ILLINOIS POLLUTION CONTROL BOARD
August 14, 1986

DUPAGE PUBLICATIONS COMPANY, Petitioner,	)	
v.	)	PCB 85-44
	)	85-70
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	85-130
	)	Consolidated
Respondent.	)	

ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on a June 16, 1986, Illinois Environmental Protection Agency ("Agency") Motion for Reconsideration of a May 9, 1986, Board Opinion and Order. Respondent DuPage Publications Company ("DuPage") filed a response on August 13, 1986. The Board's Opinion and Order strikes contested conditions for five heatset web offset printing presses and reverses the denial of an operating permit for a sixth press. Reconsideration is hereby granted and the Board's May 9, 1986, Opinion and Order is affirmed.

The Agency's first argument on reconsideration is that the Board's finding that DuPage is not subject to the Board's New Source Review ("NSR") rules is contrary to the plain and unambiguous language of those rules and is erroneous. The Agency cites Continental Grain v. Illinois Pollution Control Board, 131 Ill. App. 3d 838, 475 N.E.2d 1362 (1985), and Dean Foods v. Illinois Pollution Control Board, et al., 142 Ill. App. 3d 322, 492 N.E.2d 1344 (1986). The Board addressed this argument in its May 9, 1986, Opinion. The Board further maintains that Continental Grain and Dean Foods do not provide an absolute bar to Board interpretation of its rules. Only where administrative rules are unambiguous on their face must they be construed as written. Such is not the case with the rules at issue. The courts in Modine Manufacturing Company v. Illinois Pollution Control Board, 40 Ill. App. 3d 498, 351 N.E.2d 875 (1976) and Hoffman V. Wilkins, 132 Ill. App. 2d 810, 270 N.E.2d 594 (1971) have held that an agency "has the power in any event to construe its own rules to avoid absurd or unfair results." In the instant case, there is ambiguity in the rules in that, by the Agency's interpretation, they could apply to facilities in an over broad or unreasonable fashion, unrelated to ozone control.

The primary purpose of construction of regulations is to determine the intent of the administrative body as revealed by the language used. City of East St. Louis v. Union Electric

Company, 37 Ill. 2d 537, 542, 229 N.E.2d 522, 524 (1967). However, when a word or phrase is used in a provision and its meaning becomes an issue in a legal proceeding, the strict meaning of the term is not as important as the sense in which it was used by the lawmaking body, and a regulation must receive a sensible construction, even though the construction qualifies the universality of its language. 37 Ill. 2d 537, 542, 229 N.E.2d 522, 525 (1967). The Supreme Court, in the Union Electric case, interpreted an ordinance of the City of East St. Louis so as to avoid an absurd and unjust result, not withstanding the strict literal meaning of the words used in the ordinance. Such an approach is appropriate in construing the regulation at issue in the instant proceeding.

The Board rule at issue states that "a major stationary emission source that is major for organic material shall be considered major for ozone." In the opinion supporting the final adoption of this rule, the Board discussed the appropriate NSR emissions trigger for the criteria pollutant ozone:

> "Finally, in either case if the non-attainment designated pollutant is ozone, the source's potential to emit will be based on organic material emissions [50 (sic) CFR 51.18(j)(1)(v)(b)] (sic). It should be noted that the NSR is applied only to project's potential to emit the non-attainment designated pollutant."
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> R81-16, Docket B, In Re: Major Source Construction and Modification, Part 203 of Chapter 2: Air Pollution, 53 P.C.B. 45 at 50 (July 14, 1983).

