

ILLINOIS POLLUTION CONTROL BOARD
September 17, 1998

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 95-163
) (Enforcement - Air)
CLARK REFINING & MARKETING, INC.,)
)
Respondent.)

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

This matter is before the Board on cross motions for summary judgment filed by complainant, People of the State of Illinois, by James E. Ryan, Attorney General of the State of Illinois (complainant) on December 16, 1997 (complainant's motion), and by respondent, Clark Refining & Marketing, Inc. (Clark) on December 24, 1997¹ (Clark's motion). The issues before the Board are whether 35 Ill. Adm. Code 219, Subpart TT applies to Clark's industrial wastewater treatment facility, whether Clark failed to obtain a construction permit before modifying part of its facility, and whether Clark operated its facility without an operation permit.

On January 20, 1998, Clark filed a response to complainant's motion. On January 21, 1998, complainant filed a response to Clark's motion. On February 18, 1998, Clark filed a reply to complainant's response.²

Upon consideration of the arguments of the parties, the Board finds that Clark's industrial wastewater treatment facility is exempt from Part 219, Subpart TT's requirements. Additionally, the Board finds that Clark failed to obtain a construction permit before adding a carbon canister to the dissolved air flotation (DAF) device at the facility. Further, Clark operated its wastewater treatment facility without an operating permit for approximately seven months. Accordingly, the Board grants both Clark's motion for summary judgment in part and complainant's motion for summary judgment in part and sends the construction permit and operating permit issues to hearing to assess the matters for penalties.

¹ At the time of filing, Clark also filed a motion to file a memorandum of law in excess of the page limit. The Board hereby grants Clark's motion.

² Complainant's motion for partial summary judgment is cited as Comp. Mot. at __; Clark's memorandum in support of it motion for summary judgment is cited as Clark Mem. at __; Clark's reply brief is cited as Clark Rep. at __.

PROCEDURAL HISTORY

Complainant filed an action against Clark on June 6, 1995, and the instant five-count amended complaint on November 12, 1996, alleging violations of various sections of the Environmental Protection Act (Act) and the Board's regulations. The parties subsequently reached a proposed settlement agreement as to counts I, II, and III of the amended complaint on January 23, 1997. Stip. at 2.³ Consequently, the cross motions for summary judgment before the Board today address only those issues arising from counts IV and V of the amended complaint.⁴

BACKGROUND

Since November 22, 1988, Clark has operated a petroleum refinery, also known as Clark's "Hartford Refinery." Stip. at 2. The refinery converts crude oil into gasoline and other petroleum distillates. Stip. at 2. Clark's industrial wastewater treatment facility collects and treats stormwater, sanitary sewage, and process wastewater generated by its refinery operations. Stip. at 2. The wastewater treatment facility has been operated by Clark and prior owners since 1973, in accordance with air pollution control operating permits issued by the Agency. Stip. at 11. Most recently, the operating permit was renewed by the Agency in April 1988 (permit number 72110683). Stip. at 11.

PARTIES' ALLEGATIONS

Complainant raises five claims in support of its motion for summary judgment. The first three claims all address the applicability of three sections in 35 Ill. Adm. Code 219, Subpart TT, to Clark's facility. Specifically, complainant argues that Section 219.986 applies to the emissions from Clark's wastewater treatment plant. Comp. Mot. at 14.⁵ Complainant also contends that the sewage treatment plant exemption set forth in Section 219.980(e) does not apply to Clark's wastewater treatment facility. Comp. Mot. at 15. Further, complainant asserts that Clark has not made the demonstration required by Section 219.991. Comp. Mot. at 20. Moreover, complainant alleges that Clark did not obtain the necessary construction or operating permit for the carbon canister it installed on the DAF device at its wastewater treatment facility. Comp. Mot. at 22. Finally, complainant argues that Clark did not have an operating permit for its facility. Comp. Mot. at 22.

³ On November 17, 1997, the parties filed a joint stipulation of facts which will be cited as "Stip. at ___;" Stipulation exhibits will be cited as "Stip. Exh. at ___."

