

ILLINOIS POLLUTION CONTROL BOARD
July 18, 1996

COLOR COMMUNICATIONS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 96-125
	)	(Permit Appeal - Air)
	)	
ILLINOIS ENVIRONMENTAL PROTECTION	)	
AGENCY,	)	
	)	
Respondent.	)	

KEVIN J. O'BRIEN AND JAMES I. RUBIN, BUTLER, RUBIN, SALTARELLI & BOYD, APPEARED ON BEHALF OF PETITIONER COLOR COMMUNICATIONS, INC.;

ROBB H. LAYMAN AND BONNIE R. SAWYER APPEARED ON BEHALF OF RESPONDENT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

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

This matter is before the Board on a petition for review filed by Color Communications, Inc. (CCI) on December 7, 1995. On September 7, 1995, CCI submitted to the Illinois Environmental Protection Agency (Agency) separate Clean Air Act Permit Program (CAAPP) applications for its two Chicago facilities, located at 4000 W. Fillmore Street and 4242 W. Fillmore Street. On November 2, 1995 the Agency issued a Notice of Incompleteness (NOI), stating that CCI's two facilities must be considered one source for the purposes of CAAPP permitting. CCI seeks review of the Agency's determination.

The Board's responsibility in this matter arises from Section 40.2 of the Environmental Protection Act (Act). The Board is charged therein with the responsibility to adjudicate disputes arising out of CAAPP permit decisions made by the Agency. More generally, the Board's responsibility in this matter is based on the system of checks and balances integral to Illinois environmental governance: the Board is charged with the rulemaking and principal adjudicatory functions, and the Agency is responsible for carrying out the principal administrative duties, including the issuance of permits.

A hearing was held in this matter on April 11, 1996, before Board hearing officer June Edverson. In accordance with the orders of the hearing officer, CCI filed its post-hearing brief on May 10, 1996, the Agency filed its post-hearing brief on May 21, 1996, and CCI filed its reply brief on June 3, 1996.

BACKGROUND

CCI produces color systems, samples, color boards, and color marketing systems for the paint, automotive, and other industries. Its products include mounted color samples reviewed by consumers in the course of selecting household and automotive paint colors. CCI has facilities located in Chicago; Buffalo, New York; Poughkeepsie, New York; Ireland; New Zealand; and Mexico.

In Chicago, CCI owns and operates two manufacturing facilities, located at 4000 W. Fillmore Street (the 4000 facility) and 4242 W. Fillmore Street (the 4242 facility). The 4000 facility houses printing and assembly operations, and warehousing and shipping functions. Its main function is the printing and assembly of

color cards and other color displays. The facility receives coated web and cuts chips and other displays, glues them, cuts printed cards and the displays, collates the material, and assembles it into color cards and displays for the automotive, paint, and other industries. (Agency Record (Ag. Rec.) at 302.)

The 4242 facility houses color mixing operations and coating lines. The facility includes four coating lines with ovens, an afterburner, a latex mixing operation, a color matching procedure, boilers for space heating, and additional insignificant sources. (Ag. Rec. at 602.) The emissions at this facility are primarily the result of the operation of four Flow Coaters with knife blades, used to paint paper and film substrate in the production of color boards. There are two distinct paper coating operations at the facility. (Id.)

The two facilities are separated by a city block containing the manufacturing plant and offices of the Ribbon Webbing Corporation, which has no affiliation with CCI. CCI employees have no right of access to the Ribbon Webbing Corporation. (Pet Br. at 3-4.) Shipments between the two CCI facilities are transported using the public roads.

On September 5, 1995, CCI submitted two initial CAAPP permit applications to the Agency: one for its 4000 facility and one for its 4242 facility. In the application for the 4000 facility, CCI stated that the facility was applying for a CAAPP permit because the facility had the potential to emit more than 25 tons per year (tpy) of VOM or NO_x and is located in the Chicago ozone non-attainment area. (Ag. Rec. at 285.) CCI further indicated that the actual emissions from the facility were below the threshold for applicability of a CAAPP permit. It was therefore seeking a federally enforceable state operating permit (FESOP) which would limit the potential emissions from the facility to a level below the CAAPP applicability levels. This would effectively exclude the 4000 facility from the requirements of the CAAPP. (Id.)

