ILLINOIS POLLUTION CONTROL BOARD
March 1, 2001

CLAYTON CHEMICAL ACQUISITION LIMITED LIABILITY COMPANY d/b/a RESOURCE RECOVERY GROUP, L.L.C.,	)	
Petitioner,	)	PCB 98-113 PCB 99-28 PCB 99-158
v.	)	(Permit Appeal – RCRA) (Consolidated)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

SHELDON D. KORLIN FOR RESOURCE RECOVERY GROUP, L.L.C; and

DANIEL P. MERRIMAN FOR THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by M. McFawn):

This consolidated permit appeal involves six separate permit decisions by the Illinois Environmental Protection Agency (Agency) contained in four denial letters. Resource Recovery Group, L.L.C. (RRG) submitted four permit modifications and two temporary authorization applications for a total of six applications. The Agency granted one permit modification, the Class 1 modification, but RRG appealed the Agency's decision. The original permit which RRG sought to modify is the Resource Conservation and Recovery Act (RCRA) Part B permit issued by the Agency to Clayton Chemical Company (Clayton) on March 29, 1996, and twice modified in response to two requests by Clayton before its assets and the operations were transferred to RRG. The six applications by RRG to modify the facility's Part B permit and the Agency's four decisions concerning those applications are listed in this chart and described in more detail under the Summary of Permit Appeals.

Case No.	Modification Type	Application Date	Agency Denial Date	Petition Date
PCB 98-113	RCRA TA[1]	June 17, 1997	January 28, 1998	March 3, 1998
PCB 99-028	RCRA TA	December 12, 1997	July 9, 1998	August 13, 1998
PCB 99-028	RCRA Class 1[2]	May 7, 1998	July 23, 1998	August 13, 1998
PCB 99-158	RCRA Class 3	March 27, 1997	March 29, 1999	May 4, 1999
PCB 99-158	RCRA Class 3	June 18, 1997	March 29, 1999	May 4, 1999
PCB 99-158	RCRA Class 3	March 13, 1998	March 29, 1999	May 4, 1999

Pending before the Board are cross-motions for summary judgment involving all six permitting decisions contested by RRG. The Board has examined the facts presented and concludes that no material facts are in dispute so this matter can be resolved by summary judgment. In sum, four issues are raised in these consolidated permit appeals. On the motion for summary judgment, the Board finds in favor of the Agency on each of the four issues. First, the Board finds that the default provision of Section 39(a) of the Illinois Environmental Protection Act (Act) does not apply to RCRA permitting decisions, and therefore the contested permit modifications were not issued by operation of law. Second, the effective date of the Clayton facility's RCRA Part B permit was not changed when the permit was transferred to RRG or when the Agency approved the Class 1 modification requested by RRG. See PCB 99-28. Third, the Agency correctly denied the two RCRA temporary authorizations RRG requested. See PCB 98-113 and PCB 99-28. Fourth, the Agency correctly denied the three Class 3 modifications RRG requested for several reasons, including RRG's failure to obtain a variance when seeking to extend compliance dates in the Part B permit that had already passed. See PCB 99-158.

PROCEDURAL MATTERS

The two earliest-filed cases were consolidated pursuant to RRG's motion on August 20, 1998, and the last-filed case was consolidated with these on May 20, 1999. Both parties now seek summary judgment in these consolidated permit appeals. The Agency filed its motion on July 25, 2000, and RRG filed its response, including a cross-motion for summary judgment on October 27, 2000. Also pending is a motion for stay filed by RRG on September 25, 2000. The Agency filed its response on October 6, 2000. RRG sought to stay this proceeding, including its obligation to respond to the Agency's motion for summary judgment. In its response, the Agency opposed the motion. As explained above, RRG filed its response and cross-motion for summary judgment on October 27, 2000, before the Board ruled on the motion for stay. With the adoption of today's order, RRG's motion for stay is moot.

This opinion is organized to first explain the standards of review used in granting summary judgment in these consolidated permit appeals and set forth the facts necessary to

[1] "TA" is an abbreviation for "temporary authorization," a type of permit modification available under RCRA.

[2] This appeal involves the Agency's approval of the Class 1 modification requested by RRG, rather than a denial.

examine the questions of law presented. Then, both parties' arguments in support of their motions for summary judgment and in opposition of the other's motion are provided. Finally, the Board's conclusions are explained immediately following the arguments on each point.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the record before the Board, including the pleadings, exhibits, discovery documents, and affidavits, demonstrates a clear right to judgment as a matter of law. (Outboard Marine Corporation v. Liberty Mutual Ins. Co. (1992), 154 Ill. 2d 90, 180 lll. Dec. 691, 607 N.E.2d 1204.) The Agency submits that there are no genuine issues of material fact in dispute. It contends that what the Part B permit stated, what was filed and when it was filed, what RRG's temporary authorizations and modification requests contained, and what the Agency's denial letters stated are matters of fact which are of record and are contained in the various exhibits attached to its motion or RRG's three petitions for appeal. In its response RRG recites numerous "undisputed" facts, and identifies no facts as disputed. Furthermore, it seeks summary judgment as well.

The Board concludes that no material facts are in dispute concerning the permit denials appealed by RRG. As argued by the Agency, the matters in dispute in this action relate to the legal effect of those facts, and the determination of which regulations apply and what they require. These are all questions of law that the Board will consider and analyze in the context of the parties' arguments.

In granting summary judgment, the Board will resolve this consolidated permit appeal. The standard of review for permit appeals is well established and will be applied in this case. That standard is set forth in Joliet Sand & Gravel Company v. Illinois Pollution Control Bd., (3d Dist. 1987), 163 Ill. App. 3d 830, 833-34, 114 Ill. Dec. 800, 516 N.E.2d 955, 958. The court stated the rule that:

> At a hearing before the Board to contest a denial of a permit application, the sole question before the Board is whether the applicant proves that the application, as submitted to the agency, demonstrated that no violation of the Environmental Protection Act would have occurred if the requested permit had been issued. Illinois Environmental Protection Agency v. Illinois Pollution Control Board (1984), 118 Ill. Dec. 158, 455 N.E.2d 188.

This rule also applies to appeals of permit modification decisions by the Agency. In Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Bd., (2d Dist. 1989), 179 Ill. App.3d 598, 607, 128 Ill. Dec. 434, 440, 534 N.E.2d 616, 622, the appellate court held the permittee to have the burden of proof even in an appeal of an Agency-initiated modification. The appellate court stated that:

> However, when an Agency permit modification is appealed to the Board, the Act places the burden of proof at the Board hearing squarely on the petitioner. (Ill. Rev. Stat. 1987. Ch.111 ½ , par. 1040(a).) That burden is to show that the plan, as proposed by the applicant, will not result in the violation of the Act or that the modification is not necessary.

As stated in Browning-Ferris and clearly at Section 40(a)(1) of the Act, the burden of proof in a permit appeal is placed squarely upon the petitioner. 415 ILCS 5/40(a)(1). Thus, RRG bears the burden of demonstrating that its modification requests, if granted, would not have resulted in violation of the Act or Board regulations.

Finally, the issues on appeal to the Board from the Agency's permitting decisions are framed by the Agency's written notice of its decisions. ESG Watts, Inc. v Illinois Pollution Control Bd. (3d Dist. 1997), 286 Ill. App. 3d 325, 335, 221 Ill. Dec.778, 785, 676 N.E.2d 299, 306; citing Pulitzer Community Newspapers v. IEPA (December 20, 1990), PCB 90-142 and Centralia Environmental Services, Inc. v IEPA (May 10, 1990), PCB 89-170.

RCRA PERMIT MODIFICATIONS

The Board's Resource Conservation and Recovery Act (RCRA) regulations allow for the permittee to request modification of its RCRA Part B permit. According to Section 703.280 of the Board's regulations, the four methods are: (1) temporary authorizations; (2) Class 1 modifications; (3) Class 2 modifications; and (4) Class 3 modifications. 35 Ill. Adm. Code 703.280. The types of modifications that constitute Class 1, Class 2, and Class 3 modifications are listed in Appendix A to Part 703 of the Board's RCRA regulations.

Temporary Authorizations

According to Section 703.280(e), the Agency shall grant the permittee a temporary authorization without notice or comment for a term of not more than 180 days. The permittee may request a temporary authorization for only Class 2 or Class 3 modifications. In this case, RRG sought both temporary authorizations for Class 3 modifications.