⁴ The parties agreed to file the cross motions for summary judgment. Stip. at 3.

⁵ Although the caption on page 14 reads "219.985 Applies to Emission Units in Clark's Wastewater Treatment System," complainant's argument addresses 219.986, and the Board assumes the caption contains a typographical error.

Clark raises four claims in its motion for summary judgment. Clark first alleges 35 Ill. Adm. Code 219, Subpart TT exempts Clark's wastewater treatment plant. Clark Mem. at 3. Second, Clark argues that some of the industrial components of its wastewater treatment plant are exempt under Subpart TT, are otherwise not covered under Subpart TT, or are in compliance with Subpart TT. Clark Mem. at 12. Third, Clark contends the Agency improperly refused to grant Clark's 1993 and 1994 Permit Applications. Clark Mem. at 17. Lastly, Clark argues the Agency's failure to act on Clark's March 19, 1995 permit application causes the permit to issue by operation of law. Clark. Mem. at 17.

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 no genuine issues of fact exist on Clark's claim that its facility is exempt from Subpart TT's regulations and finds the facility exempt as a matter of law. However, the Board only grants complainant's motion for summary judgment, in part, because the Board finds that Clark failed to obtain a construction permit and operated its facility without an operating permit.

APPLICABILITY OF SUBPART TT

Section 219.980(e) of the Board's air pollution regulations provides that "[T]he control requirements of Subpart TT shall not apply to sewage treatment plants" The threshold issue in this case is what is a "sewage treatment plant" in the context of the Subpart TT regulations. If Clark's facility is a sewage treatment plant for Subpart TT purposes, the facility is exempt from the alleged violations of Subpart TT as a matter of law.

"Sewage treatment plant" is not defined in the Act. Neither is it defined in the Board's regulations or in the United States Environmental Protection Agency (USEPA) regulations from which Subpart TT is derived. Moreover, the definition cannot be derived from the plain language of the term itself. Therefore, we rely on the regulatory history of Subpart TT to determine the meaning of "sewage treatment plant" as used in Subpart TT.

When analyzing regulatory history, the Board is bound to apply rules used in construction of statutes, as those rules apply when construing regulations promulgated by an administrative agency. People v. Kilpatrick, 216 Ill. App. 3d 875, 576 N.E.2d 546 (2d Dist. 1991). If the language of the statute is clear and unambiguous, the Board like a court, may not look to extrinsic aids of construction. In re Marriage of Logston, 103 Ill. 2d 266, 469 N.E.2d 167 (1984). Generally, a statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more different senses. Szpila v. Burke, 279 Ill. App. 3d 964, 665 N.E.2d 357 (1st Dist. 1996); citing People v. Jameson, 162 Ill. 2d 282, 642 N.E.2d 1207 (1994). To the extent that the Board may find the language of the Act and the Board's regulations ambiguous, it is proper to consider various extrinsic aids, including the regulatory history of Subpart TT, to give effect to the intent of the Board when it promulgated its regulations. See e.g., Szpila, 279 Ill. App. 3d at 970, 665 N.E.2d at 362, citing State v. Mikusch, 138 Ill. 2d 242, 562 N.E.2d 168 (1990); People v. Ross, 267 Ill. App. 3d 711, 642

N.E.2d 914 (3rd Dist. 1994), aff'd 168 Ill.2d 347, 659 N.E.2d 1319 (1995). Since the meaning of “sewage treatment plant” is ambiguous, the Board relies on the regulatory history of Subpart TT for guidance.

Genesis of Subpart TT

Subpart TT is found in 35 Ill. Adm. Code 219. It is one part of Illinois’ regulations intended to control emissions of volatile organic material (VOM). The VOM control regulations are found principally in 35 Ill. Adm. Code 215, 218, and 219. Part 219 specifies VOM emission standards for the Metro-East Area of Illinois, where Clark’s facility is located.