In the application for the 4242 facility, CCI stated that it was seeking a CAAPP permit for the facility because it had the potential to emit more than 25 tpy of VOM or NO_x and is located in the Chicago ozone non-attainment area, and because it had the potential to emit more than 10 tpy of an individual hazardous air pollutant or 25 tpy of hazardous air pollutants source-wide. (Ag. Rec. at 891.) CCI further indicated that its actual emissions were above the applicability thresholds for these pollutants. (Id.)

On November 2, 1995 the Agency issued its NOI, stating that CCI's two facilities must be considered one source for the purposes of CAAPP permitting. CCI seeks review of the Agency's determination.

REGULATORY FRAMEWORK

Section 39.5 of the Act sets forth the requirements for the CAAPP. The CAAPP is the state program which fulfills Illinois' responsibility to implement an operating permits program which satisfies the requirements of Title V of the federal Clean Air Act (CAA) (42 USC 7401 *et seq.*) Illinois' CAAPP was submitted to USEPA on November 15, 1993, and USEPA granted interim approval of the program on March 7, 1995.

The CAAPP establishes permitting requirements for certain sources of air pollutants regulated pursuant to the CAA. The CAAPP requires an owner or operator of a CAAPP source to submit a single CAAPP application covering all emission units at that source. (Section 39.5(b).)

Section 39.5(2) sets forth the categories of sources subject to regulation pursuant to the CAAPP. These categories are defined in terms of classifications established within the CAA. First, the term "source" includes several categories of "major sources" defined within the CAA. CAAPP sources include any "major source" under Section 112 of the CAA, which is defined to include "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant, or 25 tons per year or more of any combination of hazardous air pollutants." (CAA Section 112(a)(1), 42 USC 7412(a)(1).)

CAAPP sources also include any “major source” as defined in Section 302 of the CAA (42 USC 7602(j)). Pursuant to Section 302 of the CAA, any source that emits or has the potential to emit 100 tpy of any air pollutant is a major source, and is thus a CAAPP source under Section 39.5 of the Act.

Finally, the last category of “major sources” which constitute a source for the purposes of the CAAPP is defined in Part D of Title I of the CAA (CAA Section 171 *et seq.*, 42 USC 7501 *et seq.*). This Part of the CAA sets forth the plan requirements for nonattainment areas. As further specified in Section 39.5(2)(c)(iii)(A) of the Act, major sources regulated pursuant to this Section include the following sources of volatile organic compounds or oxides of nitrogen within ozone non-attainment areas: (1) in marginal or moderate non-attainment areas, sources with the potential to emit 100 tons per year (tpy) or more; (2) in serious non-attainment areas, sources with the potential to emit 50 tpy or more; (3) in severe non-attainment areas, sources with the potential to emit 25 tpy or more; (4) in extreme non-attainment areas, sources with the potential to emit 10 tpy or more. Because the CCI facilities are located in the Chicago severe nonattainment area for ozone, CCI would be subject to the CAAPP permitting requirements if it emits or has the potential to emit 25 tons or more of volatile organic chemicals.

Besides the enumerated classes of “major sources,” the CAAPP also regulates several additional source categories established pursuant to the CAA. CAAPP sources also include sources subject to the New Source Performance Standards (NSPS) under Section 111 of the CAA, sources subject to Hazardous Air Pollutants (HAP) standards under Section 112 of the CAA (except those regulated solely pursuant to 112(r), which relates to accidental releases of extremely hazardous substances), and affected sources subject to the acid deposition provisions under Title IV of the CAA.

The CAAPP is designed to streamline the permitting process pursuant to the CAA, combining all the air permitting requirements for a subject facility into a single, facility-wide permit. An important feature of the CAAPP is that it allows an operator “operational flexibility.” Pursuant to Section 39.5(12) of the Act, an operator may make changes to a CAAPP source without requiring a prior permit revision, as long as the changes do not constitute modifications pursuant to Title I of the CAA, and do not exceed the emissions limits specified in the source’s permit. The operator is only required to provide written notice in advance of making the changes. Section 39.5(12) of the Act also allows the trading of emission credits where available without requiring a permit revision, and the trading of emission credits for the purpose of complying with a federally enforceable emissions cap (included as part of a FESOP.)

Section 40.2 of the Act allows for appeals of Agency CAAPP permitting decisions. This section provides in relevant part:

- a. If the Agency refuses to grant or grants with conditions a CAAPP permit, makes a determination of incompleteness regarding a submitted CAAPP application, or fail to act on an application for a CAAPP permit, permit renewal, or permit revision within the time specified. . . , the applicant, any person who participated in the public comment process. . . or any other person who could obtain a hearing before the Board pursuant to Section 41(a) of this Act, may within 35 days after final permit action, petition for a hearing before the Board to contest the decision of the Agency.