Section 703.280(e)(2)(A)(ii) specifically provides that the relevant Class 3 modification must meet "the criteria in subsection (e)(3)(B)(i) or [that meets] the criteria in subsections (e)(3)(B)(iii) through (v) and provides improved management or treatment of a hazardous waste already listed in the facility permit."

The temporary authorization request must include:

i) A description of the activities to be conducted under the temporary authorization;

ii) An explanation of why the temporary authorization is necessary; and

iii) Sufficient information to ensure compliance with 35 Ill. Adm. Code 724 standards. 35 Ill. Adm. Code 703.280.(e)(2)(B)

In pertinent part, Subsection 703.280(e)(3) provides that "[t]he Agency shall approve or deny the temporary authorization as quickly as practical. To issue a temporary authorization, the Agency shall find: (A) The authorized activities are in compliance with the standards of 35 Ill. Adm. Code 724." 35 Ill. Adm. Code 703.280(e)(3).

Class 1 Modifications

The Class 1 modifications involved in this case are: (1) changes in operational control of a facility, (2) corrections of typographical errors, and (3) administrative and informational changes. 35 Ill. Adm. Code 703.Appendix A, (A)(7), (2) and (1), respectively. The permittee can put a Class 1 modification into effect so long as he/she has notified the Agency within seven days after the change is put into effect. The Agency may reject for cause any Class 1 modification. In that event the Agency must inform the permittee in writing of the rejection and the reasons for it. 35 Ill. Adm. Code 703.281(a).

Class 3 Modifications

The Class 3 modifications that RRG sought in this case were extensions of compliance dates. 35 Ill. Adm. Code 703.Appendix A, (A)(5). To obtain a Class 3 modification, the permittee must submit a request to the Agency that:

1. Describes the exact change to be made to the permit conditions and supporting documents referenced by the permit;

2. Identifies that the modification is a Class 3 modification;

3. Explains why the modification is needed; and

4. Provides the applicable information required by Section 703.181 through 703.187, 703.201 through 703.209, 703.221 through 703.225, 703.230, and 703.232. 35 Ill. Adm. Code 703.283(a).

Class 3 modifications require a public comment period and a public hearing, and notice of both must be published in a newspaper of general circulation in the county where the facility is located. At the conclusion of the public comment period, the Agency shall grant or deny Class 3 modifications according to the permit modifications procedures at Part 705. 35 Ill. Adm. Code 703.283(f). According to Section 705.201, when the Agency issues a final permit decision, its denial letter must address four criteria, the same four criteria set forth in Section 39(a) of the Act. Those criteria are:

A) The sections of the appropriate Act that may be violated if the permit were granted;

B) The provisions of Board regulations that may be violated if the permit were granted;

C) The specific type of information, if any, that the Agency deems the applicant did not provide with its application; and

D) A statement of specific reasons why the Act and the regulations might not be met if the permit were granted. 35 Ill. Adm. Code 705.201(b)

BACKGROUND

Clayton's Operating History

The facility at issue here was originally operated by Clayton; RRG purchased Clayton's assets in part on or about December 2, 1996. Clayton owned and operated a fuel blending and solvent reclaiming facility in Sauget, Illinois, operating as a hazardous waste management facility pursuant to the provisions of Subtitle C of RCRA. Clayton blended hazardous waste fuel for use by industrial furnaces. Its facility included on-site bulk and drum storage, waste materials processing for fuels, a liquid fuel blending storage tank system and solvent recovery units. Wastes were received by Clayton either by bulk or in containers. Bulk materials arrived by truck and were unloaded into hazardous waste storage tanks. Containerized wastes were unloaded at the container storage area and stored in a designated area until the materials could be processed.

The Clayton facility was established in the early 1960s and received authorization as an interim status hazardous waste storage facility on February 11, 1982. When Clayton applied for its RCRA Part B permit, it was operating an interim drum storage area. Clayton also operated an interim status tank system. Those operations were identified in Clayton's State operating permit No. 1979-19-OP.[3] Agency Exh. B.

In October of 1993, Clayton submitted an application to the Agency for a RCRA Part B permit. Clayton's application was denied by the Agency and Clayton appealed to the Board. See generally Clayton Chemical Company v. IEPA, PCB 91-206. While that appeal was pending, Clayton negotiated a permit with the Agency that was finally issued on March 29, 1996.

[3] The Agency's exhibits are those attached to its motion for summary judgment, unless otherwise described, and cited as "Agency Exh. __;" RRG's exhibits are attached to its permit appeals, and are cited as PCB #, Exh. __."

History of Clayton's RCRA Part B Permit

The Agency issued Clayton a RCRA Part B permit on March 29, 1996. Because of the then-pending permit appeal in Clayton Chemical Company vs. IEPA PCB 91-206, that new permit could not become effective immediately. Instead, the permit provided that its effective date would be delayed until Clayton's permit appeal, PCB 91-206, was voluntarily dismissed. On April 18, 1996, pursuant to Clayton's motion, the Board dismissed PCB 91-206. Clayton, (April 18, 1996), PCB 91-206.

Under its RCRA Part B permit, Clayton was required to construct a new hazardous waste tank storage system and a new hazardous waste drum storage area that conformed to the requirements of 35 Ill. Adm. Code Part 724, also known as the "Part B Standards." Clayton's Part B permit also contained provisions that allowed it to operate certain pre-existing units while the new units that would comply with the Part B standards could be built and placed into operation. Those pre-existing units had been operated pursuant to the interim status standards of 35 Ill. Adm. Code Part 725, and were not in compliance with the Part B standards. The Part B permit also included interim and final compliance dates for the new units to be completely constructed, as well as a final deadline for the continued use of those two old interim status units regardless of whether or not the new units had been completed. By their very terms, the interim and final compliance dates for constructing the new units were tied to the effective date of the Part B permit.

Clayton's Two Class 1 Modification Requests

Clayton submitted only two requests to modify its Part B permit. The first was to correct some information and some typographical errors in the permit issued March 29, 1996. The second was to transfer the operations to RRG. The Agency approved both requests, and Clayton never appealed either modification.

On May 20, 1996, Clayton submitted its first Class I modification request to change some information and correct typographical errors in its RCRA Part B permit. The Agency approved the modifications on August 8, 1996. In the transmittal letter, the Agency included the following proviso: "Operations must be conducted in accordance with the approved Part B Permit originally issued to Clayton Chemical and all subsequent modifications to the Part B Permit." Agency Exh. E.

On July 12, 1996, Clayton submitted its second Class 1 modification to transfer its RCRA Part B permit to RRG. Resp. Exh. D. The Agency granted the request on October 8, 1996. The Agency included the same proviso quoted above. Agency Exh. F, and PCB 99-28 Exh. 13.

SUMMARY OF PERMIT APPEALS

After it became the operator of the Clayton facility, RRG submitted six requests to the Agency to modify its Part B permit. RRG submitted two requests for RCRA temporary authorizations, one for a Class 1 modification, and three for Class 3 modifications. The Agency denied five of the six requests. The Agency's denials of the two temporary authorizations are the subject of the appeals in PCB 98-113 and PCB 99-28. The Agency's denials of the three Class 3 modification requests are the subject of the appeal in PCB 99-158. RRG also appealed the Class 1 modification that the Agency approved. That appeal was included in PCB 99-28.

First Filed Appeal, PCB 98-113

RRG filed this appeal on March 3, 1998. RRG appeals the Agency decision to deny the temporary authorization it requested on June 17, 1997. (PCB 98-113 Exh. 1). RRG sought a 180-day extension of its authority to operate and perform the construction activities required under its Part B permit, and for posting financial assurance for the facility's operations and closure. On January 28, 1998, the Agency denied the temporary authorization. Agency Exh. L; PCB 98-113 Exh. 2.[4] RRG claims that the Agency never notified it of the deficiencies set out in the denial letter. Furthermore, RRG claims the decision deadlines in Section 39(a) of the Act are applicable to this permitting decision, and that since no hearing was required for this type of modification, the Agency had 90 days from receiving the request to issue its decision. RRG contends that its June 17, 1997 temporary authorization request was issued by operation of law because the Agency failed to issue its decision within the 90 days as required by Section 39(a) of the Act.[5]

Second Filed Appeal, PCB 99-28

RRG filed this appeal on August 13, 1998. In it, RRG appeals the July 9, 1998 Agency's decision to deny a second temporary authorization, and a July 23, 1998 Agency approval of the only Class 1 modification requested by RRG. RRG appeals the Agency's

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[4] In its January 28, 1998 denial letter, the Agency references a letter dated March 27, 1997, as the RRG letter requesting a temporary authorization. It should be the June 17, 1997 temporary authorization letter. The Agency's reference is incorrect as noted by RRG in its PCB 99-158 permit appeal, paragraph 26 at page 8. RRG's letter of March 27, 1997 letter requests a Class 3 Permit Modification. See Agency Exh. H; PCB 99-158 Exh. at 43.