The federal regulations cited by the Board as the basis for NSR applicability for the control of ozone provide as follows:

> "Any net emissions increase that is considered significant for volatile organic compounds shall be considered significant for ozone." 40 CFR 51.18(j)(1)(v)(b) (emphasis added)

The reference to the CFR is the only authority or source cited for the Board's adopted regulatory language. A review of the record in R81-16 indicates that the terms "volatile organic material" and "organic material" were used interchangeably by some participants and that different definitional terms were discussed (R81-16, R. at 428-39 and 724-25). The Board does not dispute the Agency's argument on reconsideration that the Agency advocated the term "organic material," rather than "volatile organic material." However, there is no indication in the Board's supporting opinion that the Agency's position was followed. The only citation is the CFR citation which uses the

term "volatile." The Board's opinion specifically states that "the NSR is applied only to project's potential to emit the non-attainment designated pollutant." In the context of ozone, the CFR prescribes that the designated pollutant is volatile organic compounds.

At 40 CFR 51.18(j)(1)(x), the definition of "significant" is as follows:

> "(x) 'Significant' means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:
>
> Pollutant and Emissions Rate
>
> Carbon monoxide: 100 tons per year (tpy)
> Nitrogen oxides: 40 tpy
> Sulfur dioxide: 40 tpy
> Particulate matter: 25 tpy
> Ozone: 40 tpy of volatile organic compounds
> Lead: 0.6 tpy"

While the Board used the term "organic material," it did not change the quantity threshold of 40 tons per year. Under the Agency's interpretation, a facility would come under NSR if it was planning a modification that would emit 20 tons of isopropyl alcohol, a reactive VOM, and 20 tons of ink solvents, while a second facility that would emit 39 tons of isopropyl alcohol would not. This would be an unreasonable application where the facility emitting substantially more VOM would not come under NSR.

In reviewing the federal regulations relevant to ozone control, one finds both the terms "organic compounds" and "volatile organic compounds" used in various locations (40 CFR 51, App. B. 4.0-4.6). No definitions for these terms are found that specifically apply to NSR. Appendix B of Part 51 - "Examples of Emission Limitations Attainable With Reasonably Available Technology" provides a definition of "volatile organic compounds" which is generally consistent with the Board's definition - a compound which contains carbon and hydrogen which has a specified vapor pressure under certain conditions. No definition of "organic compound" is provided. The ambiguity is apparent both in the Board rule and opinion and in the federal regulations.

As noted in the Board's May 9, 1986, Opinion in the instant proceeding, the general strategy in the area of ozone has been "to control volatile organic material (VOM), which is generally presumed to be photochemically reactive, i.e., an ozone

precursor. Thus, VOM, rather than non-volatile organic material is controlled because it is more likely to be emitted to the atmosphere and, therefore, available for photochemical reactivity. Certain VOM's that are of negligible photochemical reactivity are specifically excluded." This approach is consistent with relevant federal regulations. 40 CFR 51 App. B 4.6 Organic Solvents provides that: "organic solvents which have been shown to be virtually unreactive in the formation of ozone...also may be considered for exemption." The Board, relying on this rationale, has exempted certain solvents from regulation as VOM's in the R80-5, RACT II and R82-14, RACT III proceedings. The important distinction to be made in the instant controversy is that VOM's are presumed to be photochemically reactive. The same presumption does not apply to organic material. Such an interpretation would clearly be overbroad and unreasonable where the "common, and sole, focus of these various programs is the control of ozone precursors emitted to the atmosphere." PCB 85-44, 85-70 and 85-130, DuPage Publications Co. v. Illinois Environmental Protection Agency, Opinion of the Board at p. 4 (May 9, 1986). In R81-16(B), the Agency, by public comment No. 17, suggested that under "Organic Material", the Board may wish to consider exempting from the definition of organic material the solvents methylene chloride or 1,1,1-trichloroethane as was done in the recent RACT rulemaking" (R80-5, RACT II). The Board did not exempt these solvents because it did not intend that a presumption of photochemical reactivity apply to organic material as it does with volatile organic material.