(415 ILCS 5/40.2.)

This appeal authority is separate and apart from the general grant of authority for permit appeals found in Section 40 of the Act. This is the first case filed before the Board seeking review of an Agency CAAPP permitting decision. This case thus presents the question of what standard of review should be applied by the Board to a CAAPP permit appeal.

We find that it is appropriate to apply the same standard of review in CAAPP permit appeals filed pursuant to Section 40.2 as is applied in Section 40 permit appeals. In a Section 40 permit appeal, the permit applicant bears the burden of proving that the application as submitted to the Agency will not violate the Act or

the Board regulations. (Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board, 179 Ill. App. 3d 598, 534 N.E.2d 616, (Second Dist. 1989); John Sexton Contractors Co. v. Illinois, (February 23, 1989) PCB 88-139.) In Sexton, the Board held:

[T]he sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violations of the Environmental Protection Act would have occurred if the requested permit had been issued.

(Sexton at 6.)

That the issues before the Board in a permit review are framed by the Agency's denial letter is well settled. (See Centralia Environmental Services, Inc. v Illinois Environmental Protection Agency, (May 10, 1990) PCB 89-170, slip op. at 6.) The Agency's November 2, NOI (Pet. Ex. A) stated that the CAAPP applications submitted by CCI were incomplete, and therefore failed to comply with the requirements of Section 39.5 of the Act. Specifically, the NOI stated:

The Agency has previously learned that operations at both of CCI's locations include pollutant emitting activities that belong to the same industrial grouping, are located on one or more contiguous or adjacent properties and are under common control. Because the locations together constitute a single CAAPP source, CCI cannot seek recognition for each of its locations of operation as a separate CAAPP source. For this reason, CCI has failed to address source-wide operations in the necessary single CAAPP application.

(Pet. Ex. A.)

Section 39.5(5) of the Act provides in relevant part:

Applications and Completeness.

- a. An owner or operator of a CAAPP source shall submit its complete CAAPP application consistent with the Act and applicable regulations.
- b. An owner or operator of a CAAPP source shall submit a single complete CAAPP application covering all emission units at that source.

(415 ILCS 5/39.5(5).)

Thus, the dispute in this case centers on whether CCI's two facilities are properly treated as one source for the purposes of CAAPP permitting, or whether the two facilities should properly be considered separate sources for the purposes of CAAPP permitting. In Section 39.5(1) of the Act, "source" is defined as:

[A]ny stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person or persons under common control) belonging to a single major industrial grouping. For the purposes of defining "source," a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources on contiguous or adjacent property belong to the same Major Group (i.e. all have the same two-digit code) as described in the Standard Industrial Classification Manual, 1987.

(Section 39.5 of the Act.)

In crafting this definition of "source" for purposes of the CAAPP, the Illinois legislature used language almost identical to that used by the USEPA in defining "major source" in its Part 70 regulations adopted pursuant to Title V of the CAA. The Part 70 regulations provide:

Major source means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping. . . . For the purposes of defining “major source,” a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same Major Group (*i.e.*, all have the same two digit code) as described in the Standard Industrial Classification Manual, 1987.

(40 CFR 70.2.)

The definition of source under the state’s CAAPP can thus be summarized as requiring a source to satisfy three different criteria. First, all emissions sources must be located on property that is “contiguous” or “adjacent.” Second, the emissions sources must be under the common control of the same person or group of persons. Finally, the sources must belong to same major industrial grouping. Where sources have the same SIC code, they are considered as belonging to a single major industrial grouping.

DISCUSSION

The parties have stipulated that CCI is the owner and operator of both the 4242 facility and the 4000 facility. (See (First) Joint Stipulations of Fact at 1.) Therefore whether the sources are under common control is not at issue in this case. However, CCI argues that its facilities fail to satisfy the two remaining criteria necessary for them to be considered one source for purposes of CAAPP permitting. CCI asserts that the facilities do not share the same SIC code, and that the facilities are not located on properties that are contiguous or adjacent. The Agency asserts that it correctly stated that the CAAPP applications submitted by CCI were incomplete, and that the applications therefore failed to comply with the requirements of Section 39.5 of the Act, because the facilities are adjacent. Furthermore, the Agency asserts that, because a support facility relationship exists between the two facilities, they should be considered one source despite the fact that their individual operations have different SIC codes.