[5] RRG also claims that its June 18, 1997 Class 3 Permit Modification request (Agency Exh. J; PCB 98-113 Exh. 2) was issued by operation of law because the Agency failed to make a decision within 180 days of RRG's request. RRG PCB 98-113 permit appeal at 10. The Agency had not denied that request when this appeal was filed, and RRG did not pursue this claim in this proceeding. The Agency's ultimate denial of the June 18, 1997 Class 3 Modification request was appealed in PCB 99-158.

approval on the grounds that the Agency unilaterally changed the effective date of the facility's Part B permit.

RRG filed its second temporary authorization on December 12, 1997, again seeking to extend the deadlines in its RCRA Part B permit. Agency Exh. K; PCB 99-28 Exhibit 28. The Agency denied that request on July 23, 1998. Agency Exh. N; PCB 99-128 Exhibit 34. RRG claims that subsequently it timely filed the Class 3 modification request on March 13, 1998, in accordance with the December 12, 1997 temporary authorization request.[6] As in the first appeal, PCB 98-113, RRG claims the decision deadlines in Section 39(a) of the Act are applicable to this permitting decision, and that because no hearing was required for this type of modification, the Agency had 90 days from receiving the request to issue its decision. RRG concludes that its December 12, 1997 temporary authorization request was issued by operation of law because the Agency failed to issue its decision within the 90 days as required by Section 39(a) of the Act. PCB 99-28 permit appeal at 24.

Secondly, RRG appeals the Agency determination concerning its Class 1 modification. On July 23, 1998, the Agency granted the grammatical and typographical error corrections RRG requested. It also approved changes in names, addresses and phone numbers of the Emergency Coordinators. According to the Agency, it sent only the signature page of the permit because no revisions were required in the Part B permit. The Agency noted that it made a correction to the effective date of the RCRA Part B permit modified October 8, 1996. It wrote: "[t]he correction resulted from a typographical error. Based upon dismissal of the permit appeal PCB 91-206, the proper effective date for this permit is April 18, 1996." Agency Exh. O; PCB 99-28 Exhibit 36. RRG argues that this "attempted unilateral change" of the permit's effective date is void because it was an improper Class 1 modification which changed, under the terms of the permit, certain interim and final compliance deadlines within the permit delivered to RRG and challenges it on several constitutional grounds. PCB 99-28 RRG permit appeal at 28.

Third Filed Appeal, PCB 99-158

RRG filed this appeal on May 4, 1999. RRG appeals three permitting decisions made by the Agency in a single letter in which the Agency denied three Class 3 modifications requested by RRG. Agency Exh. R; PCB 99-158 Exh. 60. RRG had individually requested the modifications on March 27, 1997, June 18, 1997 and March 13, 1998. Agency Exhs. H, J, M; PCB 99-158 Exhs. 37, 38, 39. The Agency had issued a notice of intent to deny all three Class 3 modifications on August 19, 1998. Agency Exh. P; PCB 99-158 Exh. 42.

In the March 27, 1997 request, RRG asked for a 270-day extension to the compliance dated for constructing and operating the drum storage unit or until December 2, 1997. In its June 18, 1997 request, RRG asked for a 330-day extension for all of the listed permit's interim

[6] The Agency's subsequent denial of this Class 3 Modification request is appealed in PCB 99-158.

and final compliance dates. In its March 13, 1998 request, RRG asked for 395-day extension of all of the interim and final compliance dates listed in the Part B permit. Concerning each of the denied Class 3 modification appealed, RRG claims:

1. RRG made timely application for Class 3 modifications;

2. The Agency did not notify it of any deficiencies in the Class 3 modification requests;

3. More than 180 days expired prior to the Agency issuing either its Notice of Intent to Deny or its final decision;

4. The Agency failed to act within 90 days on the two temporary authorizations appealed in PCB 99-28 and 98-113 and which precede the June 18, 1997 and March 13, 1997 Class 3 modifications, respectively, appealed in PCB 99-158;

5. That all three Class 3 modifications became effective by operation of law due the Agency's failure to issue its decision within 180 days under Section 39(a) of the Act.

CONTESTED ISSUES

RRG bears the burden of proof in this consolidated permit appeals. The Agency, however, made the original motion for summary judgment, and RRG responded to it. Given the structure of the relevant pleadings, the Agency's arguments generally precede those of RRG. However, the Board addresses the four legal challenges presented by RRG in these consolidated appeals. Those issues are: (1) the two temporary authorizations and three Class 3 modifications requested by RRG were issued by operation of law because the Agency failed to act within the permitting decision deadlines in Section 39(a) of the Act; (2) the effective date of the RCRA Part B permit was unlawfully changed by the Agency when it approved the Class 1 modification requested by RRG; (3) the two denied temporary authorizations were timely filed and were granted by operation of law; and (4) the three denied Class 3 modifications were timely filed and should have been granted.

RRG's Modification Requests Issue by Operation of Law

An issue common to all three consolidated cases is RRG's claim that the temporary authorizations and Class 3 modifications were issued by operation of law because the Agency did not take final action within the timeframes found in Section 39(a) of the Act. RRG makes this claim concerning the two temporary authorizations appealed in PCB 98-113 and PCB 99-28, and the three Class 3 modifications appealed in PCB 99-158. RRG relies upon the "deemed issued" language of Section 39(a) of the Act and the fact that final actions on these requests were not made by the Agency within the 90 (or 180) days of the requests being filed

as specified in Section 39(a) of the Act.[7] In fact, none of the Agency's five denials contested in this matter were taken within 90 or 180 days of RRG's requests. The only time the Agency acted within 90 days was when it approved the Class 1 modification RRG requested.

The Agency Argues that Section 39(d) of Act is Controlling

The Agency argues that Section 39(d) of the Act, rather than Section 39(a), is controlling because it provides that RCRA permits are issued exclusively under Section 39(d) of the Act. The Agency claims that under a plain reading of Section 39(d), RCRA permits cannot be issued by default. In support the Agency explains that both the appellate court and the Board have held that the "exclusively under this subsection" language of Section 39(d) precludes the application of the time limitations and default provisions of Section 39(a) to RCRA permits.

The Agency cites to ESG Watts, Inc. v. Illinois Pollution Control Board (3d Dist. 1992), 224 Ill. App. 3d 600, 603; 586 N.E.2d 1323, 1325 (ESG Watts II); J & M Plating, Inc. v. IEPA (November 18, 1993), PCB 93-73; and Marathon Petroleum v. IEPA (July 27, 1988), PCB 88-179. Each case prohibits the issuance of RCRA permits by the default provisions of Section 39(a). The Agency concludes that there can be no issuance of a RCRA permit by default. The Agency contends that this prohibition extends to RCRA permit modifications.

The appellate court held in ESG Watts II that the time limitations of Section 39(a) do not apply to RCRA permits issued under Section 39(d) of the Act for two reasons. First, "[a] request for a RCRA permit is a more complicated procedure and is governed exclusively by section 39(d) of the Act." ESG Watts II at 603. Second, "Section 39(d) does not place any time limits on the applications for such permits, except to the extent '. . . filing requirements and procedures . . .' are adopted by the agency." *Id*. The court added "even assuming arguendo that the time limit was applicable, the issue was waived by Watts failure to clearly raise it before the Board . . . ." *Id*.

The Agency also argues that the default provisions of Section 39(a) do not apply to RCRA permits because of the legislative findings of Section 20(a)(5) through (9) of the Act. 415 ILCS 5/20(a)(5) through (9) (1992). Therein the General Assembly noted the propriety of Illinois' State hazardous waste management system being consistent with, no less stringent than, and equivalent to the federal hazardous waste management program. The Agency points out that in keeping with those goals, Section 22.4(a) of the Act requires the Board to adopt State RCRA regulations that are identical in substance to federal regulations promulgated by the USEPA to implement Sections 3001-3005 of RCRA, and Section 22.4(b) of the Act permits the Board to adopt additional regulations relating to the State hazardous waste management program so long as they are "not inconsistent with and at least as stringent as"

[7] In pertinent part, Section 39(a) of the Act provides that the Agency must make its final action within 90 days of the application being filed, and within 180 days if notice and opportunity for public hearing is required by State or federal law. 415 ILCS 5/39(a).

