

ILLINOIS POLLUTION CONTROL BOARD
October 16, 1992

OHIO GRAIN COMPANY,)
)
 Petitioner,)
)
 v.) PCB 90-143
) (Permit Appeal)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ROY M. HARSCH, OF GARDNER, CARTON & DOUGLAS, APPEARED ON BEHALF OF PETITIONER;

RENEE A. STADEL, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

This matter comes before the Board on a petition for review filed August 1, 1990 by Ohio Grain Company (Ohio Grain) pursuant to 35 Ill. Adm. Code 105.102(a) and Section 40(a) of the Illinois Environmental Protection Act (Act). Ohio Grain is seeking review of the Illinois Environmental Protection Agency's (Agency) June 27, 1990 denial of Ohio Grain's application for an air operating permit. Ohio Grain operates grain-handling, drying, and storage facilities in Ohio, Illinois. A hearing was held on this matter in Princeton, Bureau County, Illinois, on March 25, 1992, which no members of the public attended.

PROCEDURAL HISTORY

Although the instant case involves a petition for review of a permit denial filed with the Board on August 1, 1990, there is a court case involving the parties which has bearing. (see People v. Ohio Grain, Circuit Court for the Thirteenth Judicial Circuit, Bureau County, Illinois, No. 87-MR-39, October 3, 1988.) On November 12, 1987, the State of Illinois filed a complaint against Ohio Grain in the circuit court of Bureau County alleging that Ohio Grain had failed to obtain a construction and operating permit for its grain-handling and grain-drying operations located in Ohio, Illinois. The complaint was dismissed by order of the court on October 3, 1988, because the Agency failed to provide the opportunity to resolve the alleged violations through a pre-

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enforcement conference as required by Section 31(d) of the Act. (Tr. at 30, Pet. Ex. 5.¹)

Following dismissal of the complaint, Ohio Grain met with the Agency and the Illinois Attorney General in a 31(d) conference in an attempt to resolve the alleged violations. (Pet. PHB at 2.) No further enforcement proceedings have been filed to date.

On March 22, 1990, Ohio Grain applied for an air operating permit pursuant to 35 Ill. Adm. Code 201.144 for its grain-handling and grain-drying operations. By letter dated June 27, 1990, the Agency denied Ohio Grain's request for an operating permit, stating that the permit was denied because Section 9 of the Act and 35 Ill. Adm. Code 201.142, 201.143 and 212.462(b) might be violated. On August 1, 1990, Ohio Grain filed a timely petition for permit appeal.

FACTS

There are no contested facts presented by this permit appeal according to the petitioner. (Pet. PHB at 7.) The issues presented in this permit appeal involve interpretation of the grain-handling and grain-drying regulations set forth in 35 Ill. Adm. Code 201.146(s), 201.146(u), 212.461 and 212.462(b). (Pet. PHB at 7.) Before proceeding to the issues, a review of the facts is necessary. A stipulation of facts by both parties was entered at hearing setting forth certain of the facts below. (Pet. Ex. 1.)

Ohio Grain's operations were originally located within the village limits of Ohio, Illinois. (Tr. at 16.) In 1972, Ohio Grain purchased property approximately one mile west of the village boundaries and began receiving grain at the site in fall, 1972. (Tr. at 17.) The out-of-town site consists of an office, a scale, truck dump pits, legs, cleaning screens, load out, internal transfer, storage bins, and three dryers. The storage bins at the out-of-town site total 2,833,000 bushels capacity and the three dryers have a drying capacity of 7,250 bushels/hour. (Pet. Ex. 2 at 5.) Equipment at the original in-town elevator

¹Citations to record documents will be according to the following conventions. The transcript is cited as "Tr. at"; the petitioner's post-hearing brief as "Pet. PHB at"; the respondent's post-hearing brief as "Res. PHB at"; and the petitioner's reply brief as "Pet. Reply at". Exhibits will be referenced: Board Group Exhibit #1 as "Board Ex. 1"; Petitioner's Exhibit #1 as "Pet. Ex. 1"; Petitioner's Exhibit #2 as "Pet. Ex. 2 at"; Petitioner's Exhibit #3 as "Pet. Ex. 3"; Petitioner's Exhibit #4 as "Pet. Ex. 4"; Petitioner's Group Exhibit #5 as "Pet. Ex. 5"; and Respondent's Exhibit #1 as "Res. Ex. 1".

