

ILLINOIS POLLUTION CONTROL BOARD

September 17, 1998

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Complainant, )  
)  
v. ) PCB 97-30  
) (Enforcement - Air)  
SHELL OIL COMPANY, )  
)  
Respondent. )

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

This matter is before the Board on a motion to dismiss and memorandum of law in support thereof (collectively, motion to dismiss)<sup>1</sup> filed November 17, 1997, by respondent, Shell Oil Company (Shell). Shell requests that the instant action, in which complainant, People of the State of Illinois, by James E. Ryan, Attorney General of the State of Illinois,<sup>2</sup> charges Shell with two counts of air pollution, be dismissed. As a threshold issue, Shell contends that it is exempt from the regulations it is charged to have violated. If not exempt, Shell contends that the State is precluded from bringing this action because it has failed to provide adequate notice as required by due process.

Complainant filed a response to Shell's motion to dismiss on December 23, 1997. On January 5, 1998, Shell filed a motion for leave to file a reply to complainant's response. Complainant filed an objection to Shell's motion on January 8, 1998. On January 12, 1998, Hearing Officer John Burds granted Shell's motion to file a reply. Shell filed a reply on January 23, 1998, accompanied by a motion to file a memorandum of law in excess of the page limits as set forth in 35 Ill. Adm. Code 101.104. The Board hereby grants Shell's motion to file the memorandum of law in excess of the page limit.

Complainant asserts, and Shell does not dispute, that Shell operates a wastewater treatment facility at its Wood River petroleum refining facility in Madison County, Illinois.

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<sup>1</sup> Shell's motion to dismiss shall be referred to as Mot. to Dism. at \_\_; complainant's response to the motion to dismiss shall be referred to as Resp. at \_\_; Shell's reply shall be referred to as Rep. at \_\_; complainant's amended complaint shall be referred to as Am. Comp. at \_\_.

<sup>2</sup> The Board notes that Amy Symons-Jackson filed the action on behalf of the People of the State of Illinois in her position as an Assistant Attorney General. Ms. Jackson has since become employed by the Board as a hearing officer; however, she did not participate in any discussions regarding this decision.

Am. Comp. at 2; Mot. to Dismiss at 1. Complainant alleges Shell's facility is subject to 35 Ill. Adm. Code 219, Subpart TT. Am. Comp. at 2.

### NECESSITY OF AN AFFIDAVIT

First, we address a procedural issue raised by complainant in its response. Complainant contends that some factual allegations in Shell's motion to dismiss do not comply with 35 Ill. Adm. Code 101.242(a) and Section 2-619(a) of the Code of Civil Procedure (735 ILCS 5/2-619(a)) since they are not supported by affidavit and, therefore, Shell's motion to dismiss should be denied. Resp. at 1-2. The factual allegations at issue in the motion to dismiss are that: (1) enforcement of Section 219.986 and 219.991 against Shell violates "due process;" (2) Shell participated in the development of Subpart TT; (3) "[d]espite its good faith, Shell could not reasonably have been expected to infer the Agency interpreted Subpart TT as applicable to its industrial wastewater treatment facility;" and (4) "[t]he Agency's prior statements . . . lulled members of the regulated community such as Shell, into believing they were not expected to comply with Subpart TT." Resp. at 2.

Complainant notes that Section 101.242(a) of the Board's procedural rules require that "facts asserted which are not of record in the proceeding shall be supported by affidavit." Resp. at 3; see 35 Ill. Adm. Code 101.242(a). Further, complainant argues that Section 2-619(a) of the Code of Civil Procedure provides that "[i]f the grounds do not appear on the face of the pleading attacked, the motion shall be supported by affidavit." Resp. at 3; see 735 ILCS 5/2-619(a). Complainant asserts that because Shell did not support its allegations by affidavit, its motion to dismiss is defective and should be denied. Resp. at 4.

Shell asserts that it has fully complied with Section 101.242(a) of the Board's procedural rules and Section 2-619(a) of the Code of Civil Procedure. Rep. at 3. Shell maintains that the issue disputed in the motion to dismiss is whether Subpart TT's generic rules apply to Shell's facility. Rep. at 4. Shell asserts that Subpart TT's applicability is a matter appearing on the face of the amended complaint and does not implicate facts not of record in the proceeding. Rep. at 4. Finally, Shell contends that the motion to dismiss, which analyzes the Act and regulations thereunder, rulemaking proceedings, and opinions or published statements by administrative entities charged with promulgation of the rules, is amply supported by public records. Rep. at 5.

The Board finds Shell's second assertion that it participated in the development of Subpart TT to be a question of fact. The record does not prove or disprove this factual allegation, therefore the Board will not take administrative notice of this claim. However, the Board will take administrative notice of Shell's assertion regarding the Agency's statements as those comments are part of an official Board transcript. Shell's first, third, and fourth allegations, described above, are merely among Shell's arguments and do not require affidavits. The Board will not deny the motion to dismiss on these procedural grounds.

MOTION TO DISMISS

Shell presents two main arguments in support of its motion to dismiss. First, Shell contends the regulations found at 35 Ill. Adm. Code 219, Subpart TT do not apply to its industrial wastewater facility because there is an explicit exemption in those regulations for "sewage treatment plants." Shell contends that the facility qualifies for this exemption. We find, as we did in People of the State of Illinois v. Clark Refining & Marketing, Inc. (September 17, 1998), PCB 95-163, that for purposes of Subpart TT, the term "sewage treatment plant" encompasses the term "industrial wastewater treatment facility." Hence, we hold that Shell has shown that its facility is exempt from the regulations at issue, and grant that claim in the motion to dismiss.

Second, Shell argues it was not properly notified of any potential violation of 35 Ill. Adm. Code 219, Subpart TT. Because we find that Subpart TT does not apply to Shell's facility, this issue is moot.

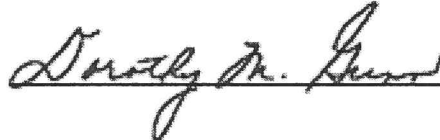
CONCLUSION

Based upon the above, the Board finds that Shell's wastewater treatment facility is exempt from 35 Ill. Adm. Code Part 219, Subpart TT. The Board also finds that whether or not Shell received proper notice as required by due process is moot. Accordingly, the Board grants Shell's motion to dismiss.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

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 7-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board