RCRA and the regulations adopted thereunder. The Agency concludes that if the Act or State regulations allow for a RCRA permit to be issued by default because the Agency exceeded some designated review period, such default provisions would have to be equivalent to, consistent with, and no less stringent than the corresponding federal law. Ag. Mot. at 26.[8]

The Agency then outlined why RCRA would not allow for these types of modification to be issued by operation of law. RCRA Section 3005(c)(1), Permit issuance, 42 U.S.C. 6925(c)(1), allows issuance of a RCRA permit for a hazardous waste TSD only upon a determination by the Administrator (or a State, if applicable) of the facility's compliance with the requirements of RCRA Section 3004 (applicable TSD standards, comparable to 35 Ill. Adm. Code Part 724) and Section 3005 (TSD permit requirements). Therefore, if Illinois law allows a RCRA permit to be issued, or modified by default, the Agency contends that Illinois law would be less stringent than federal law. Ag. Mot. at 27.

Finally, the Agency examined whether the United States Environmental Protection Agency (USEPA) would allow Class 3 modifications or RCRA temporary authorizations to be issued by operation of law. The USEPA considered and rejected the suggestion that Class 3 modifications should be deemed issued in the absence of an Agency final decision. The USEPA declined to include an automatic authorization in the absence of agency authorization because a Class 3 modification may have a significant effect on human health and the environment if proper permit conditions are not developed before the Class 3 modification is implemented. 53 Fed. Reg. 37912, 37919 (1988) (preamble to final rule amending RCRA modifications of hazardous waste management permits). Ag. Mot. at 27.

In the same preamble, USEPA also addressed temporary authorizations under the federal rules. It summarized its authority as the right to deny any requests that are not protective of human health and the environment or do not meet the criteria for a temporary authorization. 53 Fed. Reg. 37912, 37920 (1988). The Agency argues that since no mention is made about approval of Class 3 modifications or temporary authorizations by default, RCRA and the USEPA do not allow the default provisions of Section 39(a) of the Act to apply to RCRA permits or their modifications. Ag. Mot. at 28.

RRG Argues that Section 39(a) is Applicable

RRG argues that the appellate court's decision in ESG Watts II is not controlling, and claims that it is merely *dicta*. In support, RRG points out that on the same day the same court had ruled in another case that Watts had waived this time limitation issue by failing to raise it before the Board in an National Pollutant Discharge Elimination System (NPDES) permit appeal. ESG Watts v. PCB, 224 Ill. App. 3d 592, 594, 586 N.E.2d 1320, 1322 (ESG Watts I). RRG Response at 41. The Board notes that Section 39(c) of the Act parallels the language of Section 39(d) of the Act for NPDES permitting, *i.e.*, it provides that NPDES permits are

[8] The Agency's motion for summary judgment is cited as "Ag. Mot. at ___." RRG's response and cross-motion for summary judgment is cited as RRG's response at ___."

issued exclusively under Section 39(c) of the Act. RRG also argues that there is *dicta* in Grigoleit Company v. Pollution Control Board, 613 N.E.2d 371, 376, 245 Ill. App. 3d 337, 344 (4th Dist. 1993) to support an argument that the appellate court is split on whether Section 39(a) means a permit can issue by default. RRG response at 44-45.

RRG also distinguishes Marathon Petroleum v. IEPA (July 27 1989), PCB 88-179, one of the Board cases upon which the Agency relied. RRG argues that Marathon Petroleum is based in significant part on the Board examination of the federal statute and regulatory process because the delegated state programs cannot be less stringent than the federal program. RRG then examines the federal program in pertinent part and concludes that 40 C.F.R. 270.40 to 270.42 do contain language that would allow a permittee to deem their temporary authorization or some modifications requests to be effective, at least until there is a final decision by the USEPA or the delegated state program. Therefore, RRG believes that the Board's interpretation in Marathon Petroleum of the federal regulatory language was too limiting because it inferred that no time limits can be applied to the permitting process. RRG response at 42; 44.

Finally, RRG raises the argument that Section 39(d) of the Act cannot be exclusive because Section 39(a)(i)-(iv) of the Act contains four specific reasons that the Agency must address at a minimum when it denies a permit. 415 ILCS 5/39(a)(i)-(iv) (1998). RRG response at 43. RRG claims that the Agency accepts that this and the other provisions of Section 39(a) of the Act apply to RCRA permitting decisions. In support of this statement, RRG cites to the Agency's Notice of Intent to Deny the three Class 3 modifications, wherein the Agency states that it is "required under Section 39(a) of the Illinois Environmental Protection Act [cite] to provide the applicant with specific reasons for denial of a permit modification request." PCB 99-158 Exh. 42 at 8.

RRG also argues Sections 703.280 and 703.283 pertaining to temporary authorization and Class 3 modification both "contemplate reasonably speedy decisions" although neither contain specific decision deadlines. RRG argues that the Board should find that a reasonable time for action should be inferred. RRG response at 43.

Board Finds Section 39(a) Deadlines Are Not Applicable

Our reasons for finding that the permitting decision deadlines in Section 39(a) of the Act are not applicable to RCRA Part B permits are fully set forth in Marathon Petroleum. Therein the Board found that "the default provisions in the last paragraph of Section 39(a) do not apply to RCRA permits." Marathon Petroleum v. IEPA (July 27, 1989) PCB 88-179, slip op. at 7. In J & M Plating, Inc. v. IEPA PCB 93-73, another RCRA permit appeal, J & M sought summary judgment on the ground that the Agency did not render a timely permit determination. The Board again found that the default provisions of Section 39(a) of the Act do not apply, and held that the Board had extensively addressed the reasons for this finding in Marathon Petroleum. As done in J & M Plating, we reaffirm that the default provisions of Section 39(a) of the Act do not apply to RCRA permits. We again find this issue was

extensively addressed in Marathon Petroleum, and find no reason to deviate from our prior determination.

Furthermore, we disagree with RRG that the appellate court's decisions on this issue are *dicta*. In ESG Watts II, the appellate court clearly held that RCRA permitting is governed exclusively by Section 39(d) of the Act. While the Court does not mention Marathon Petroleum, its reasoning and findings are fully supported by the Court in ESG Watts II.

As for RRG's argument that Section 39(d) cannot be exclusive because Section 39(a) mandates the Agency to spell out its reasons for denying a permit, we also disagree. As explained in Marathon Petroleum v. IEPA (July 27, 1989) PCB 88-179, the provisions of the Act which are not in conflict with the federal RCRA scheme are preserved. The default provisions are inconsistent with the federal RCRA scheme, but the requirement that the Agency spell out the reasons for denying a RCRA modification is not in conflict. Therefore, only the latter are preserved. Notably, the Section 39(a)(i)-(iv) provisions have been adopted in Section 705.201(b) of the Board's RCRA regulations. 35 Ill. Adm. Code 705.201(b). Pursuant to that Section, the Agency is required to address the identical reasons listed at Section 39(a) of the Act when it denies, as in this case, the Class 3 modifications. In fact, the Agency did address each of those reasons in the attachment to the letter denying these three contested Class 3 modifications, and the Agency cited the requirements of Section 39(d) as the reason for doing so. Agency Exh. R.

We agree that the pertinent regulations contemplate reasonably speedy decisions, and the time taken by the Agency in denying the contested temporary authorizations and Class 3 modifications was lengthy. We believe, however, that several factors minimize the effect of any delay. RRG was seeking only extensions of time to comply with the deadlines contained in the Part B permit. In effect, the Agency's delayed decision-making gave RRG the additional time it sought. The Agency's failure to act did not prohibit RRG from performing and finishing the construction necessary to continue operations or post the necessary financial assurance. Yet, nothing in the record indicates that RRG took action, timely or otherwise, to come into compliance with the actions required under the permit.

We find that Section 39(a) of the Act is not applicable to RCRA permits or permit modifications. Therefore, we find that summary judgment should not be granted RRG on the grounds that the contested permit modifications were issued by operation of law.

The Effective Date of the Part B Permit

The Agency granted only one of the permit modifications requested by RRG, and RRG appealed that decision in PCB 99-28. On July 23, 1998, the Agency granted the Class 1 Permit modification RRG requested. When doing so, the Agency listed the permit's effective date as April 18, 1996. The Agency explained that it was including this effective date to correct a typographical error in the permit modification issued to RRG on October 8, 1996, the Class 1 modification transferring operational control from Clayton to RRG. The expiration

date on the signature page to the October 8, 1996 permit was August 4, 1989. Neither Clayton nor RRG appealed that permit modification.

