

ILLINOIS POLLUTION CONTROL BOARD

May 7, 1998

W.R. MEADOWS, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 97-195
)	(Permit Appeal - Air)
THE ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by R.C. Flemal):

This matter comes before the Board on a motion for summary judgment filed by petitioner, W.R. Meadows (Meadows). Meadows contends that the Illinois Environmental Protection Agency (Agency) improperly denied Meadows a construction and operating permit and that it is entitled to the permit as a matter of law. The major issue involves whether certain of Meadows' emissions are properly classified as fugitive emissions (as Meadows contends), or as non-fugitive emissions (as the Agency stated in its permit denial). For the reasons set forth below, the Board denies Meadows' motion for summary judgment and sends the matter to hearing in part.

Meadows challenges the Agency's legal basis for the permit denial and contends it is entitled to summary judgment on the following three grounds: (1) the Agency improperly characterized the emissions from the curing area as non-fugitive emissions; (2) the Agency improperly included the curing area emissions in determining that the Meadows' facility had major source status; and (3) the Agency improperly based the permit denial on Meadows' failure to comply with the coating limitation in 35 Ill. Adm. Code 218.926(b). The Board addresses each count in turn and concludes that undisputed facts establish the Agency erroneously denied the permit based on Meadows' alleged failure to comply with 35 Ill. Adm. Code 218.926(b), as further specified below. Accordingly, the Board grants the portion of Meadows' motion regarding that issue. However, the parties do dispute the facts relating to the Agency's classification of the emissions as non-fugitive and the classification of the facility as a major source. The Board therefore orders that this case be sent to hearing on the remaining disputed claims.

BACKGROUND

Meadows manufactures asphalt fiberboard expansion joint material for the concrete construction industry at a facility located in Hampshire, Kane County, Illinois. Kane County is located in the Chicago ozone nonattainment area. Under 35 Ill. Adm. Code 218, Organic

Material Emission Standards And Limitations For The Chicago Area, certain stationary sources of volatile organic emissions (VOM) located in the Chicago ozone nonattainment area are subject to emission standards and limitations.

Meadows' Hampshire facility has two sources of VOM emissions: (1) a dip tank saturator which saturates the fiberboard with an asphalt/mineral spirits blend (saturant), and (2) a two-acre outdoor area where the fiberboard is stored for approximately four weeks to allow the saturant to penetrate the fiberboard (curing area). Adm. R. at 26, 29.¹

On December 21, 1996, Meadows sought a permit from the Agency to install VOM emission control equipment on the dip tank saturator unit. Adm. R. at 1. On March 31, 1997, the Agency denied Meadows' request for a permit on three grounds:

- a. The Agency does not classify the emissions from curing as fugitive emissions. In particular, W.R. Meadows did not show that some or all of these emissions do not or could not reasonably pass through a chimney, vent, or equivalent opening.
- b. Even if they are classified as fugitive, 35 Ill. Adm. Code 203.206(e) states that in severe nonattainment areas, fugitive emissions shall be included in determining whether it is a major stationary source or a major modification. As a result, the board coating line would be a major source even if the proposed condenser provided 100% control of the saturation step. Hampshire is located in a severe nonattainment area.
- c. The application does not show that 35 Ill. Adm. Code Part 218 Subpart PP would not be violated. Adm. R. at 106-108.

On May 5, 1997, pursuant to Section 40(a)(1) of the Environmental Protection Act (Act), Meadows filed this permit appeal. On February 23, 1998, Meadows filed the instant motion for summary judgment (Motion) and a brief in support of the motion for summary judgment (Brief). On March 9, 1998, the Agency filed a response in opposition to the motion for summary judgment (Response). On March 16, 1998, Meadows filed a reply to the Agency's response (Meadows' Reply). On March 24, 1998, the Agency filed a reply to Meadows' Reply (Agency's Reply).

On March 24, 1998, the Agency filed a motion to strike Meadows' Reply and filed the Agency's Reply *instante*. On March 26, 1998, Meadows filed a motion in opposition to the Agency's motion to strike Meadows' Reply and a motion to file the Meadows' Reply *nunc pro tunc*. The Board hereby disposes of these motions as follows. The Agency's motion to strike is denied. The Agency's motion to file a reply *instante* is denied. Meadows' motion to file Meadows' Reply *nunc pro tunc* is granted.

¹ The administrative record is cited as "Adm. R. at ____".

MOTION FOR SUMMARY JUDGMENT

Summary judgment is appropriate when there are no genuine issues of fact for the trier of fact to consider and the movant is entitled to judgment as a matter of law. Sherex Chemical v. IEPA (July 30, 1992), PCB 91-202; Williams Adhesives, Inc. v. IEPA (August 22, 1991), PCB 91-112. For the reasons stated below, the Board finds that genuine issues of fact exists on two of Meadows' three grounds for summary judgment.