Adjacency

CCI asserts that the facilities are not located on properties that are contiguous or adjacent. CCI asserts that the buildings are separated by more than 1 city block. That city block is occupied by the Ribbon Webbing Corporation, which is totally independent and has no connection with any of CCI’s business. CCI points out that the facilities are not connected by an easement, rail line, or other common element, and that CCI’s situation is therefore distinguishable from all the examples cited by the Agency. Furthermore, CCI asserts that the Agency relies on its finding that a support relationship exists to support its finding that the facilities are adjacent. (Pet. Br. at 11.)

The Agency relies on Alabama Power Company v Costle, 636 F2d 323 (D.C. Cir. 1980), to support the idea that the definition of source is intended to be a common sense grouping of activities. The Agency states that the notion of proximity was articulated in the preamble to the Prevention of Significant Deterioration (PSD) regulations (45 FR 52676), and was carried over into the Part 70 regulations. The Agency asserts that the determination whether facilities are contiguous or adjacent is made on a case-by-case basis. In making these case-by-case determinations, the Agency asserts that it must consider whether the facilities are in close proximity, and must consider the interdependency of their manufacturing operations (including the concept of “long-line operations). In the preamble to the PSD regulations, the USEPA stated that it was unable to say how far apart activities must be to be treated separately. However, it stated that a distance of 20 miles would be too far, even if the activities were connected by a railroad. (45 FR 52676 at Lexis p. 47.)

In applying these criteria to CCI, the Agency acknowledges that the properties are not touching or adjoining. (Ag. Br. at 37.) However, the Agency asserts that the properties are “adjacent,” which is defined to mean “near or neighboring.” The Agency asserts that adjacent is not limited to properties that are touching or contiguous, but includes properties which are close in proximity or nearby, and may encompass parcels of

property separated by an intervening parcel of property. (Ag. Br. at 37, *relying on Wolfe v. Hurley*, 46 F2d 515, 521 (D.C.La.)). The Agency points to Black's Law Dictionary, which defines adjacent as:

Lying near or close to; sometimes contiguous, neighboring. *Adjacent* implies that the objects are not widely separated, though they may not actually touch, *Harrison v. Guilford County*, 218 N.C. 718, 12 S.E.2d 269, while adjoining imports that they are so joined or united to each other that no third object intervenes *Wolfe v. Hurley*, D.C. La., 46 F2d 515, 521.

The Agency also points to caselaw where "adjacent" was distinguished from adjoining. In addition to *Wolfe v. Hurley*, the Agency relies on *People ex rel. Sackman v. Keechler*, 62 N.E. 525 (Ill. 1901.). In *Keechler*, the Illinois Supreme Court noted the ambiguous meaning of "adjacent," looking to Webster's Dictionary where "adjacent" was defined as "to lie near"; "close, or contiguous;" and noted that "adjacent" is also sometimes defined as synonymous with "adjoining" "near," or "contiguous," as well as "in the neighborhood or vicinity of." The court therefore stated that the meaning of "adjacent" must be determined by the object sought to be accomplished by the statute in which it is used. (*Id.* at 527.)

Applying this analysis to CCI's facilities, the Agency asserts that the facilities are adjacent because they are nearby or adjacent to each other. (Ag. Br. at 39.) The Agency asserts that finding that the operations are not adjacent would defeat the common sense aggregation of activities USEPA intended in its definition. The Agency asserts that the facilities must be considered adjacent to advance the intended use of this term in the CAAPP source definition. The Agency further asserts that the Board should give substantial deference to the Agency's and USEPA's construction of "source" as applied to CCI.

At hearing, the Agency provided two examples where two facilities were determined to be one source for purposes of New Source Review (NSR) even though the facilities were separated by long distances. First, Chris Romaine of the Agency's permitting section testified that Acme Steel operates a blast furnace and coke oven in Chicago, and steel making in Riverdale, approximately ten miles away. (Tr. at 93.) These operations were treated as a single source for purposes of new source review. Mr. Romaine testified that the two entities were operated in an integrated fashion, and were connected by an oxygen pipeline. (Tr. at 94.) Second, Mr. Romaine testified that Lone Star Cement operates a quarry that is slightly less than a mile from a cement manufacturing facility. (Tr. at 95-96.) The two operations were connected by a conveyor belt used to transport crushed stone. The quarry was considered part of the cement manufacturing facility for permitting purposes. (Tr. at 96.)