RRG appealed this modification in PCB 99-28 on the grounds that it was an improper Class 1 modification because "it changed certain and final compliance deadlines with the permit delivered to RRG." RRG second appeal at 28. RRG also challenged it on several constitutional grounds, but did not pursue those arguments in its response to the Agency's motion for summary judgment.

History of the Effective Date of the Part B Permit

Original Part B Permit. The Agency sent Clayton its Part B Permit on March 29, 1996. Agency Exh. B. In the upper right hand corner of the permit's cover sheet the following information appeared: "Effective Date: May 8, 1996*"; "Expiration Date: May 8, 2006." The * denoted a footnote at the bottom of the cover sheet that read "See Section VI, Condition K."

That reference appears to be to the single paragraph appearing on page VI-21 of the March 29, 1996 Part B permit, which is the last page of the permit. While that condition is not labeled "K," it reads:

> Effective Date:
> In addition to any other permit conditions included in this RCRA Part B Permit, this permit is effective upon dismissal of the Permit Appeal PCB no. 91-20 filed by Clayton Chemical Company before the Illinois Pollution Control Board.

As mentioned earlier, that appeal was dismissed on April 18, 1996. See Agency Exh. C.

Part B Permit as Modified per Clayton's Requests. As explained above, on August 8, 1996, the Agency sent the first modified version of the Illinois portion of the Part B permit to Clayton in response to Clayton's first Class 1 modification request to correct some typographical errors in the original Part B permit. The modified permit contained approximately 130 pages. PCB 99-28 Exh. 13; Agency Exh. E. The signature page to the modified permit included the same language as that found on the original RCRA Part B permit, *i.e.*, an effective date of May 8, 1996* and expiration date of May 8, 2006. The same footnote appeared as well on that signature sheet. *Id*.

On October 8, 1996, the Agency sent yet another revised Illinois portion of the RCRA Part B permit to Clayton in response to its second Class 1 modification request, transferring operations from Clayton to RRG. In the transmittal letter the Agency included the same explanation about why only the Illinois portion of the permit was being sent, and the same routine language that the operations must be conducted in accordance with the original Part B permit issued to Clayton and all subsequent modification thereto. However, the signature page

was slightly different from the original permit and the first modified permit. The effective date listed in the upper right corner was "August 4, 1989," while the expiration date remained May 8, 2006. There was no footnote referencing Section VI, Condition K. Also, the original final condition in Section VI had been substituted with an entirely new Condition K. This new condition required the new operator to obtain the requisite financial assurance within 6 months. Specifically, Condition K required that:

> Clayton Chemical Acquisition, LLC d/b/a Resource Recovery Group, LLC shall demonstrate compliance with 35 Ill. Adm. Code 724, Subpart H (Financial Requirements) within six months after the date of change of operational control of the facility. Upon demonstration to the Agency by the new operator of compliance with that subpart, the Agency shall notify the old operator that the old operator no longer needs to comply with that subpart as of the date of demonstration. PCB 99-28, Exh. 13, at Page VI-24 of VI-24; Agency Exh. F.

Part B Permit as Modified per RRG's Requests. When the Agency granted RRG the Class 1 Permit modification it requested, the Agency explained in its transmittal letter that only the permit's signature page was being attached because the changes did not require a revision in the language of the Part B permit. It added: "Operations must be conducted in accordance with the approved RCRA Part B Permit issued to RRG and all subsequent modifications to the Part B Permit." Agency Exh. F.

The signature page in this instance listed the effective date as April 18, 1996*, the expiration date as May 8, 2006, and the Modification Date as July 23, 1998. The footnote denoted by the asterisk read:

> The original permit Log 157 contained a conditional effective date of May 8, 1998 (sic) Former Condition VI(6)(K) stated that "In addition to any other condition included in this RCRA Part B permit, this permit is effective upon dismissal of the permit Appeal PCB No. 91-206 filed by Clayton Chemical Company before the Illinois Pollution Control Board." Appeal PCB No. 91-206 was dismissed April 18, 1996. Therefore the permit became effective on April 18, 1996. Agency Exh. O.

The Agency Argues the Change is Typographical Error Correction

The Agency claims that the change in effective date appearing on this modification is just a typographical correction to the clearly erroneous date of August 4, 1989, that appeared on the last permit modification made to Clayton's Part B permit. The Agency argues that for this change to be a modification as RRG claims, the Part B permit's original effective date of April 18, 1996 would have to have been modified when the permit was transferred on October 8, 1996. According to the Agency this could not have occurred because a Part B permit becomes effective at a certain point in time. In this case, that point was fixed pursuant to Section VI of Clayton's original Part B permit that provided for the effective date to be the

date a then-pending permit appeal was dismissed by the Board. That dismissal was granted by the Board on April 18, 1996, and therefore that became the effective date of this Part B permit. Ag. Mot. at 40-44.

The Agency theorizes that an effective date arguably may be changed when a permit is reissued for a new term. Even then, the Agency contends that the effective date of the original permit is not changed, rather the reissued permit gets its own, new effective date.

The Agency also anticipates RRG's claims that the October 8, 1996 permit determination was really a permit reissuance. It explains that even if an effective date can be changed when a permit is reissued, the record in this case clearly demonstrates that the transfer in October 1996 of operational control to RRG was a Class 1 modification, and not a reissuance of the Part B permit. First, Clayton only submitted a Class 1 permit modification request that the Part B permit be "modified" to reflect the transfer of operations to RRG as the operator. Agency Exh. D. The Board's rules also require that such a transfer be made by a Class 1 Permit modification with prior written approval of the Agency. 35 Ill. Adm. Code 260(b), and 703, Appendix A, A.7. The Agency adds that permit reissuances require certain formalities such as draft permits, and that none of these were performed for the October 8, 1996 change. See 35 Ill. Adm. Code 705.128.

Finally, the Agency argues that the only condition opened to change was operational control. Nothing in Clayton's request was related to changing the Part B permit's effective date. The Agency concludes that placing a clearly erroneous date – a date almost seven years prior to the original Part B permit being issued to Clayton – on the signature page could not have been done as a modification the permit. Thus it is clear that the effective date of August 4, 1989 was just a typographical error and could not effect a change in the permit's actual effective date of April 18, 1996. Therefore its subsequent action to correct the typographical error could not be a permit modification. The Agency concludes that the actual effective date of the RCRA Part B permit is and has always been April 18, 1996. Ag. Mot. at 40-46.

RRG Argues for a New Effective Date

RRG agrees that the August 4, 1989 date in the October 8, 1996 permit modification was a typographical error. RRG response at 9. Nevertheless, RRG argues that the correct effective date is a date governed by Section 705.201(d) of the Board's RCRA permitting rules. RRG argues mostly in favor of November 13, 1996, *i.e.*, 35 days after the October 8, 1996 permit modification transferring operations to RRG was approved.

RRG's argument is two-fold. First, it claims that there must be a new effective date because all references to the permit's effective date were removed in the October 8, 1996 document, but for the erroneous August 4, 1989 date replacing the May 8, 1996* date which appeared in the original Part B permit. Most specifically, RRG argues that the paragraph at Section VI which was referenced by the asterisk appearing next to the May 8, 1996* date in

Clayton's March 29, 1996 Part B permit was eliminated entirely. RRG argues that since all references were deleted, there was no effective date so it concluded that Section 705.201(d) must govern. That rule provides that "[a] final permit shall be come effective 35 days after the final permit decision . . .." 35 Ill. Adm. Code 705.201(d).

RRG also argues that the Agency converted its Class 1 modification request to a Class 3 modification request by unilaterally including the April 18, 1996 effective date. RRG response at 26-27. It also claims that the Agency unilaterally reissued a revised permit in response to Clayton's Class 1 modification request. RRG response at 30. In support of this argument, RRG points out that the Agency issued a permit with over 130 pages, when it believes that a simple one or two page document would have been responsive to Clayton's Class 1 modification. RRG response at 30-31. It cites examples of changes made in the permit text in the July 23, 1998 document.

RRG concludes that since the Agency issued the October 8, 1996 permit modification with substantive changes to the permit issued on March 29, 1996, the permit was reissued on October 8, 1996 with an effective date established by the 35-day rule in Section 705.201(d).

The Board Finds No Modification to the Part B Permit's Effective Date

The Board agrees with the Agency and RRG that the August 4, 1989 date that appeared as the effective date in the October 8, 1996 permit modification was a typographical error. Clearly that date was erroneous being almost seven years before the October 8, 1996 modification. In fact, we find that is all that it is. It was not a modification of the original Part B permit, and therefore, the correction in the latest Class 1 modification approval cannot be a permit modification.