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has been removed, so that only three storage bins remain at this time. (Pet. Ex. 2 at 5.) While not specified in the documents, the total storage capacity of the three bins in-town is assumed to be 319,600 bushels².

Ohio Grain receives grain that is grown by about 70 local farmers (Tr. at 37) and stores or dries the grain as required. The majority of the grain received at Ohio Grain is received in hopper bottom trucks (Pet. Ex. 1) and hopper bottom wagons. (Tr. at 25.) Grain is also received from farmers using dump-type trucks and wagons. (Pet. Ex. 1.) Those trucks and wagons discharge their grain into one of three truck dump pits (Pet. Ex. 1) which are enclosed by steel buildings which are not equipped with quick-closing doors at the ends. (Pet. Ex. 1.) None of the pits are equipped with aspiration. (Tr. at 24, Pet. Ex. 1.) Approximately 80% of the corn received at Ohio Grain is dried. (Pet. Ex. 1.) In the last fiscal year, Ohio Grain processed 496,000 bushels of soybeans and 3,030,000 bushels of corn. (Pet. Ex. 1.) The storage elevators are filled and emptied with permanent equipment as opposed to portable equipment. (Tr. at 36.)

REGULATORY FRAMEWORK

Section 40 of the Act provides for Board review of the Agency's denial of a permit application or imposition of permit conditions. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1040.) When the Agency denies a permit, it must issue a statement in accordance with Section 39(a) of the Act which sets forth the sections of the Act and regulations that may be violated, the type of information which the Agency deems the applicant failed to provide and a statement of the specific reasons why the Act and regulations might not be met if the permit was granted. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1039(a).)

It is well established that the information in the denial statement frames the issues on review. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1039(a); Centralia Environmental Services, Inc. v. IEPA, PCB 89-170 at 6 (May 10, 1990); City of Metropolis v. IEPA, PCB 90-8 (February 22, 1990).) Such information is necessary to satisfy principles of fundamental fairness because it is the applicant who has the burden of proof before the Board to demonstrate that the reasons and regulatory and statutory bases for denial are inadequate to support permit denial. (Technical Services Co. v. IEPA, PCB 81-105 at 2 (November 5, 1981).)

²This figure was determined by taking the total grain storage of 3,152,600 bushels and subtracting the 2,833,000 bushel storage given for the out-of-town facility by Ohio Grain (Pet. Ex. 2 at 5, 7).

ISSUES

As previously stated, the Agency's permit denial letter states that the permit was denied because Section 9 of the Act (generally prohibiting air pollution), and 35 Ill. Adm. Code 201.142 (requiring construction permits), 201.143 (requiring operating permits), and 212.462(b) (specifying technical requirements for pollution control), might be violated if the permit were issued.³ (Pet. Ex. 2 at 1-3.)

Ohio Grain argues that the permit should have been issued because its grain-handling operation is exempt from the permit requirements and that its grain-drying operations are in compliance and should be issued a permit. Ohio Grain presents three major arguments in support of its position (Pet. PHB at 5):

- (1) Ohio Grain is exempt from the control and permit requirements because its annual grain through-put is less than 300,000 bushels;
- (2) Alternatively Ohio Grain should be issued a permit because its grain-handling and grain-drying operations were in existence before June 30, 1975; and
- (3) Ohio Grain is in compliance with the applicable grain-handling regulations.

Ohio Grain's arguments will be considered in the discussion that follows.