The Agency's second argument is that in amending the Part 203 rules by construction, the Board has erroneously allowed DuPage to circumvent the Board's rulemaking procedures and created inconsistency in its approach to ozone control. The Agency contends that by modifying the NSR rules, by construction in the absence of a formal rulemaking, the Board has created an administrative and regulatory morass. The Board disagrees. The implication of the Agency's argument is that the Board cannot reasonably construe its own rules in the context of an adjudicatory case. This position is clearly untenable under the Environmental Protection Act ("Act") which provides that the Board shall promulgate regulations and interpret them in the context of permit appeal, variance and enforcement cases while the Agency monitors, investigates, issues permits and brings enforcement actions. Landfill, Inc. v. Pollution Control Board et al., 387 N.E.2d 258, 262-263 (1978). It is through interpretation in an adjudicatory setting that some degree of consistency can be achieved. As the Agency points out, it may not be feasible to achieve total consistency in terminology between RACT and NSR. The RACT and NSR programs apply to different classes of facilities (existing versus new or modified) and the degree of control prescribed is different (Lowest Achievable Emission Rate - LAER versus Reasonably Available

Control Technology - RACT). However, the basic purpose and focus of these two programs should not be incompatible or different in kind. The purpose is the same; the control of ozone through the control of ozone precursors. While LAER is certainly intended to be more stringent than RACT, it should be related to the control of photochemically reactive volatile emissions.

The Agency, in its motion for reconsideration, contends that the Board erred in relying on the fact that the printing ink oils do not fall within the Board's definitions of "volatile organic materials" and "photochemically reactive material." The Agency states that:

> "The formal record before the Board in this case and facts of which the Board should take official notice, overwhelmingly demonstrate that the organic emissions from DuPage's offset presses do fall within the scope of Part 203 regardless of the fact that they are neither "volatile organic materials" nor "photochemically reactive" as those terms are defined" (emphasis added). (Respondents' Motion for Reconsideration, p. 11)

This argument appears to be based on the conclusion that the ink solvents in question are ozone precursors and should, therefore, be regulated. This conclusion is not supported by the Agency's record of decision regarding the DuPage permits, the stipulation of facts and exhibits. The Agency urges the Board to rely on the Carter Report and a United States Environmental Protection Agency Administrative Order, which the Agency admits, came to its attention subsequent to the permit decision. Under Illinois Environmental Protection Agency v. Pollution Control Board and Alburn, 455 N.E.2d 188 (1983), the pertinent case on the scope of an air permit appeal, the "decision of the Pollution Control Board must be based exclusively on the record before the Agency including the record of the hearing, if any." Id. at 194. Consequently, the "factual" support for the Agency's conclusion cannot be considered by this Board in this proceeding.

The Agency further argues that the terms "photochemically reactive materials" and "volatile organic material" are "regulatory definitions" and are "adopted solely for purposes of implementing a particular rule or rules" (Respondents' Motion for Reconsideration, p. 12). The Agency argues that, therefore, these terms have no meaning beyond the original rulemaking context. Because the terms "volatile organic material" and "photochemically reactive material" were not adopted in the NSR regulatory proceeding, they are irrelevant to this proceeding. The implication of this argument is that the interpretation of regulatory language is solely limited to the meaning and context of its original adoption. This approach is too formalistic and

unworkable especially in light of the almost continuous process of amendment that occurs in the Board's air regulations. Of course, all definitions in the Board's regulations are "regulatory," and their primary interpretation should be based on their supporting opinions. However, this approach to regulatory construction ignores the complex interrelationship of the rules as they are amended in various regulatory proceedings. As an example, the Agency in this proceeding argues that the Board should utilize the "regulatory definition" of "organic material" in the context of NSR. However, the term "organic material" was adopted not in the R81-16(B) NSR rulemaking, but in the R80-5, RACT II rulemaking. If one were to follow the Agency's reasoning, "organic material" would have no applicability outside the rules adopted in RACT II. Clearly, the NSR rules were drafted to overlay the existing regulatory scheme and to be consistent with it.