We disagree with RRG's claim that no effective date was left in the permit because all other references to an effective date were deleted in the October 8, 1996 document. RRG ignores the fact that there was, however, an effective date listed on the permit modification, albeit clearly erroneous. Especially since internal compliance deadlines were triggered by the permit's effective date, RRG must have realized the error and therefore could have either requested a clarification or a modification to correct the obvious typographical error, or RRG could have appealed the October 8, 1996 modification. It did not, and instead now argues that it was correct to assume an effective date different from the original Part B permit.

Furthermore, RRG cannot now claim in this appeal that the October 8, 1996 permit modification was unlawful. We are not persuaded by RRG's argument that the permit was reissued or converted to a Class 3 modification by the Agency's response to Clayton's Class 1 modification. We have examined the October 8, 1996 document transferring operational control to RRG and find that only changes necessary to effectuate that transfer, rather than substantive changes. In any case, RRG could have appealed that permit modification at that time if it believed that the Agency had overreached its authority.

Finally, we find that RRG cannot claim that it could correctly assume, in lieu of the erroneous effective date, that the 35-day rule of Section 705.201(d) is applicable. Section 705.201(a) specifically provides that this rule is applicable only to final permit decisions that are subject to public comment periods or public hearing. 35 Ill. Adm. Code 705.201(a). The October 8, 1996 Class 1 modification was subject to neither. Therefore, the 35-day rule of Section 705.201(d) is not applicable to this modification.

Also, RRG cannot rely upon its claim that the Agency somehow converted this Class 1 modification into a Class 3 modification when it granted the Class 1 modification on October 8, 1996. First, we find that the terms changed in the Part B permit at that time dealt with the transfer of operations only. Second, RRG did not timely appeal that permit modification. It cannot now claim that it was a Class 3 modification in an attempt to support its presumption that the 35-day effective date provisions of Section 705.201(d) governed the Part B permit's effective date.

For these reasons, we find that the Agency did not unilaterally change the Part B permit's effective date when it approved the Class 1 modification appealed in PCB 99-28.

Two Temporary Authorization Requests

RRG appealed the Agency's determination denying the two temporary authorizations it requested. The first is appealed in PCB 98-113; the second is one of the two decisions appealed in PCB 99-28. Ag. Mot. at 30. In general, RRG sought to extend all of the Part B's permit interim and final compliance dates, authorization to continue operation of the interim status units, and to extend the date for posting financial assurance. Agency Exhs. H and I, and K. Very simply, the Agency argues that the relief sought by RRG in the two temporary authorizations do not qualify as temporary authorizations.

Section 703.280(e) of the Board's regulations contains the requirements for RCRA temporary authorizations. The Agency denied both requests because they did not include the information required under Section 703.208(e)(2)(B). Section 703.280 also provides that to grant a temporary authorization for a Class 3 modification, the Agency must find that "[t]he authorized activities are in compliance with the standards of 35 Ill. Adm. Code 724." 35 Ill. Adm. Code 703.280(e)(3)(A). The Agency explains that RRG sought authorization to continue operating its interim drum storage and tank storage system areas under Part 725, rather than the final standards of Part 724. Therefore, the Agency could not make the necessary finding and it had to deny both temporary authorization requests. Agency Exh. L and N. The Agency acknowledges that RRG could not make such a demonstration since it was requesting to maintain operations under Part 725. For that very reason, the Agency argues that the authorizations requested by RRG were not appropriate for RCRA temporary authorizations. Ag. Mot. at 31.

RRG responds that both temporary authorizations were approved by default because the Agency did not make a permitting determination in accordance with the time limitations in

Section 39(a) of the Act. RRG also argues that both temporary authorizations were timely filed because the correct effective date of the permit was November 13, 1996 - 35 days after the October 8, 1996 permit modification. The Board has decided against RRG's positions on both issues. Therefore, RRG cannot prevail in contesting the Agency's decisions to deny both temporary authorizations on those arguments.

The Board has reviewed the Agency's interpretation of Section 703.280(e)(3)(A), and agrees that RRG could not seek temporary authorizations to allow it to continue to operate under the Part 725 standards. The Agency was correct to deny both temporary authorizations since it could not approve them without a violation of law.

RRG's Class 3 Modification Requests

Introduction. RRG filed three Class 3 Permit modification requests. With the first one, dated March 2, 1997, RRG sought only to extend the Part B permit's compliance date for construction and operation of its new drum storage area. It was a one and one-half page request. RRG requested that the final compliance date be extended from March 2, 1997, until December 2, 1997. Agency Exh. H.

With its second Class 3 Permit modification request, dated June 18, 1998, RRG sought to extend all of the interim and final compliance dates in its Part B permit by 330 days, and included the specific request to extend the operating authority for the old drum storage unit and tank system and as well as its interim permitted status and the deadlines for posting financial assurance for the interim units and the new units. This second Class 3 modification request was five pages in length. In all, RRG sought 14 extensions for specific actions and deadlines required in its Part B permit. Agency Exh. J.

In its third Class 3 modification request, dated March 13, 1998, RRG requested an extension and permit modification of 395 days for all of the permit's listed interim and final compliance dates, including but not limited to extending its operating authority for the existing drum storage and storage tanks as well as its interim permitted status and financial assurance requirements. RRG also sought to extend the deadline for posting financial assurance for its interim and new units. This Class 3 modification request was 5 pages long, with no substantive attachments. Again, RRG sought 14 extensions for specific actions and deadlines required in its permit. Agency Exh. M.

The Agency denied all three modifications on March 29, 1999. The reasons for denial are not identical, although some of the same reasons are given for more than one denial. In Attachment A to that letter, each of the three Class 3 modifications were individually identified according to the Agency's Log Numbers: 157-M-3 (March 27, 1997), 175-M-4 (June 18, 1997), and 157-M-6 (March 13, 1999). Agency Exh. R. Nine reasons were given for denying the March 27, 1997 request; 12 for the June 18, 1997 request; and 10 for the March 13, 1998 request.

Applicable Rules. In general, with each Class 3 modification requested, RRG sought to extend the final compliance dates in its Part B permit. An extension of a final compliance date in a permit requires a Class 3 modification. See 35 Ill. Adm. Code 703.App.A., A 5.b. The rule governing RCRA Class 3 modification requests is found in Section 703.283. Specifically, subsection (a) of that section lists the primary contents that are required in a Class 3 modification request. The permittee must submit a modification request to the Agency that:

1) Describes the exact change to be made to the permit conditions and supporting documents referenced by the permit;

2) Identifies that the modification is a Class 3 modification;

3) Explains why the modification is needed; and

4) Provides the applicable information required by Section 703.181 through 703.187, 703.201 through 703.209, 703.221 through 703.225, 703.230, and 703.232. 35 Ill. Adm. Code 703.283(a)

Failure to Have a Variance

The Agency denied RRG's first and second Class 3 modifications, citing a failure to comply with Section 702.162. Attachment A, Log No. 157-M-3 par. 1 and Log No. 175-M-4, par. 1. Section 702.162(d) provides that the Agency may not permit a schedule of compliance involving violation of regulations adopted by the Board unless the permittee has been granted a variance. 35 Ill. Adm. Code 702.162.

The Agency contends that RRG needed a variance for the Agency to grant the modifications requested. In support, the Agency also cites to Section 702.108(a) which prohibits the Agency from issuing a permit that is inconsistent with Board regulations. In pertinent part, that section provides that:

> If an applicant seeks a permit that would authorize actions which are inconsistent with Board regulations, including delayed compliance dates, the applicant should file for either of two forms of relief:
>
> 1) A petition for variance pursuant to Title IX of the Environmental Protection Act (Act) [415 ILCS 5] and 35 Ill. Adm. Code 104; or
>
> 2) A petition for an adjusted standard pursuant to Section 28.2 of the Act and 35 Ill. Adm. Code 106. 35 Ill. Adm. Code 702.108(a). (Emphasis added.)