Guideline documents developed by USEPA helped create most of the Illinois VOM control regulations. These documents, called control technology guidance, or CTG documents, set reasonable levels of VOM control by industrial category. Thus, for example, there is a specific set of VOM control regulations governing pharmaceutical manufacturing based on the CTG addressed to that activity. See 35 Ill. Adm. Code 219, Subpart T.

The Board adopted most of the Illinois VOM control regulations in the early- and mid-1980s. Near the end of that process, when State rules had covered most of the industrial categories, the Board also added a series of “generic” or “non-CTG” rules. See In the Matter of: Organic Material Emission Standards and Limitations: Organic Emission Generic Rule (April 7, 1988), R86-18. These rules were intended to define control requirements for activities for which no CTG had been published, but which nevertheless constituted major sources of VOM emissions. The Board promulgated four major non-CTG rules, now found in Subparts AA, PP, QQ, and RR of Part 219.

USEPA oversaw the State’s entire effort to develop the Illinois VOM control regulations. Relevant to the instant case is USEPA’s disapproval of the State’s VOM control program, known as the State Implementation Plan, or SIP. On November 24, 1987, USEPA notified Illinois that the Illinois SIP was “substantially inadequate.” 52 Fed. Reg. 45044 (November 24, 1987). USEPA disapproved the Illinois SIP in accordance with Section 111(a)(2)(H) of the Clean Air Act (42 U.S.C. § 7411(a)(2)(H)), which requires that states demonstrate attainment by the end of 1987. 52 Fed. Reg. 45044 (November 24, 1987).

Furthermore, USEPA announced that it would assume regulatory authority and impose upon Illinois a federal implementation plan, or FIP, that would supersede the SIP until such time as Illinois could produce a SIP acceptable to USEPA. 54 Fed. Reg. 53080, 53083 (December 27, 1989). Illinois achieved a new, acceptable SIP by adopting the entire FIP into State law. For the regulations at issue in the instant matter, this was done by the Board in the rulemaking R91-8. See RACT Deficiencies in the Metro-East Area: Amendments to Part 215 and the Addition of Part 219 (July 25, 1991), R91-8.

USEPA’s FIP contained many of the same rules that the Board had promulgated previously in the various VOM control rulemakings. Hence, in adopting the new SIP, the Board simply readopted many of its old regulations. However, USEPA added a few new regulations when it developed the FIP. Therefore when the Board adopted the new SIP rules it

also added these FIP-generated rules into the State rules. Subpart TT was one of these rules that had its genesis in the FIP.

Regulatory Intent to Exclude Industrial Wastewater Treatment Facilities

To assess whether there was an intent to exempt industrial wastewater treatment facilities from Subpart TT, we first look at the genesis of Subpart TT under the FIP and then under the SIP.

The FIP was developed in a two-stage process. First, USEPA presented a proposed FIP, and then, due to stakeholder response, ultimately issued the adopted FIP. The proposed FIP was published in the *Federal Register* on December 27, 1989. 54 Reg. 53080 (December 27, 1989). Notable in the proposed FIP was a new non-CTG rule governing “Other Emission Units.” This was the first public manifestation of eventual Subpart TT. 54 Fed. Reg. at 53119. Further, the proposed FIP provided no specific exemption for “sewage treatment plants.” Rather, the proposed exemption read:

The control requirements in paragraph (x) shall not apply to coke ovens. . . fuel combustion sources, bakeries, barge loading facilities, jet engine test cells, non-synthetic pharmaceutical manufacturing production of polystyrene foam insulation board...production of polystyrene foam packaging...and iron and steel production. 54 Fed. Reg. at 53119.

USEPA held a hearing on the proposed FIP on January 17, 1990. See In Re: Proposed Federal Revisions to the Reasonably Available Control Technology (RACT) Rules for Volatile Organic Compounds Contained in the Illinois State Implementation Plan for Ozone Docket No.51-89-X.⁶ At hearing, Katherine Hodge, as counsel for the Illinois Environmental Regulatory Group (IERG) questioned whether USEPA planned to exclude sewage treatment plants from the generic rule. Tr. at 12. Daniel Goodwin, President of Goodwin and Brauns, Inc., also inquired whether sewage treatment plants were covered by the generic rules’ 81% capture and control requirement, and if so, what was the technical support, including applicable control methods and costs, for subjecting these plants to the generic rules. Tr. at 41.