DISCUSSION

Annual Grain Through-Put

Ohio Grain maintains that it is exempt from the grain-handling air permit control and permit requirements because its annual grain through-put is less than 300,000 bushels. Ohio Grain bases its contention on Section 201.142 and Section 201.146. Section 201.142 states:

No person shall cause or allow the construction of any new emission source or any new air pollution control equipment, or cause or allow the modification of any existing emission source or

³ The Board notes that generally denial of an operating permit because a facility needs an operating permit and is operating without one would seem circular. However, in this case the issue is whether or not Ohio Grain is exempt from the requirements of Sections 201.142 and 201.143.

air pollution control equipment, without first obtaining a construction permit from the Agency, except as provided in Section 201.146.

Section 201.146 specifies that no permit is required for certain classes of equipment. Specifically, the petitioner maintains that the plain language of Sections 201.146(s) and (u) exempt the petitioner from the permit requirements for the construction and operation of Ohio Grain's facility. (Pet. PHB at 7.) Sections 201.146(s) and (u) state:

- s) Grain-handling operations, exclusive of grain-drying operations, with an annual grain through-put not exceeding 300,000 bushels;
- u) Portable grain-handling equipment and one-turn storage space.

Ohio Grain maintains that its annual grain through-put is 176,247 bushels, which is below the 300,000 bushels threshold which triggers the permit requirement for grain-handling requirements. (Pet. PHB at 8.) In calculating its annual grain through-put, Ohio Grain subtracted the amount of grain placed into one-turn storage. (Tr. at 35.) Ohio Grain maintains that because one-turn storage is exempt from permit requirements (see 35 Ill. Adm. Code 201.146(u)), the amount of grain in one-turn storage should be excluded when calculating annual through-put. Ohio Grain believes that since grain placed in one-turn storage is exempt, it should not be considered in the annual grain through-put calculation.

The Agency disagrees with Ohio Grain's calculation of annual grain through-put (Res. PHB at 3) and maintains that Ohio Grain's annual grain through-put is greater than 300,000 bushels. (Res. PHB at 7.) Therefore, the Agency believes that Sections 201.142 (set forth above) and Section 201.143 (requiring operating permits for new air pollution control equipment) might be violated if a permit is issued. (Pet Exh. 2 at p. 1.)

To understand why Ohio Grain and the Agency arrive at different values when calculating annual grain through-put, we need to examine several key definitions in the current grain-handling and grain-drying regulations. Section 211.122 specifies that "Annual Grain Through-Put" is determined "by adding grain receipts and shipments for the three previous fiscal years and dividing the total by 6", or in some cases "by reasonable three-year estimate". The Board exempted grain-handling facilities with annual grain through-put of 300,000 bushels or less. The

Board record in R72-18⁴ established the grain-handling air pollution control regulations and explains why such facilities are exempt. (Amendments to Chapter 2, Air Pollution Regulations For Grain-Handling and Grain-Drying Operations, R72-18, June 13, 1975, 17 PCB 355.)

The objectives of the grain-handling regulations are to maintain satisfactory air quality and eliminate nuisances caused by particulate emissions from grain-handling and grain-drying operations. Uncontrolled emissions from such sources can irritate people who live or work nearby and can also settle on property in amounts which can be unsightly or damaging. (R72-18 Op. at 3 and R72-18 Tr. at 690-696.) In explaining the exemption for operations of 300,000 bushels or less annual grain through-put the Board opined:

Twenty-three percent of the 1,400 elevators in Illinois have a grain through-put of less than 300,000 bushels per year. (Ex. 7.) These small grain elevators have generated only 4 percent of the air pollution complaints received by the Agency. (R. 477) and earn very low economic returns (Ex. 7) so that their ability to finance pollution control equipment is quite limited. Approximately 100,000 farmers in Illinois (R. 384) have personal grain-handling facilities, but almost all of them have an annual grain through-put of much less than 300,000 bushels. Since these small grain-handling facilities usually do not create an air pollution problem if they are properly managed, and the administrative costs of issuing permits to them would greatly exceed the benefits gained, they are exempt from the operating permit requirements. However, all grain-handling and grain-drying facilities, regardless of size, are still subject to sanctions pursuant to a violation of Section 9(a) of the Environmental Protection Act. (R72-18 Op. at 12.)

