, and they are likely already into the permitting system as a result of other activities at those facilities. Such is the case for the Prairie Material Sales plant, for which Fox Valley Concrete had already initially obtained construction and operating permits for other aspects of the plant operations. Therefore, the most consistent reading of "residential or commercial establishment" would include shops, stores, private houses, apartment buildings, schools, office buildings and other facilities that do not have any industrial character.

Examining the Prairie Material Sales operations at Batavia, the Board cannot accept the argument that the concrete is manufactured off-site and that Prairie Material Sales merely sells construction materials. All ingredients for the concrete are added in the proper proportions within the Prairie Material Sales plant. It is immaterial that the actual mixing is not completed until later, after the truck has left the site. There is little difference between this activity and one in which the full mixing of the ingredients occurred at the plant. Prairie Material Sales performs all activities within the boundaries of its facility that are necessary to assure the final composition of the concrete--i.e., Prairie Material Sales manufactures concrete at its plant. Thus, this facility is an industrial facility.

Acceptance of Prairie Material Sales' argument that the manufacture of the concrete occurs elsewhere, so it merely sells construction materials, could lead to absurd results. Nearly any other industrial facility that takes bulk materials and blends them on-site in packages intended for delivery could claim the "residential or commercial establishment" exemption. This is beyond the character of this exemption as the Board intended it. It goes beyond the intent of administrative convenience with regard to those multitudinous sites of minimal environmental significance and not otherwise in the permitting system that the

Board intended to exempt in 1972. Rather, there is another exemption that applies to facilities having this more industrial character; it is set forth in subsection (d). Prairie Material Sales does not qualify for the subsection (d) exemption because its boiler exceeds the size limitation of that provision.

Another fact adds further support to the Board's conclusion that the boiler is not in the same situation as a residential or commercial boiler used for providing heat. Prairie Material Sales also uses its boiler to heat aggregate, a component of the concrete. This situates the boiler as part of the industrial process of manufacturing concrete.

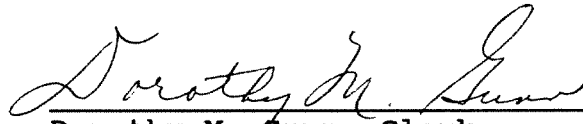
Having concluded that the "residential or commercial establishment" exemption of 35 Ill. Adm. Code 201.146(c) does not apply to the Prairie Material Sales boiler, the Board must deny the respondent's prayer for summary judgment on counts I and II on this basis. The Board grants partial judgment in favor of the People on the narrow issue of the applicability of the permit requirements to this boiler. The Board holds that the construction and operating permit requirements of 35 Ill. Adm. Code 201.Subpart C applied to the boiler that Prairie Material Sales used to heat water for mixing concrete at its plant.

However, the Board does not go so far as stating that this finding in favor of the People alone establishes a violation on either count. First, Prairie Material Sales avers that the boiler fell within the general site permit. Second, the Board must weigh the factors of Ill. Rev. Stat. 1989 ch. 111½, par. 1031(c) in finding a violation. The present record does not allow such consideration.

For the foregoing reasons, the Board hereby denies both of the December 9, 1991 prayers for summary judgment set forth by Prairie Material Sales. The Board hereby grants partial summary judgment in response to the People's prayers of January 8, 1992: we hold that the exemption of 35 Ill. Adm. Code 201.146(c) does not apply to the Prairie Material Sales boiler. Therefore, the permit requirements of 35 Ill. Adm. Code 201.Subpart C applied to that boiler.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above Order was adopted on the 26th day of March, 1992, by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board