On June 29, 1990, USEPA approved the FIP. 55 Fed. Reg. 26814 (June 29, 1990). Regarding exceptions from the proposed non-CTG rules, USEPA noted that it had received two comments asking whether sewage treatment plants would be exempt. In response to those inquiries, USEPA acknowledged, in pertinent part, that:

it did not intend, due to lack of available technical justification, to subject these [sewage treatment plants] to the generic rules. USEPA has, therefore, added sewage treatment plants to the list of exempt source categories specified in § 53.741(x). As such, sewage treatment plants are exempt from the federal

⁶ The transcript in this proceeding is cited as “Tr. at ___.”

generic rule and consequently will not be regulated at this time. 55 Fed. Reg. at 26834.

In July 1991, Illinois adopted, as its SIP, the FIP for the Metro-East area in Board docket R91-8. In so doing the Board retained the exact language of the FIP regarding the new non-CTG rules for “Other Emission Sources,” as well as the specific exemption for “sewage treatment plants.” See RACT Deficiencies in the Metro-East Area: Amendments to 35 Ill. Adm. Code Part 216 and the Addition of Part 219 (July 25, 1991), R91-8. These are the rules and exemptions found in 35 Ill. Adm. Code 219, Subpart TT.

In 1993, Illinois submitted the SIP for USEPA approval, incorporating therein Subpart TT exactly as it appeared in the FIP and in the R91-8 rulemaking. In May of 1996, USEPA approved and promulgated the SIP. 61 Fed. Reg. 20455 (May 7, 1996). In approving the SIP, the USEPA commented, in part, that Illinois’ SIP in Subpart TT:

exempts bakeries and sewage treatment plants from these major non-CTG regulations. Major non-CTG regulations are, therefore, required for any major bakeries and industrial wastewater treatment plants in the East St. Louis area.” 61 Fed. Reg. 20455 (May 7, 1996); see also Clark Rep. at 2. (emphasis added).

These statements express USEPA’s belief that major non-CTG regulations (such as Subpart TT) for industrial wastewater treatment plants are required in the Metro-East area. This belief can be true only if industrial wastewater treatment plants are considered currently unregulated under Subpart TT because they are exempt as either being bakeries or sewage treatment plants. We thus find that the USEPA comments unambiguously show that USEPA understands wastewater treatment facilities to fall within the exemption given to “sewage treatment plants.”

We further find that Clark’s facility is now, and has been since Subpart TT’s inception, exempt from Subpart TT. It is exempt because the “sewage treatment plant” exemption language originated with USEPA when it adopted the FIP, and the Board used USEPA’s exemption concept and language in adopting the same language in the SIP. As such, there is a clear, connected regulatory history that shows Subpart TT exempts Clark’s facility.

In so finding, however, we note that in contexts other than the present, and perhaps even the majority of contexts, “sewage treatment plant” does not necessarily have meaning that encompasses wastewater treatment facilities generally. Regardless, it is the use of the phrase in the context of air regulations generally and Subpart TT particularly, that we examine today. In that context, Clark’s facility is exempt under Subpart TT.

Because Clark’s facility is exempt from Subpart TT’s regulations as a matter of law, the Board rejects complainant’s first three claims regarding Subpart TT.

PERMIT ISSUES

The following two permitting issues are before the Board: (1) whether Clark has an operating permit by operation of law and (2) whether Clark installed air pollution control equipment to its DAF device without a construction permit.