Therefore, the Board clearly intended the regulatory exemption to exempt most farmers, and those small elevators with an annual grain through-put of less than 300,000 bushels per year.

While the calculation of annual grain through-put seems straightforward, it is complicated by the definition and application of Section 201.146(u). As stated previously, Section

⁴The Board opinion of June 13, 1975, docket number R72-18, establishing the current grain-handling and grain-drying air regulation will be cited as "R72-18 OP. at". The hearing transcript in R72-18 will be cited as "R72-18 Tr. at".

201.146(u) exempts "portable grain-handling equipment and one-turn storage space" from the grain-handling air permit requirements at Section 201.142. "One-turn storage space" is defined at Section 211.122 as "that space used to store grain with a total annual through-put not in excess of the total bushel storage of that space". The Agency and Ohio Grain have interpreted the scope of the exemption provided to "One-turn storage space" differently. (Pet. PHB at 8, and Res. PHB at 3.) Therefore, definition and application of "one-turn storage" becomes the most important issue in this permit denial.

One-Turn Storage

Ohio Grain maintains that 35 Ill. Adm. Code 201.146(u) exempts one-turn storage space from permit requirements and therefore, the amount of grain placed in one-turn storage should be excluded when calculating annual grain through-put. (Pet. PHB at 8.) In addition, Ohio Grain maintains that the exemption provided to "one-turn storage space" is not limited to sites with portable grain-handling equipment. (Pet. Reply at 5-8.) Therefore, Ohio Grain believes that grain placed in one-turn storage at its facility, which is equipped with permanent grain-handling equipment, is exempt from permit requirements. Based on this interpretation, Ohio Grain has calculated its annual grain through-put as 176,247 bushels⁵, which is below the 300,000 bushels threshold which triggers the permit requirement for grain-handling requirements. (Pet. PHB at 8.) Ohio Grain further argues that the Agency has allowed in the past the subtraction of the amount of grain placed into one-turn storage when determining the annual through-put of a grain-handling operation. (Pet. Ex 3.) Therefore, Ohio Grain maintains that its calculation of annual grain through-put is consistent with the regulations and past Agency practice. (Pet. PHB at 9.)

The Agency maintains that it has limited the exemption for one-turn storage to only that grain loaded and unloaded with portable grain-handling equipment. (Pet. Ex. 3, Tr. at 50.) The Agency's interpretation of Board grain-handling rules are published at 35 Ill. Adm. Code 264 (Res. Ex. 1) which were filed with the Secretary of State in 1977 and codified in 1984. Section 264.105 entitled "One-Turn Storage" provides that "one-turn storage is the storage of grain by the use of portable grain-handling equipment exclusively in a space filled and emptied only once in any 365 day period." At the hearing, an Agency official testified that this operational definition is used by the Agency. (Tr. at 94-96.) Petitioner argues that the Agency has changed the regulation in its interpretation, thus requiring a rulemaking to incorporate these changes. (Pet. PHB

⁵Annual Grain Through-put (AGT) = 1,109,247 (initial AGT) - 933,000 (one-turn storage space) = 176,247 bushels. (Pet. at 20).

at 10.) The Agency argues that it is carrying out the language and intent of the regulations. Further, the Agency sought to apprise the public of its clarification by publishing its interpretations in the Administrative Code. (Res. PHB at 3.)

The Agency arrived at its interpretation by reading the permit exemptions for "one-turn storage" and "portable handling equipment" together. The word "and" ties the two terms together and, therefore, one-turn storage and portable handling equipment must exist simultaneously at each site to warrant a permit exemption. Thus, a subtraction of such space from annual grain through-put to determine the applicability of permit and control requirements could only happen if portable grain-handling equipment were used. This was the Agency's understanding of the intent of the regulations, based on testimony at the grain-handling regulatory proceeding (R72-18) linking one-turn storage with portable handling equipment. (R72-18 Tr. at 479-480.)