The Board finds that CCI's two facilities are adjacent. We are persuaded that the term "adjacent" encompasses facilities which are within close proximity or nearby, as well as "in the neighborhood or vicinity of." As the court in *Keechler* indicated, the term adjacent should be interpreted to accomplish the purposes of the statute in which it is used. The purpose of the air pollution provisions under the Act, as well as the CAA, is to reduce and control air pollution. The emissions at issue from these two facilities (specifically, the VOM emissions) contribute to the ozone non-attainment status for the greater Chicago area. Furthermore, the history of the CAAPP program and the federal Title V program demonstrate that the program is intended to streamline the permitting process for certain regulated emissions. Thus, within the Section 39.5 CAAPP program, the term "source" is intended to establish a common sense grouping of emissions activities. In this context, we believe that emission sources which are within approximately one city block of each other are sufficiently close to be considered adjacent for purposes of the CAAPP. Because there is no question of the facilities being separated by a significant distance, it is not necessary to examine whether there is an interconnecting structure which establishes a physical connection, such as a conveyor belt or rail line.

Major Industrial Grouping

CCI asserts that the facilities do not belong to the same major industrial grouping because they do not share the same two digit SIC code. CCI asserts that the 4000 facility's SIC code is Group 2759, commercial printing, while the 4242 facility's SIC code is Group 2672, paper coating not elsewhere classified. CCI asserts

that the SIC classifications have been in use for at least 5 years, and have never been questioned by any administrative agency.

CCI asserts that the Agency's position that the different SIC codes should be ignored because the output of one facility arguably supports operations of the other is contrary to law and arbitrary. CCI argues that the Agency's application of the support facility concept explicitly eliminates the SIC code factor in defining source as a "single major industrial grouping." CCI points out that USEPA had proposed eliminating the SIC code criteria from the Part 70 regulations, but that the proposed change was never adopted.

In its reply brief, CCI points out that the Agency has not cited a statute or regulation to support its interpretation, but instead relies on regulatory preambles and guidance. CCI asserts that the law does not permit the Agency to alter the express terms of a regulation.

The Agency argues that CCI's two facilities constitute a single source for the purposes of the CAAPP, although the facilities do not share the same SIC code. The Agency argues that they belong to the same major industrial grouping because a support facility relationship exists between the two facilities. To support this position, the Agency traces the history of the support facility concept. According to the Agency, the support facility concept was first articulated by USEPA as a means for aggregating activities based on functional interrelationships in the PSD portion of its NSR rules, promulgated August 7, 1980 in response to the Alabama Power decision. (45 FR 52676 Lexis at 46.) In the preamble to these rules, the USEPA stated:

Each source is to be classified according to its primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered. Thus, one source classification encompasses both primary and support facilities, even when the latter includes units with a different two-digit SIC code. Support facilities are typically those which convey, store, or otherwise assist in the production of the principal product.

(45 FR 52676 at Lexis pp. 46-47.)

In order to implement the permitting requirements of Title V of the Clean Air Act Amendments of 1990, USEPA proposed its operating permit program, to be codified at 40 CFR Part 70, on May 10, 1991. In the preamble to the proposed Part 70 rules, issued May 10, 1991, USEPA addressed the definition of "major source" in the context of Title V permitting. USEPA stated its belief that Congress intended that USEPA define major source for purposes of Part 70 in a manner consistent with the established PSD procedures in the NSR regulations. (56 FR 21712.) In support of this interpretation, USEPA cited the House committee report on the Title V amendments, which states:

The definition of "major source" here and elsewhere in the bill uses the term "group of sources located within a contiguous area and under common control." The Committee understands this to mean a group of sources with a common industrial grouping, i.e. the same two-digit SIC code. It is the approach followed today by [US]EPA as a result of the Alabama Power litigation.

(56 FR 21712 at Lexis p. 209.)

Relying on this House report, the USEPA defined major source for the purposes of Title V permitting in a manner almost identical to that in the PSD rules. In the preamble to the proposed Part 70 regulations, USEPA also restated its position that any equipment used to support the main activity at a site would also be considered as part of the same major source regardless of the 2-digit SIC code for that equipment. (56 FR 21712 at Lexis p. 209-210.)

The final Part 70 rules were adopted by USEPA on July 21, 1992 (57 FR 32250.) While the preamble to the final rules did not repeat the discussion of support facility contained in the draft rules, the final rules states:

In the preamble of the May 10, 1991, proposal, [US]EPA explained the basis for its various proposed positions. Where the proposed regulations have not been changed in the final rules, [US]EPA continues for the most part to rely on the rationale provided in the proposal notice. Where the regulations have changed in more than a minor way, this preamble states the basis and purpose for the final regulations.