The Board's air regulations are intended to be a cohesive set of regulations that are internally consistent. While sections of the regulations are adopted in different proceedings, they often must be interpreted as a whole rather than in a segmented fashion. This is especially true in the "definitions" section of the regulations where the meaning of the terms used throughout a Part are established. Each new amendment is not isolated from the regulations it amends but should be interpreted in light of what already exists. Inevitably, ambiguity does exist in the Board's regulations but through reasoned interpretation in an adjudicatory context, some ambiguity can be eliminated. As the Board stated in its May 9, 1986, Opinion in this matter, the Board has attempted to provide some consistency between the RACT regulation and the NSR regulations. "While these programs do entail different regulatory approaches, they both utilize the same definitional terms and address the same problem - achieving the NAAQS for ozone, in non-attainment areas" DuPage Publications v. Illinois Environmental Protection Agency, PCB 85-44, 85-70 and 85-130, Opinion at page 6 (May 9, 1986).

The Agency makes a number of comments regarding the propriety and relevance of considering the pending regulatory proceedings in R82-14, RACT-III, and R85-20, New Source Review in the context of this proceeding. The Agency argues that it was inappropriate for the Board to decide, in the instant proceeding, an issue which is still unresolved in the RACT-III proceeding, i.e., the photochemical reactivity of heatset web offset ink oils. However, at the same time, the Agency urges the Board to take official notice of a specific technical report from the record in that proceeding. The Agency also states that the Board's error in this case will be compounded if the Board concludes in the RACT-III rulemaking that heatset web offset ink oils do not lead to the formation of ozone. The Agency apparently wants to "have its cake and eat it too" by relying on selected pieces of the RACT III record, so long as the Board

comes to the "correct" conclusion. This inconsistent argument suggests that the Agency may not be as concerned with procedural improprieties as with the substance of the Board's decision.

The Agency argues that their proposed amendments in R85-20 which would change the applicability of Part 203 to "volatile organic emissions" rather than "organic emissions" is not a tacit acknowledgment that sources like DuPage should not be subject to NSR because "neither the Agency nor the USEPA have ever concluded that emissions from heatset web offset printing ink oils do not lead to the formation of ozone." Once again, the Agency fails to recognize that it is the appropriate role of the Board and not the Agency to promulgate and interpret regulatory language.

The Agency argues that the Board inappropriately took administrative notice of an exhibit presented in the R85-20 regulatory proceeding, while refusing to take administrative notice of the Carter Report. The Agency asserts that the Board has been inconsistent in its application of official notice and unequally treats litigants. The "exhibit" which the Board took official notice of in R85-20 is an Agency regulatory proposal; hardly a document likely to be subject of much factual dispute. The Board believes that it is justified in distinguishing between refusing to take official notice of a technical report on an issue of disputed fact which is an exhibit in a pending regulatory proceeding and taking official notice of a proposal for regulatory language made by the Agency. The Board cannot take official notice of the facts contained in a technical report which are not part of the permit record. However, it is undisputed that the Agency has filed a regulatory proposal with the Board in R85-20. The only use the Board has made of this "fact" is recognization that the Agency has proposed to change "organic material" to "volatile organic material" in the pertinent regulation at issue in this proceeding

It would be inappropriate for the Board to take official notice of a technical document not before the Agency at the time the permit decision was rendered. A permit appeal must be based on the Agency record. However, the legal validity of an underlying rule upon which the permit appeal is based can be challenged in the context of the permit appeal. Consequently, it is appropriate to go beyond the Agency factual record to construe the legal import of a regulation. That is a question of law, rather than a question of fact.

Based on the record before the Agency and a review of the regulatory record of the underlying rules at issue in this proceeding, the Board affirms its decision of May 9, 1986.

IT IS SO ORDERED.

Chairman J.D. Dummelle and Board Member R. Flemal dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 14th day of August, 1986, by a vote of 4-2.

Dorothy M. Gunn/bbs.
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board