The Agency argues (Res. PHB at 3) that grain-handling operations receiving and sending out an excess of 300,000 bushels of grain averaged over a three year period with other than portable handling equipment at any time, require a permit, even if a portion of that storage space associated with the grain-handling operation is one-turn storage. Since Ohio Grain does not use portable handling equipment, the Agency has calculated Ohio Grain's annual grain through-put at 2 million bushels per year. (Res. PHB at 6.)

The key to deciding this issue before the Board is the construction of the definition of "one-turn storage", and how it should be used in determining exemptions from the air permit requirements. In construing administrative rules the same rules which apply to statutory construction apply. (May v. Illinois Pollution Control Board, 35 Ill.App.3d 930, 342 N.E.2d 784 (1976).) Further a cardinal rule in construing the meaning of a statute is that the intention of the legislature must be ascertained and given effect. (People v. Kerans, 103 Ill.App. 3d 522, 59 Ill.Dec. 225, 431 N.E.2d 726 (1982).) In this case, the Board finds in the record establishing the regulations that the purpose of the 300,000 bushels threshold, as well as the exemption for portable equipment and one-turn storage space, were for the purpose of exempting farmers and small elevators from the permit requirements. The definition of "annual grain through-put" at Section 211.122 plainly states that annual grain through-put is calculated by adding grain receipts and shipments for the previous 3 years and dividing by 6. There is no statement in the definition that grain exempt by virtue of Section 201.146 should be subtracted from the figure derived above. Clearly the 300,000 bushel exemption threshold was to be based on the volume of grain handled by the establishment.

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The Board agrees with the Agency that allowing subtraction of all grain through-put associated with one-turn storage reaches a ridiculous result. If all one-turn storage grain could be subtracted from annual grain through-put, then all grain elevators in the state could escape grain-handling air permit requirements by simply building more storage than its average yearly intake of grain. For example, Ohio Grain's out-of-town facility has 2,833,000⁶ bushels of storage. According to Ohio Grain's method of calculating annual grain through-put, it could receive 2,800,000 bushels and ship 2,800,000 bushels for each of three consecutive years and have an annual grain through-put of 2,800,000 bushels. Since 2,800,000 bushels is less than their storage capacity of 2,833,000 bushels (Pet. Ex. 2 at 5), under this scenario, Ohio Grain would not need an air permit. Furthermore, by adding more storage bins, it would never need air permits no matter how many millions of bushels they processed every year. Therefore, Ohio Grain's interpretation of one-turn storage, and its application in determining annual grain through-put, would make the grain-handling air permit requirement meaningless.

Clearly, it was not the intent of the grain-handling regulations to provide a potential loop-hole so that a grain elevator of any size could be exempt from the air permit requirements. Therefore, the Agency interpretation that one-turn storage was the storage of grain by use of portable grain-handling equipment is a reasonable application of the intent of the regulation. In fact, the Board notes that this is a liberal interpretation in favor of grain-handlers, since there is nothing in the record to suggest that one-turn storage should be subtracted from annual grain through-put in determining the 300,000 bushels threshold.

In summary, the Board finds that the Agency's interpretation of one-turn storage as "the storage of grain by the use of

⁶The storage capacity of 2,833,000 bushels in the out-of-town facility was taken from Ohio Grain's permit request to the Agency, which was included in Petitioner's Exhibit #2 at 5, the Agency Record on Appeal. The Board notes that two pages later, Ohio Grain gives a total one-turn storage capacity of 3,152,600 bushels (Pet. Ex. 2 at 7; corroborated at Tr. at 41). This is assumed to include the three in-town storage bins. The Agency permit denial letter (Pet. Ex. 2 at 2) indicates that the Agency considers the permit application and denial to refer to the out-of-town facility. Therefore, the Board will use the 2,833,000 bushel storage figure for illustration. Readers should note that Ohio Grain does not clearly differentiate grain storage activities at the two facilities. For example, Ohio Grain's calculation of annual grain through-put (Pet. Ex. 2 at 23) does not differentiate between the two sites. However, this does not affect the outcome of the case.

portable grain-handling equipment", which is codified at Section 264.105, is the correct interpretation. Further, such an interpretation is consistent with the stated intent by the Board in the grain-handling regulation. The Board further finds that the Agency has correctly applied the specific exemptions at Section 201.146(s) and (u), with the definition of annual grain through-put at Section 211.122.