(57 FR 32250 at Lexis p. 4.)

Because there is no further explanation in the July 21, 1992 preamble to the final rules, the Agency asserts that the discussion contained in the preamble to the May 10, 1991, proposal reflects USEPA's intended meaning for the term "major source," including the support facility analysis. The Agency therefore asserts that the support facility concept was incorporated into the Part 70 rules.

In addition to the legislative history, the Agency asserts that the support facility concept is described in guidance available from USEPA. The Agency asserts that the support facility concept is included in USEPA's draft guidance document "the New Source Review Workshop Manual," dated October 1990, and is included in source determination letters which USEPA makes available as guidance for regulated sources. The Agency asserts that this guidance is available on the USEPA Technology Transfer Network (TTN), a network of electronic bulletin boards available free of charge. (Ag Br. at 26.)

The Agency asserts that the legislative intent embodied in Section 39.5 of the Act reflects Illinois' commitment to implement an operating permits program that fully comports with Title V's requirements. The Agency points out that the SIC code requirement is contained in the CAAPP definition of "source," and that the Illinois legislature used language almost identical to that contained in USEPA's Part 70 regulation's definition of "major source" when defining this term. The Agency asserts that the Illinois legislature therefore intended to incorporate USEPA's previously established concept of support facility when crafting the Illinois permit program to implement the Title V requirements. The Agency points to Section 39.5(3)(a) of the Act, which states:

The Agency shall issue CAAPP permits under this Section consistent with the Clean Air Act and regulations promulgated thereunder and this Act and regulations promulgated thereunder.

(415 ILCS 5/39.5(3)(a).)

The Agency asserts that the SIC code requirement contained in the Illinois CAAPP's definition of "source" is properly intended to include the concept of a support facility. The Agency asserts that the language of Section 39.5 is almost identical to the language in USEPA's Part 70 regulations and New Source Review Regulations. The Agency asserts that, while the definition of source in Illinois' CAAPP is not identical to the federal language, its meaning and its three principle criteria are synonymous with the federal language.

We believe that the support facility concept is part of the federal Title V program, which is the premise for the Illinois CAAPP. The Title V permit program, and the Part 70 regulations which implement it, have been defined with reference to other, pre-existing sections of the CAA. These sections include the New Source Review (NSR) provisions. In fact, the analysis for determining whether a source constitutes a major source for purposes of Title V permitting is taken directly from the NSR rules. The USEPA has incorporated the support facility concept into the Title V program through the definition of "major source." The language used in that definition was identical to the language USEPA used in the PSD portions of its NSR rules, promulgated August 7, 1980 after the Alabama Power decision, wherein USEPA first used SIC codes as a means of aggregating emission activities. USEPA articulated this concept in the preamble to the NSR regulations. Ten years later, USEPA reaffirmed this interpretation and imported this concept into the Title V rules. The support facility concept has thus consistently been a part of the SIC code analysis since it was first introduced.

The Board finds it proper under Section 39.5 of the Act to apply the support facility concept when determining whether two or more facilities are within the same major industrial grouping. As explained in greater detail below, this conclusion is supported by the fact that the CAAPP's definition of "source" shares the language, and history, of the federal definition. Additionally, we find that the term "source" must be examined

in the context of the other provisions of Section 39.5 of the Act, in particular Section 39.5(3)(a). When examined in this context, we find that in order for the provisions of the CAAPP program to be read as consistent, and in order to avoid imposing contradictory obligations upon the Agency, the support facility analysis must be included when determining when facilities are part of the same major industrial grouping.

Throughout its history, the support facility concept has been articulated in the preamble to the NSR rules, in 1980, and in the preambles to the Title V regulations. While the statements supporting this analysis are contained in the preambles to these regulations, the principle is well settled that it is appropriate to consider the preamble to a federal regulation in construing the regulation and determining the meaning of the regulation. (See Wiggins Bros., Inc. v. Department of Energy, 667 F.2d 77, 88 (Temporary Emergency Court of App. 1981). In the construction of the Constitution of the United States, statutes and regulations, the federal rule of law permits and requires consideration of preambles in appropriate cases. (*Id.*) There is no support for the view that, under federal rules of construction of statutes and legislative regulations, definitions in a preamble may be ignored. The rule is contrary to this view. (*Id.* (*citations omitted*); see also National Mining Ass'n v. United States Environmental Protection Agency, 59 F.3d 1351 (D.C. Cir. 1995), (relying on USEPA's preamble in construing the definition of "major source" as it applies to hazardous air emissions regulated pursuant to Section 112 of the CAA).)