The Agency claims that RRG's Class 3 modifications were each filed after the relevant permit compliance date: after February 1, 1997, for completion of the tank system (Agency Exh. F, Section VI, Condition I (4)); after March 1, 1997, for completion of the new drum

storage area (Agency Exh. F, Section VI, Condition I (1)); after March 2, 1997, for terminating operation of the interim status drum storage area; and after the 300 and 330 day periods had expired which allowed for the continued operation of the old interim status drum storage area and hazardous waste tank system, respectively. Agency Exh. F, Section VI, Condition I (2). As for RRG's first Class 3 modification request that was filed March 27, 1997, and therefore before the Part B permit's final compliance date of May 8, 1997, the Agency argues that merely filing a modification request does not stay the permit condition sought to be modified. (See, *e.g.*, 35 Ill. Adm. Code 702.146 and 705.128(c)(2).) And finally, the Agency points out that RRG's second and third Class 3 permit modification requests were each filed after the permit's final compliance date of May 8, 1997. Agency Exh. F, Section VI, Condition I (5).)

Pursuant to RRG's Part B permit compliance schedule, Section VI, Condition I (5), both the drum storage area and tank system were clearly required to be completed and RRG's ability to use the old interim status drum storage area and tank system was fully and finally terminated "no later than May 8, 1997.[9] Agency Exh. F, Condition VI (5). Therefore, all the extensions requested by RRG in the second and third Class 3 modifications were after the final termination date for all activities. The Agency therefore concludes that any continued use of those units thereafter were subject to the standards and requirements of Part 724.

In support of its denials of all three Class 3 modifications, the Agency cites to Section 702.108(a) as clearly requiring that the permittee seeking authorizations for actions inconsistent with the Board's regulations, *i.e.*, not in compliance with Part 724, must file for either a variance or an adjusted standard from the Board. Since RRG did not file for a variance or adjusted standard or include such with the Class 3 modification requests, the Agency claims that it was barred under Section 702.162(d) from modifying RRG's compliance schedule. Ag. Mot. at 56.

RRG Response. RRG argued that it did not need a variance because the Part B permit had been reissued, and therefore its effective date changed to November 13, 1996, and all of the interim and final compliance dates had been extended accordingly. RRG therefore concludes that it was not out of compliance with its permit or the Board's regulations at the time it submitted the three Class 3 permit modifications. RRG Resp. at 50, 54.

The Board has already ruled that this argument is not legally valid. Therefore, the Board finds that RRG did not sustain its burden of proof on this issue. RRG has not demonstrated that the Agency could approve these Class 3 Modification requests without a violation of the Act.

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[9] Ordinarily, interim status would have terminated for all of RRG's units on the effective date of its Part B permit, (see 35 Ill. Adm. Code 703.157(a) and (d)), but for the permit's compliance schedule that authorized continued use of the two old interim status units for a limited time.

The Board finds that the Agency is entitled to summary judgment on this issue. RRG failed to comply with the terms of its permit and therefore its operations were not in compliance with the Board's regulations at the time it sought these Class 3 modifications. Because RRG was out of compliance, absent a variance, Section 702.162(d) does bar the Agency from granting the Class 3 modifications RRG sought. As for the first Class 3 modification, we agree with the Agency that the permit condition specifying a compliance date of May 8, 1997, was not stayed. RRG sought to delay compliance until December 2, 1997. Therefore, under Sections 702.162(d) and 702.108(a), RRG would have had to obtain a variance for that request as well to obtain the requested modification.

Lack of Certification Required under Section 702.126(d)

The Agency denied the first two Class 3 modifications because RRG failed to provide the certification required under Section 702.126(d). See Log #157-M-3, par.2 and Log #157-M-4, par.3. Part 702, Subpart C of the Board's RCRA regulations, contains the basic regulatory conditions applicable to all RCRA permits and modifications. Section 702.151 provides that: "[a]ll application [sic], reports, or information submitted to the Agency shall be signed and certified in accordance with the requirements of Section 702.126." 35 Ill. Adm. Code 702.151. Section 702.126, at subsection (a) lists the persons who must sign applications. Subsection (d) requires that [a]ny person signing a document under subsection (a) or (b) of this Section shall make the following certification: The rule then recites the exact language that must be certified. 35 Ill. Adm. Code 702.126. The record does not contain such a certification for either the March 27, 1997, or the June 18, 1997 Class 3 modification requests. The Agency claims that it is therefore entitled to summary judgement on this point. Ag. Mot. at 56-57.

In response RRG claims that Section 702.126 is not applicable because it just applies to "applications" as opposed to the permit modification requests submitted by RRG. Resp. at 48.

The Board finds that together Sections 702.151 and 702.126 require that the Class 3 modifications be signed and certified. We are not persuaded by RRG's argument. Section 702.151 provides that "[a]ll application (sic), reports, or information submitted to the Agency" must be signed and certified in accordance with Section 702.126. Therefore, we find that the Agency was correct to deny the first two Class 3 modifications since RRG's requests did not comply with the Board's regulations.

Failure to Explain Need for Modification

The Agency denied each of the three Class 3 modification requests because RRG failed to provide the technical information required as required by 35 Ill. Adm. Code 703.283(a)(3). See Log # 157-M-3, par. 3; Log #157-M-4, par. 4; Log #157-M-6, par.4. Specifically, the Agency denied these three requests because in each instance RRG failed to:

> provide technical information which would indicate that the continued operation of the former interim status tank farms and container storage area would not cause a violation of Section 21(e) and (f) of the Act or regulations, or to explain why the modification was needed. 35 Ill. Adm. Code 703.283(a)(3). (Agency Exh. R, Attachment A)

The Agency claims that RRG's three Class 3 modification requests were totally:

> devoid of any information or other justification or documentation explaining how granting their requests to further postpone construction of the new, Part 724 conforming units, and continued to use the old non-Part 724 conforming units, would meet the requirement of current Board regulations and standards (*i.e.*, Part 724), as required by Section 21(e) of the Act, or would avoid the violation of any current Board regulations and standards (*i.e.*, Part 724), as required by Section 21(f) of the Act. Ag. Mot. at 58-59.

Presumably as an example of the type of technical information it was seeking, in its motion the Agency explains that Section 703.283(a)(4) requires a Class 3 modification request to include applicable information required by Sections 703.201 (containers) and 703.202 (tank systems). Section 703.201(a), for example, requires operators of hazardous waste container storage areas to provide a description of the containment system to demonstrate compliance with Section 724.275. 35 Ill. Adm. Code 703.201(a). Section 703.202(a), for example, requires owners or operators of hazardous waste tank storage systems to provide a written assessment that is reviewed and certified to by an independent, qualified, registered professional engineer as to the structural integrity and suitability of the tank system for handling hazardous waste, as required by Sections 724.291 and 724.292. 35 Ill. Adm. Code 703.202(a).

RRG responds that no engineering, *i.e.*, technical information, was required because it was not seeking to change any of the underlying documents. Resp. at 50, 54.

We agree with RRG. The denial points identified by the Agency cite only to Section 703.283(a)(3), which only requires that the permit modification request explain why the modification is needed. 35 Ill. Adm. Code 703.283(a). RRG was seeking only to extend final compliance dates, and it offered an explanation about why those extensions were needed. Section 703.283(a)(3) does not specifically require the type of technical information the Agency described. Therefore, on this denial point we find that RRG satisfied Section 703.283(a)(3). We note that the Agency's example of the types of technical documents it was seeking are required under Section 703.283(a)(4), but that regulation was not identified at Log# 175-M-4, par.7 or Log # 157-M-6, par 4.

<u>No Description of "Exact Changes" to Be Made to the Permit</u>

The Agency denied each of the three permit modification requests because "[t]he applicant failed to describe the exact changes to be made to the existing permit conditions and supporting documents referenced by the permit. (35 Ill. Adm. Code 703.283(a)(1))". Agency Exh. R, Attachment A, #157-M-3, par. 4; #157-M-4, par. 5; and #157-M-6, par.6.

The Agency acknowledges that RRG described generally the changes that it was seeking, but claims that it failed to designate the lines, paragraphs, pages, conditions or even section of the permit that it wished changed and exactly how it wished them to be changed. The Agency argues that changing interim and final compliance dates is not the simple substitution of one date for another that it appears to be. The Agency does not believe that it should be required "to shift through RRG's Part B permit and interpolate changes that RRG might require or desire of specific portions of its permit." Agency Mot. at 59. The Agency claims that RRG's requests were clearly deficient because they contained no such descriptions. *Id*.

The Board notes that in the second and third Class 3 modification requests, RRG did specifically list the types of extensions and the dates it sought concerning the facility's operations and construction activities. RRG makes no response to this denial point. Therefore, the Board finds that RRG did not meet its burden of proof and we find in the Agency's favor on this issue.