Existing Grain-Handling Facilities

Ohio Grain also argues that it is an existing grain-handling facility which is exempt from air pollution control requirements pursuant to 35 Ill. Adm. Code 212.461(c). Existing grain-handling operations which meet the housekeeping requirements at Section 212.461(b), and do not have investigations for alleged violation on file at the Agency (Section 212.461(c)(2)), shall receive an operating permit from the Agency pursuant to Section 212.461. "Existing grain-handling operation" is defined at 35 Ill. Adm. Code Section 211.122 as "any grain-handling operation the construction or modification of which commenced prior to June 30, 1975".

Ohio Grain argues that its grain-handling and grain-drying operations were in existence before June 30, 1975. The record indicates that Ohio Grain was operating within the village limits of Ohio, Illinois in the early 1970's (Board Group Ex. 1, Tr. at 16.) In 1972, property was purchased approximately one mile west of town and began to receive grain in fall, 1972 (Tr. at 16, 17.)

The Agency argues that Ohio Grain does not qualify as an existing facility. The Agency notes that Ohio Grain previously applied for an operating permit and self-characterized as a new facility (Pet. Ex. 2 at 29.) The Agency also notes that petitioner's most recent permit application tabulates a construction chronology that does not show continuous operation at the site. (Pet. Ex. 2 at 5-6.)

Ohio Grain's argument is that in 1972 it bought the out of town property, which contained four storage bins. (Pet. Ex. 2 at 5.) Dryer #1 was constructed in 1973, used in 1973-74, then moved to town in 1974. (Pet. Ex. 2 at 5.) Major construction commenced in 1976, including a new dryer, dump pits, and more storage bins. Construction continued through 1986. (Pet. Ex. 2 at 6.)

Ohio Grain argues that construction of facilities outside of town commenced in 1972, in a phased expansion to reduce traffic in the center of town, reduce waiting times to a minimum and expand grain storage facilities. (Pet. PHB at 11.) The Board notes that the record lacks support for Ohio Grain's position. In fact the only specific evidence of a plan offered by the

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petitioner is a statement by Ohio Grain manager, Robert Payne, at the hearing. When questioned by his counsel, Robert Payne stated that the plan was to build a facility to handle the farmer's needs. (Tr. at 17-18.) Mr. Payne also referred to the construction chronology (Pet. Ex. 2 at 6) as an accurate chronology. (Tr. at 18.) The record does not include any written evidence of planning documents which might support Ohio Grain's position.

The Board agrees with the Agency that the record fails to show that Ohio Grain would qualify as an existing grain-handling facility. Ohio Grain itself has supplied evidence for this determination in the construction chronology introduced. (Pet. Ex. 2 at 6.) This chronology shows that Ohio Grain had a dryer at the rural site and moved it to town in 1974. Nothing again happened at the rural site until 1976 when a new dryer along with a dump pit, storage tanks and bins, legs, and office and scales were constructed. (Pet. Ex. 2, p. 6, Tr. 45.) Clearly, no construction was commenced at the out-of-town site until 1976. Clearly such construction was after the regulatory definition deadline of June 30, 1975.

In fact, the Board specifically took note of plans of development, such as those presented by Ohio Grain in the instant case, when it adopted 35 Ill. Adm. Code 212.462(e). This section entitled "Circumvention" states:

It shall be a violation of this regulation for any person or persons to attempt to circumvent the requirements of this regulation by establishing a pattern of ownership or facility development which, except for such pattern of ownership or facility development, would otherwise require application of Section 212.462 or 212.463.