We find that this reliance on the federal preambles is appropriate under Illinois law. The Illinois Supreme Court has stated that a preamble may be used to clarify ambiguous portions of an act, although it may not be used to create an ambiguity in a statute or an ordinance. (Triple A Services, Inc. v. Rice, 137 Ill.Dec.53 at 56-57, 545 N.E.2d 709 (Ill. 1989).) Here, where the definition had acquired a prior meaning through its interpretation at the federal level, and where the state law is intended to be fully consistent with the federal, we believe that relying on the prior interpretation is not creating an ambiguity. Rather, by construing those terms in accordance with their previously acquired meaning, we are properly interpreting Section 39.5(3)(a) of the Act and the definition of "source" at 39.5(1). (See Rockford Drop Forge Co. v. Pollution Control Board, 164 Ill. Dec. 45 at 47-48, 582 N.E.2d 253 (Ill.App.2d Dist. 1991), (upholding the Board's interpretation of UST law where the Board relied on explanations and definitions in the preamble to the relevant section of the Code of Federal Regulations).)

Accordingly, we find that the "support facility" concept is properly part of the permitting decisions made pursuant to the Illinois CAAPP. The definition applied to "source" at Section 39.5, the CAAPP provisions of the Act, not only uses almost identical language to that used federally to define "major source" for purposes of the Title V program, it shares the history of the federal definition. The support facility concept had been established through its history at the time the legislature adopted the CAAPP, and we believe that this language must be interpreted consistent with its history to properly effectuate the legislative intent. Furthermore, as discussed below in more detail, we believe that including the support facility concept in the definition of source is critical to effectuate the purpose of the CAAPP, which is to provide streamlined permitting and greater flexibility for air permit holders.

As previously stated, the CAAPP is intended to simplify and streamline the air permitting program by combining all the air permitting requirements for a subject source into a single, source-wide permit. The CAAPP then allows the owner of a subject source certain benefits, such as operational flexibility, including emissions trading between emission points within the CAAPP source, and operational changes within the CAAPP source, both without a permit revision. (See Section 39.5(12) of the Act.) The definition of the term "source" is intended to further the goal of streamlining the permitting process by establishing a common sense grouping of activities for a single CAAPP permit. Including the concept of a support facility within the meaning of the term source furthers these purposes by clarifying that this grouping of activities includes the joining together of those emission points that work together in the production of a single, final product. The single, unified CAAPP permit allows the source to extend the flexibility accorded to CAAPP sources to the emissions from the support facility. While CCI does not value this flexibility, other operations do favor application of the CAAPP permitting requirements to their facilities due to the flexibility it affords, especially the ability to make their own decisions concerning internal emissions trading.

Conversely, if the term source did not include the concept of support facility, such facilities would be subject to separate regulatory and permitting requirements, as they were prior to adoption of Title V of the CAA, despite the fact that the operations are united in the production of a single final product. One of the purposes of the CAAPP, which was to eliminate the fragmented approach that had previously existed in the air permitting arena, would be thwarted. Again, such sources would not be able to share the operational flexibility benefits accorded CAAPP sources despite the fact that they are part of a process which produces a single product. This would defeat the purposes of the CAAPP, which are to streamline and simplify the permitting requirements for regulated sources, and to allow sources additional flexibility in meeting applicable requirements.

Finally, examination of the federal definition of what constitutes a single source under Title V is necessitated by the language of Section 39.5(3)(a) of the Act, wherein the Illinois legislature mandated that the Agency issue CAAPP permits consistent with federal law and state law. A finding by the Board that these facilities constitute two sources under the state definition of source would require the Agency to issue two separate CAAPP permits to CCI. This would conflict with the obligation under federal law to include both facilities in a single permit. Since the issuance of two separate CAAPP permits would be in violations of federal law, the Agency would also be violating the mandate set out in Section 39.5(3)(a) of the Act. Thus Section 39.5(3)(a) of the Act would impose contradictory obligations upon the Agency.