Fugitive Emissions

Meadows alleges that the emissions from its Hampshire facility's curing area are fugitive emissions. Brief at 13. If the emissions are properly characterized as fugitive emissions, the Meadows' facility is potentially exempt from the need for a major source permit. See 35 Ill. Adm. Code 203.211. To support its claim, Meadows asserts: (1) the curing area emissions meet the legal definition of fugitive emissions; (2) the Agency previously correctly determined that the curing area emissions are fugitive and is estopped from now adopting a contrary determination; and (3) the Agency's failure to specify reasons why the curing area emissions are non-fugitive emissions violates the Section 39(m) requirement that Agency permit denials be accompanied by a statement of reasons for the denial. Brief at 9, 15, and 17.

Fugitive Emissions Definition

Fugitive emissions are defined in the Board's air regulations as "those emissions which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening." 35 Ill. Adm. Code 203.124. Meadows contends that the emissions from the curing area meet this definition, and hence are fugitive emissions. Meadows asserts that emissions from an outside curing area such as the area used at the Hampshire facility cannot be collected, without great cost, such as to be reasonably passed through a stack, chimney, vent, or other functionally equivalent opening. Brief at 13-14.

In response, the Agency notes that Meadows failed to show that the emissions released during the curing process could not be collected from current operations at a different stage of the curing process. Response at 9. Addressing Meadows' assertion that enclosing the curing area would be too expensive, the Agency observes that Meadows only provided a cost estimate for one type of building design. Response at 10. The design represented enclosing the current Hampshire facility, and Meadows failed to consider other building designs. Response at 10. The Agency further comments that there is no showing that Meadows investigated the feasibility of transporting the saturated fiberboard to an existing covered facility. Response at 10.

The Board finds that an issue of material fact remains regarding whether there exists reasonable technology or modes of operation that would allow the VOM currently emitted during the curing process to be managed as non-fugitive emissions. For this reason, Meadows' motion for summary judgment related to this issue is denied.

Agency's Prior Emissions Determination

Meadows asserts that the Agency erroneously classified the instant emissions as non-fugitive in the permit at issue here, since, in a prior 1988 permit, the Agency classified the emissions as fugitive. Brief at 15. Specifically, Meadows argues the Agency's prior determination that the emissions were non-fugitive estops the Agency from now reaching a contrary determination. Brief at 16. Meadows claims the nature of its production operation has not changed between the 1988 permit's issuance and the current Agency's permit denial. Brief at 16.

The doctrine of equitable estoppel may be applied when a party reasonably and detrimentally relies on the words or conduct of another. See Brown's Furniture Inc. v. Wagner, 171 Ill. 2d 410, 431, 665 N.E.2d 795, 806 (1996). For Meadows' estoppel argument to prevail, Meadows must, among other things, show that the Agency made a misrepresentation, knowing that the misrepresentation was untrue. White and Brewer Trucking, Inc. v. IEPA, (March 20, 1997), PCB 96-250, slip op. at 25.

Meadows has failed to establish that it is entitled to summary judgment on this claim as a matter of law. First, Meadows fails to allege or show that the Agency made a misrepresentation knowing that the misrepresentation was untrue. Meadows claims that the Agency must grant the instant permit because it granted Meadows a permit in 1988: no misrepresentation is alleged. Second, Meadows has not shown that it reasonably relied on that fact that the 1988 permit was granted. Meadows claims that it built and operated the plant based on the Agency's previous determination in 1988 that the curing area emissions were fugitive. Brief at 16. But, Meadows fails to allege this reliance was reasonable. Because Meadows neither alleges nor shows that the Agency made a knowing misrepresentation, and because Meadows does not allege it reasonably relied on the Agency granting the 1988 permit, Meadows has failed to establish that it is entitled to summary judgment on this claim as a matter of law. Summary judgment is denied on this issue.

Section 39(m) Reasons For Permit Denial

Meadows alleges the Agency's permit denial letter violates statutory requirements of the Act, namely, 415 ILCS 5/39(m) (1996), because the Agency fails to give a specific reason why the regulations might be violated if the permit was granted. Brief at 17. Meadows challenges the Agency's alleged failure to explain why the curing area emissions do not satisfy the regulatory definition of "fugitive emissions." Brief at 17.

Section 39(m), in part, requires that when the Agency denies a permit, it

"shall transmit to the applicant within the time limitations of this subsection specific, detailed statements as to the reasons the permit application was denied. Such statements shall include, but not be limited to the following:

- (i) the Sections of this Act that may be violated if the permit were granted;

- (ii) the specific regulations promulgated pursuant to this Act that may be violated if the permit were granted;
- (iii) the specific information, if any, the Agency deems the applicant did not provide in its application to the Agency; and
- (iv) a statement of specific reasons why the Act and the regulations might be violated if the permit were granted. 415 ILCS 5/39(m)(1996).

The Agency responds that the permit denial letter explains that the Agency does not classify the emissions as fugitive. Response at 16. The letter further states that Meadows failed to “show that some or all of the curing area emissions do not or could not reasonably pass through a chimney, vent or equivalent opening.” Response at 16. Given the explicit statements in the letter, the Board finds Meadows’ argument that the permit letter violated Section 39(m) to be without merit and denies summary judgment on this issue.