Ohio Grain is now attempting to avoid permits or control measures by arguing that it planned its development is to include the out-of-town facility which was purchased in 1972. While some activity occurred at the site from 1972 to 1974, there was a hiatus from 1974 to 1976. Petitioner did not return to the out-of-town site until 1976, when the facility was constructed over the next 10 years without any air pollution control equipment. Petitioner now attempts to back into the "existing" category to avoid the controls it should have installed when construction commenced in 1976 and continued through 1986. This type of facility development clearly is the type that the Board had in mind when it promulgated Section 212.462(e).

In addition, even if the Board were to accept Ohio Grain's argument that it is an existing facility, the facility was modified on or after June 30, 1975. The permit applications and Robert Payne's testimony show that numerous equipment items were

physically added that could increase particulate emissions after that date. These changes meet the definition of "modification" contained in the regulations at 35 Ill. Adm. Code 201.102 which states in part:

Any physical change in, or change in method of operations, of an emission source...which increases the amount of any specified air contaminant....It shall be presumed that an increase in the use of raw materials, the time of operation or the rate of production will change the amount of any specified contaminant emitted....

Ohio Grain also meets the definition of a modified grain-handling operation in 35 Ill. Adm. Code 212.462(e), in that its annual grain through-put increased by more than 30%. If Ohio Grain is not a new facility, it certainly meets the definition of a modified facility. For instance, Ohio Grain claims annual grain through-put in 1973-74 of 50,000 bushels/year. (Tr. 43.) By Ohio Grain's current calculations, its 1990 annual grain through-put was 176,247 bushels (Pet. PHB at 8) which is a 300% increase. In 1990, the Agency estimated Ohio Grain's annual grain through-put at 2,000,000 bushels/year which is a 3,900% increase. (Pet. Ex. 2, p. 1.) So, whether calculated by the petitioner or by the Agency, petitioner meets the general definition of modification as well as that provided by the grain-handling regulations.

For the reasons enunciated above, the Board finds that Ohio Grain is "new facility" under the Board's regulations, because Ohio Grain constructed or modified the facility after June 30, 1975. Therefore the Board holds that the Agency's permit denial on this point is proper and Ohio Grain is required to obtain a permit.

Major Dump-Pit Area Regulations

Section 212.462 sets forth the specific air pollution control measures for major dump pit areas of grain-handling operations with annual grain through-put more than 300,000 bushels. Ohio Grain's truck dump pits are not equipped with aspiration (Tr. at 25-26) as required by Section 212.462(b)(1). However, according to Section 212.462(b)(2) particulate matter emissions from the dump pits can be controlled by "any equivalent method...".

Ohio Grain argues that particulate matter emissions from Ohio Grain's grain-handling operations are controlled by an equivalent method because: (a) the dump pits are enclosed; (b) a substantial amount of grain is received in hopper trucks which

are choke unloaded; and (c) the grain received is usually wet and virtually dust free. (Pet. PHB at 14.)

Further, Ohio Grain maintains that its grain-drying operations, consisting of three column dryers, are in compliance with Section 212.463(a). The largest effective circular diameter of the transverse perforations in the external sheeting of each dryer is 0.09375 inches, and the grain inlet and outlet of each dryer is completely enclosed. No other type of dryers are present on-site. Thus, Ohio Grain maintains that the dryers are in compliance (Pet. PHB at 14) and the Agency should therefore have issued an operating permit.

Ohio Grain maintains that the truck load-out area is in compliance with Section 212.462(d) because socks which extend six (6) inches below the sides of trucks are used during the loading process. No boxcars or watercraft are loaded on-site. In addition, the internal transfer areas and truck dump pits are enclosed as required by Section 212.462(c)(1) to prohibit particulate matter emissions directly into the atmosphere. (Pet. PHB at 14.)