Operating Permit

On December 24, 1992, Clark submitted an initial application for renewal of Clark's operation permit number 72110683. Stip. at 5; Stip. Exh. 7. The Agency denied Clark's renewal operating permit application on June 10, 1993. Stip. at 6; Stip. Exh. 11. On September 8, 1993, Clark submitted a second application for renewal of Clark's operating permit number 72110683. Stip. at 6; Stip. Exh. 12. The Agency denied Clark's renewal operating permit application on September 29, 1993.⁷ Stip. at 6; Stip. Exh. 13. On November 8, 1993, Clark submitted a third application for renewal of Clark's operating permit number 72110683. Stip. at 6; Stip. Exh. 14. Clark provided the Agency with one 90-day waiver of decision deadline on May 6, 1994. Stip. at 6; Stip. Exh. 18. The Agency did not issue a letter granting or denying Clark's November 8, 1993 application. On April 26, 1994, the Agency sent Clark an "Enforcement Notice Letter," highlighting alleged violations of the Act and Board regulations. Stip. at 6-7; Stip. Exh. 16. On March 10, 1995, Clark submitted a fourth application for renewal of Clark's operating permit number 72110683. Stip. at 8; Stip. Exh. 25.⁸

A review of the parties' stipulated facts reveals that on June 10, 1993, Clark received a letter from the Agency denying its initial permit application to operate its facility. Clark did not file a permit appeal within 35 days (or by July 15, 1993) as is required by Section 40 of the Act (415 ILCS 5/40 (1996)). Filing a permit appeal would have enabled Clark to operate its facility without a permit during the pendency of the appeal. See 5 ILCS 100/10-65(b) (1994). Instead, Clark operated its facility without a valid permit beginning July 15, 1993.

However, Clark submitted a revised operating permit application on September 8, 1993. Under Section 39(a) of the Act, the Agency was required to grant or deny Clark's permit application within 90 days of Clark's September 8, 1993 permit application submittal, or by February 8, 1994. Notwithstanding that the Agency obtained a waiver of decision deadline on May 6, 1994, it did not obtain a proper waiver within 90 days of Clark's submittal of the November 8, 1994 permit application. Under Section 39(a) of the Act, the Agency should have first sought a waiver on or before February 8, 1994.⁹

⁷ The Agency issued Clark a notice of incompleteness which the Board deems a denial.

⁸ Clark submitted another permit application on June 9, 1994; however, that application was for construction of the carbon canister on the DAF device and was issued a separate permit number (94060044) by the Agency on July 8, 1994. Stip. at 7; Stip. Exh. 21.

⁹ The Agency sought a waiver of decision deadline on February 7, 1994; however, that waiver related to Clark's permit application number 93110057. Stip. Exh. 15.

The Board finds that, from the time Clark should have appealed the initial permit denial (July 15, 1993) until the time the Agency should have issued a letter granting or denying Clark's third permit application (February 8, 1994), Clark operated its wastewater treatment facility without a valid permit. Clark's submittal of a fourth application on March 10, 1995, is not relevant to the Board's finding that the Agency failed to respond to Clark's November 8, 1993 third permit application. While the Agency issued an enforcement letter to Clark on April 26, 1994, it does not constitute a response in accordance with Section 39(a) of the Act.

The Board also finds that beginning February 9, 1994, to the present, Clark operated the facility with a permit that was issued as a matter of law. Pursuant to Section 39(a) of the Act, the Agency had 90 days to respond to Clark's permit application filed November 8, 1993. The Agency did not request a waiver within 90 days of the November 8, 1993 permit application. When the Agency failed to grant or deny the permit pursuant to Section 39(a), the permit was granted by operation of law.

The Board grants complainant's motion for summary judgment on the issue regarding Clark's lack of an operating permit only to the extent that Clark operated its facility without a permit from July 15, 1993, until February 8, 1994. The Board sends this matter to hearing to address the penalties for this violation.