Failure to Identify Modification Class

The Agency states that another reason summary judgement should be granted in its favor is that RRG failed to identify that it was seeking a Class 3 modification as required by Section 703.283(a)(2). Resp. Exh. R, #157-M-3, par. 5. The Agency claims that a review of RRG's first Class 3 modification request will reveal no such identification. Agency Mot. at 60. See Agency Exh. H. RRG makes no response to this denial point. The Board examined RRG's Class 3 modification request of March 27, 1997. Finding no such identification, the Board finds in the Agency's favor on this issue.

No Certified Assessment that Interim Status Tank System Complied with Part 724

The Agency denied RRG's second and third Class 3 modification requests because:

> The applicant failed to provide the applicable information required by 35 Ill. Adm. Code 703 to demonstrate that the tank farm was constructed and will be operated in accordance with 35 Ill. Adm. Code 724, Subpart J. (35 Ill. Adm. Code 703.283(a)(4).) Agency Exh. R, Attachment A, Log #175-M-4, par.8 and Log# 157-M-6, par.6.

The Agency argues Section 703.283(a)(4) requires that a Class 3 modification request contain the applicable information required by, among other provisions, 35 Ill. Adm. Code

703.202. To demonstrate RRG's failure to comply with Section 703.283(a)(4), the Agency uses Section 703.202 as an example. That rule requires, in part that:

> owners and operators of facilities that use tanks to store or treat hazardous waste shall provide the following additional information:
>
> a) A written assessment that is reviewed and certified by an independent, qualified, registered professional engineer as to the structural integrity and suitability for handling hazardous waste of each tank system, as required under 35 Ill. Adm. Code 724.291 and 724.292. 35 Ill. Adm. code 703.202.

The Agency explains that RRG requested in its June 18, 1997 Class 3 modification an extension of:

> 330 days for all of the listed Permit's interim and final compliance dates, including but not limited to extension of operating authority for such period for the existing DS-1 and TM-1 units, as well as its interim permitted status and financial assurance requirements. Agency Exh. J.

RRG specifically sought to "[e]xtend compliance deadline for storage of hazardous waste in existing interim status storage tanks until May 31, 1998." *Id.* Agency Exh. J at page 2, point 7. RRG's March 13, 1998 Class 3 modification request also specifically sought to "[e]xtend compliance deadline for storage of hazardous waste in existing interim status storage tanks until June 30, 1999." Agency Exh. M, page 2, point 7.

The Agency argues that since interim status authority to operate RRG's old interim status tank system had terminated on May 8, 1997, in accordance with the Part B permit's compliance schedule, any operation of hazardous waste tank system would, of necessity, be required to conform to the minimum requirements of 35 Ill. Adm. Code Part 724. To ensure such compliance, Section 703.202 requires an assessment of structural integrity as required under Part 724 rules certified by a professional engineer be included. As the Agency points out, neither RRG's June 18, 1997, nor its March 13, 1998 Class 3 modification request included such a certified assessment. Therefore, the Agency concludes that its denial of RRG's request for failing to satisfy the requirements Section 703.283(a)(4) is correct.

RRG makes no response. Therefore, the Board finds in the Agency's favor.

No Justification for Postponing Posting Financial Assurance

Both RRG's second and third modification requests sought to postpone the deadline for posting financial assurance along with all other compliance deadlines. Agency Exhs. J and M. The Agency denied those modifications because RRG failed to provide proof that postponing posting its financial assurance would not cause a violation of Part 724 Subpart H or Section 21(f) of the Act. Agency Exh. R, Attachment A, Log #175-M-4, par. 11; Log#157-M-4, par. 9.

Section 21(f) of the Act prohibits the treatment, storage or disposal of hazardous waste without a RCRA permit, or in violation any permit conditions or Board regulations. 415 ILCS 5/21(f)(1998). Special Condition K, page 24 of Section VI of RRG's Part B permit required RRG to demonstrate compliance with the financial assurance requirements of 35 Ill. Adm. Code Part 724, Subpart H within six months of the change in operational control of the facility. Agency Exh. F.

The Agency explains that this condition is consistent with Section 703.260(b), which provides, in pertinent part, that:

> When a transfer of ownership or operational control occurs, the old owner or operator shall comply with the requirements of 35 Ill. Adm. Code 724.Subpart H (Financial Requirements), until the new owner or operator has demonstrated compliance with that Subpart. The new owner or operator shall demonstrate compliance with that Subpart within six months after the date of change of operational control of the facility. 35 Ill. Adm. Code 703.260(b).

The Agency argues that operational control was transferred by the October 8, 1996 Class 1 modification. Agency Exh. F. Based upon that presumption the Agency contends that the regulations required RRG to post financial assurance in accordance with 35 Ill. Adm. Code Part 724, Subpart H within six months thereafter, or by April 8, 1997. Agency Mot. at 62.

The Agency also argues that when RRG first sought an extension to post financial assurance on June 18, 1997, it was already overdue. The Agency then argues that there is no exception provided to the six month deadline under Section 703.260(b). Therefore, the Agency argues that RRG required a variance from that rule for the Agency to be able to grant the requested extension of time to post financial assurance. Agency Mot. at 63.

RRG's response to this denial point is that the Agency frustrated its ability to obtain financial asssurance. RRG Resp. at 51, 53.

The Board finds that the Agency was correct to deny this portion of the Class 3 modifications due to RRG's failure to obtain a variance or otherwise explain why further delay in obtaining financial assurance would not result in a violation of Part 724 or Section 21(f) of the Act. We note that even if December 2, 1996, was the date when operational control of this facility transferred instead of October 8, 1996 when the Part B permit was modified

transferring operational control, the 6 month deadline for posting financial assurance was past when RRG sought the first extension.

No Justification to Modify Compliance Schedule

RRG's three Class 3 permit modification requests sought the postponement of all of its permit's compliance dates. Agency Exhs. H, J and M. The Agency denied each of those modification request because:

> The applicant failed to provide the applicable information that modification of the compliance schedule is justified because of an act of God, strike, flood, material shortage or other event over which the permittee has little or not control in accordance with 35 Ill. Adm. Code 703.271(d). Agency Exh. R, Attachment A, Log#157-M-3, par. 8; Log#157-M-4, par. 9; and Log#157-M-6, par 7.

According to the Agency, Section 703.271 sets forth the permissible causes for modification of RCRA permits, and concerning compliance schedules specifically, provides at subsection (d):

> Compliance schedules. The Agency determines good cause exists for modification of a compliance schedule, such as an act of God, strike, flood or materials shortage or other events over which the permittee has little or no control and for which there is no reasonably available remedy. 35 Ill. Adm. Code 703.271(d).

The Agency acknowledges that in the first Class 3 modification request, for example, RRG explains that it had no control over Clayton's insolvency and its inability to fully perform the construction required by the permit. Agency Exh. H. However, the Agency argues that RRG was well acquainted with Clayton's financial condition before RRG voluntarily agreed to become the facility operator in October, 1996. Since RRG knew of Clayton's financial condition and the permit conditions prior to assuming responsibility as the permitted operator, the Agency argues that RRG cannot claim to have been overtaken by any sudden, unexpected circumstances beyond its control.

The Agency also addresses the rationale expressed by RRG in its Class 3 modification that winter weather conditions were not optimal for construction activities. The Agency claims that winter weather conditions were reasonably foreseeable in October 1996 when the Part B permit was transferred to RRG. Therefore, this argument does not fall within the ambit of reasons the Agency could find good cause for modifying the construction schedule. Agency Mot. at 63-65.

RRG did not respond to the Agency's arguments concerning this denial point. The Board finds in favor of the Agency on this denial point.

CONCLUSION

The Board concludes that these consolidated permit appeals are correctly decided by the parties' motions for summary judgment. The Board has examined the applicable law in relation to the facts in these cases as presented by the parties. The Board finds in favor of the Agency on each of its permitting decisions. Therefore, the Board grants the Agency summary judgment, and denies RRG's cross-motion for summary judgment.

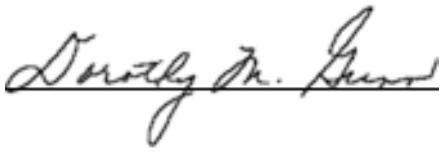
ORDER

Summary judgment is granted in favor of the Illinois Environmental Protection Agency. The decisions by the Illinois Environmental Protection Agency to deny the five permit modifications requested and appealed by Resource Recovery Group, L.L.C. in PBC 98-113, 99-28, and 99-158 are affirmed. Its action to correct a typographical error as part of the Class 1 modification contested in PCB 99-28 is also affirmed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1998)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days 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 101.520, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 1st day of March 2001 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board