The Agency argues that since Ohio Grain is a new facility with an annual grain through-put greater than 300,000 bushels, controls on the dump pit and other areas are required by Section 212.462. The Agency completely disagrees with Ohio Grain's argument that a combination of four factors shows that its operations are equivalent. First, Ohio Grain argues that most of the grain it receives is wet. The Agency notes that while most of the grain could be wet, there is a difference in moisture content which frequently depends on a particular year's weather and growing conditions. (Rep. PHB at 9.) In addition, soybeans arrive at Ohio Grain already dry. (Tr. at 34.)

Next Ohio Grain claims that most grain is received by hopper-bottom trucks. While Ohio Grain may use a majority of hopper bottom trucks, the Agency has only witnessed dump trucks and side unloading wagons. (Tr. at 73-74.) Additionally, the Agency notes that a number of privately-owned vehicles dump grain at petitioner's facility and apparently, Ohio Grain does not prohibit any particular type of vehicle. (Tr. at 25, 43.)

Third, Ohio Grain suggests that merely because hopper bottom trucks are occasionally used, choke unloading necessarily occurs. (Pet. Ex. 2 at 8.) The Agency argues that even if Ohio Grain used hopper bottom trucks, the conditions for choke unloading are not present. The Agency notes that it has never observed choke unloading at Ohio Grain during its inspections, nor is it likely to exist because of the large capacity of the dump pits and the speed of the conveyors. (Res. PHB at 10, Tr. 77, 105-107, 111-112.)

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Fourth, Ohio Grain argues that its doors are important in terms of equivalency. The Agency notes that the doors are of little effect since they are not closed to prevent the escape of particulates during grain unloading. (Pet. Ex. 1, Tr. 76-77.)

~~The Agency maintains that it is not in a position to deem Ohio Grain's practice equivalent as each of Ohio Grain's factors contain uncertainties (i.e., will it only accept grain over a certain percent moisture) and the Agency's records are in disagreement with reports by Ohio Grain. (Res. PHB at 10.)~~ Additionally, the Agency could not determine that Ohio Grain's current emissions are no greater than that emitted if Ohio Grain were to put on the required dump pit aspiration and control or emit about 5.0 lb/hour rather than the 49.6 lb/hour estimated to be emitted. (Tr. at 75-76, Pet. Ex. 2, at 24, Res. PHB at 10.)

The Board notes that Section 212.462(b)(2) provides guidance for determining what constitutes an equivalent method, technique or system for complying with the major dump pit regulations. According to Section 212.462(b)(2), alternate methods may be considered as equivalent, only if such methods achieve a particulate emission reduction equal to the reduction which could be achieved by applying induced draft (aspiration). In this regard, the Board notes that the information provided by Ohio Grain in support of its petition does not indicate whether or not the current emissions are less than that emitted if the dump pit is equipped with an aspiration system. Therefore, the Board finds that Ohio Grain has not met the burden of proof for demonstrating equivalency in meeting the air control requirements for major dump pit areas prescribed at Section 212.462(b). Therefore, the Board affirms the Agency's permit denial on this point.

CONCLUSION

The Board finds that the Agency properly denied the permit application of Ohio Grain because issuance of such permit might lead to violation of Section 9 of the Act as well as 35 Ill. Adm. Code 212.462. The record clearly supports the Agency's findings that Ohio Grain is anew or modified facility with an annual through-put of over 300,000 bushels. In addition, the record does not support the claim by Ohio Grain that the measures used at its facility are equivalent to control measures required under 35 Ill. Adm. Code 212.462.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

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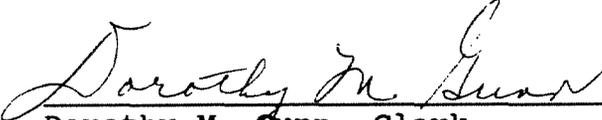
ORDER

The Board affirms the June 27, 1990, denial of an operating permit by the Illinois Environmental Protection Agency for the Ohio Grain Company's facilities in Ohio, Illinois.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill.Rev.Stat. 1991, ch. 111 1/2, par. 1041) provides for the appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above opinion and order was adopted on the 16th day of October, 1992, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

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