Construction Permit

In its September 8, 1993 second application for renewal of general operating permit number 72110683, Clark mentioned that it had "installed a cover over the dissolved flotation air device and are in the process of connecting the vent to an activated carbon system." Stip. at 13-14; Stip. Exh. 12 at 1. In its November 8, 1993 third application for renewal of general operating permit number 72110683, Clark also applied for a construction permit for covering the DAF device with a carbon canister. Stip. at 13; Stip. Exh. 14. In this application, Clark stated "[w]e intend to build a new forebay which will be closed and have a carbon canister on it, install two new aboveground floating roof tanks to replace the API separator, cover the oil slump in that area and vent it to a carbon canister." See Stip. Exh. 14. The Agency denied the September 8, 1993 application and did not respond to the November 8, 1993 application. Stip. at 14; Stip. Exh. 13.¹⁰

On June 9, 1994, Clark notified the Agency of the following:

[w]e have begun operation of the modified BIO-Equalization unit. The modifications made to the existing unit consisted of shutting down the Forebay and the two API, also the covering of the DAF. Stip. at 15; Stip. Exh. 19 at 1.

¹⁰ In Clark's November 8, 1993 application, it appears the Agency assigned Clark the construction permit application number 93110057. Stip. Exh. 14B at 12.

The Agency issued a notice of incompleteness for the construction permit application on July 8, 1994, and assigned it a new permit number 94060044. Stip. at 15; Stip. Exh. 21.¹¹

Complainant argues that Clark violated 35 Ill. Adm. Code 201.142 and 201.143 and Section 9(b) of the Act (415 ILCS 5/9(b) (1994)) by installing and operating the carbon canister on the DAF device without a construction permit or operating permit. Comp. Mot. at 22. In its memorandum of law in support of its motion for summary judgment, Clark maintains that the allegation that Clark installed certain pollution control equipment on the DAF device without a construction permit is not a Subpart TT issue and therefore is not a part of its motion for summary judgment. Clark Mem. at 2. Clark did not directly respond to complainant's allegations regarding this issue.

The Board finds that Clark failed to obtain a construction permit to install the carbon canister on the DAF device. Clark did not respond to complainant's argument regarding this issue and therefore has waived its objection with regard to this issue.

35 Ill. Adm. Code 201.142 requires:

No person shall cause or allow the construction of any new emission source or any new air pollution control equipment, or cause or allow the modification of any existing emission source or air pollution control equipment, without first obtaining a construction permit from the Agency

The record before the Board demonstrates that Clark initiated installation of the carbon canister on the DAF device in the Fall of 1993, prior to obtaining a proper construction permit. See Stip. at 3. While Clark ultimately applied for the construction permit, it does not negate the finding that Clark conducted the modifications to the DAF device without a construction permit. Therefore, the Board finds Clark in violation of Section 201.142. The Board sends this matter to hearing to address penalties for this violation.

Briefly, the Board will not address Clark's third claim that the Agency improperly denied Clark's permit application in 1993 and 1994. Clark Mem. at 17. This enforcement action is not the proper forum for such a claim. The method by which to challenge a permit denial is a permit appeal. See 415 ILCS 5/40 (1996).

CONCLUSION

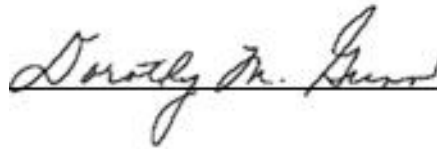
¹¹ The Board notes that on March 10, 1995, Clark submitted a revised "Application for Modification to Existing Wastewater Treatment Facility and Permit to Operate." In its cover letter, Bill Irwin, Clark's Environmental Manager, indicated that "Clark is seeking to amend its current permit Number 72110683 to incorporate the process improvements found in this application, and to be issued a permit to operate." Stip. Exh. 25 at 1. While the revised application suggests the application included the permit for modification, a review of the permit confirms that the March 10, 1995 submittal was only for the permit to operate the wastewater treatment facility. See Stip. Exh. 25.

In sum, the Board grants both motions for summary judgment in part. Subpart TT exempts Clark's facility, but Clark operated its facility without an operating permit for approximately seven months and failed to obtain a construction permit for the addition to the DAF device. The Board accordingly finds Clark has committed the violations as alleged. This matter shall proceed to hearing to develop a record addressing issues of remedies and penalties.

IT IS SO ORDERED.

Board Member K.M. Hennessey abstained.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 17th day of September 1998 by a vote of 6-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board