Fugitive Emissions And Major Source Status

Meadows argues the Agency erroneously included the curing area emissions in determining Meadows’ major source status. Brief at 18. Noting that the Agency relied on 35 Ill. Adm. Code Part 203, Section 203.206(e) to make this determination, Meadows contends that Section 203.206(e) violates both federal and state law. Brief at 28. Because the Board finds Meadows’ argument fails as a matter of law, summary judgment is denied.

Section 203.206(e) provides, in part, that in areas classified as serious, severe, or extreme nonattainment, fugitive emissions of a stationary source shall be included in determining whether the source is a major stationary source. 35 Ill. Adm. Code 203.206(e). Meadows argues Section 203.206(e) is “inconsistent” with federal law. Brief at 19. In support of its claim, Meadows laboriously explains the rulemaking history of Section 203.206. Meadows suggests that in a 1992 rulemaking for Section 203.206(e), the Agency erroneously believed federal law required that fugitive emissions be included in a major source determination. Brief at 21. Citing Alabama Power v. Castle, 636 F.2d 323 (D.C. Cir. 1983), Meadows claims federal law prohibits including fugitive emissions in major source determinations. As discussed below, Meadows misinterprets Alabama Power. Despite Meadows’ attempt to show that federal law now prohibits including fugitive emissions when determining a major source, no federal law prohibits such an inclusion.

The Agency properly noted in its Response that there is nothing in the Clean Air Act’s provisions addressing non-attainment area new source review program requirements that prohibits the State from counting fugitive emission in its major source applicability determinations. Response at 22. Further, Meadows’ reliance on Alabama Power is misplaced. In Alabama Power, the United States Court of Appeals for the D.C. Circuit found that the United States Environmental Protection Agency (USEPA) had not followed proper rulemaking procedures under the federal administrative procedures act when it included fugitive emissions in determining

whether a source was a major source. Alabama Power v. Castle, 636 F.2d 369-70. Simply because the USEPA did not follow proper procedures, however, does not preclude the existence at the state level of a valid rule requiring including fugitive emissions when determining major source status. Meadows does not dispute that the Board followed proper rulemaking procedures when it adopted 206.203(e) to include fugitive emissions. Meadows' contention is that the Agency proposed and the Board adopted a rule under the USEPA's erroneous advice as to what was actually federally required. Brief at 22. Regardless of the conditions under which the rule was adopted, there is no federal law prohibiting including fugitive emissions when evaluating major source status.

Meadows further asserts that Section 203.206(e) conflicts with Section 203.211. Brief at 18. Specifically, Meadows argues that Section 203.211 excludes counting fugitive emissions from the calculation of a source's aggregate emissions for purposes of determining whether the facility is classified as a major source. Brief at 18. The Agency responds that no conflict exists because Section 203.211 does not apply to exclude fugitive emissions from the calculation of a source's aggregate emissions, but rather the source's potential to emit. Response at 30. Section 203.211 states as follows:

The provisions of this Part shall not apply to a source or modification that would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable as evidenced by 35 Ill. Adm. Code 201.122, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the categories enumerated in Section 203.206(d).
35 Ill. Adm. Code 203.211

The Board agrees with the Agency that Section 203.206(e) does not conflict with 203.211 because Section 203.211 does not apply to exclude fugitive emissions from the calculation of a source's aggregate emissions, but rather the source's potential to emit. The Board denies Meadows' motion for summary judgment on this ground.

VOM Content: Compliance With Part 218, Subpart PP

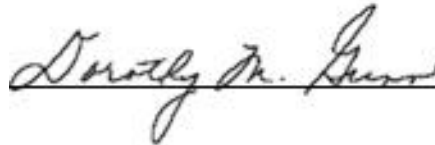
Meadows' final ground for summary judgment alleges the Agency improperly based its denial on Meadows' failure to comply with the coating limitation in 35 Ill. Adm. Code 218.926(b). Brief at 36. The Agency responds that "[I]n recognition of the Petitioner's recent assertions, under oath, of facility compliance with the VOM content requirement of 35 Ill. Adm. Code Part 218, Subpart PP, the Illinois EPA will neither concede nor challenge the Petitioner's argument on this issue." Response at 32. The Board finds no issue of material fact exists on this issue and finds as a matter of law that Meadows is entitled to summary on this ground. However, although the Board grants summary judgment on this issue, the parties do dispute the facts relating to the Agency's classification of the emissions as non-fugitive and the classification of the facility as a major source. The Board therefore orders that this case proceed to hearing on the remaining disputed claims.

CONCLUSION

For the reasons set forth herein, Meadows' motion for summary judgment is denied on the ground that the Agency improperly characterized the emissions as non-fugitive and on the ground that the Agency improperly included the curing area emissions in determining the facility had major source status. However, the Board grants Meadows' summary judgment on the issue of its compliance with the VOM content requirements of 35 Ill. Adm. Code 218.926(b). Accordingly, the Agency's denial reason on this issue is stricken as improper. This matter shall proceed to hearing concerning the remaining permit denial reasons.

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 7th day of May 1998 by a vote of 7-0.

A handwritten signature in dark ink, appearing to read "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board