The Board's obligation is to consider all the requirements of the Act, and where possible, to interpret statutory provisions in such a way as to avoid such contradictions. (See American National Bank v. National Advertising, 594 N.E.2d 313, 171 Ill.Dec. 461 at 465 ("Since a statute is passed as a whole, and animated by one general purpose, each part should be construed with every other part so as to produce a harmonious whole." (citations omitted)).) Our analysis of the law and facts in this case allows us to read the two mandates of Section 39.5(3)(a) in a manner consistent with federal and state law, thus enabling the Agency to comply with its mandate.

Having found that Illinois' program properly includes a "support facility" analysis when making a source determination under the CAAPP, we must determine whether the Agency properly determined that a support relationship exists between CCI's two facilities.

CCI's Facility

The Agency asserts that CCI's facilities satisfy the support facility analysis, and therefore the Agency's source determination was not erroneous, arbitrary, or unreasonable. The Agency asserts that the two facilities act as one source in the primary production of color samples and other products. The Agency asserts that the initial coating operations at the 4242 facility produce an intermediate product which is sent to other locations including the 4000 facility for final assembly and production. While each of these facilities performs some of its activities for other locations, the majority of product from the 4242 facility is sent to the 4000 facility. The Agency asserts that the elements of reliance and dependency are present in the relationship between the two facilities.

Additionally, the Agency asserts that the quality management at the 4242 facility is important for the final quality of the product from the 4000 facility. The Agency asserts that this illustrates interdependency between the two facilities.

Applying this analysis to CCI, the Agency asserts that the majority of coated rolls of paper or webs from the 4242 facility are shipped to the 4000 facility, where they are cut and mounted on printed board, and some are laminated. The Agency asserts that the quality control at the 4242 facility assists in the further processing of the product which takes place at the 4000 facility. The Agency asserts that the facilities operate an

integrated production, and that the “package” for each job includes customer specifications and directs what needs to be done in every department. The 4242 facility coats paper and identifies the color name to fulfill the job package. At the 4000 facility, cards are pre-printed with the matching names of colors used on the coated product from the 4242 location.

CCI asserts that treating its two facilities as one source would violate the common sense notion of plant imposed by the court in Alabama Power. CCI asserts that the record is clear that the two facilities perform wholly different functions, are separated by a non-affiliated company, and are not connected by any manufacturing apparatus or dedicated transportation line. (Pet. Br. at 9.) Furthermore, CCI asserts that USEPA already considered and rejected the idea of doing away with the SIC code requirements in its NSR rules. In rejecting this idea, the USEPA stated:

[US]EPA had originally proposed a definition similar to that requested by the commenter, but it decided instead to adopt the present system, based upon SIC codes, since a broader definition would severely strain the boundaries of even the most elastic of the four terms which define the term “source”. . . . [US]EPA believes that aggregation of separate contiguous plants under common ownership into one source would be inconsistent with the common sense notion of plant.

(46 Fed. Reg. 50769 (October 14, 1981; see Pet. Br. at 9.)

Additionally, CCI asserts that the operations of the two facilities are not fully integrated. CCI asserts that it operates the two plants independently, and that the plants have separate plant managers, and are covered by separate insurance. CCI asserts that some coated product from its 4242 plant is sent to facilities other than the 4000 facility for assembly into color boards and other color systems. Additionally, some of the printing jobs processed at the 4000 facility involve no materials originating from the 4242 facility. CCI asserts that in the past, the Agency has treated the two facilities as two separate entities for permitting purposes.

As policy grounds for treating the facilities as separate, CCI asserts that requiring the facilities to be further separated in order to be considered separate sources would require a fleet of trucks to be constantly on the road. CCI further points out that the Agency definition invokes no statute or regulation which would be violated if the facilities were to be treated as separate sources.

In response to the arguments that the Agency had always treated the two facility as separate for permitting purposes, the Agency points out that the permits to which CCI refers were state permits under the old system. Chris Romaine testified for the Agency that, under the old state permitting system, it was possible for one facility to have a separate permit for each emission source. (Tr. at 106-107.) The Agency asserts that its independent treatment of CCI’s two facilities under the old state permitting system has no bearing on whether the emissions points should be aggregated for purposes of CAAPP permitting, since the requirements of the CAAPP were not yet in effect at the time the prior permits were issued. (Tr. at 108.) The Board notes that the permit applications at issue in this appeal are CCI’s initial CAAPP permit applications.

The Agency asserts that, in a letter dated May 9, 1995, sent in response to CCI’s application for a construction permit for a new laminating machine at the 4000 facility, the Agency informed CCI that it believed its two facilities should be treated as one source for the purposes of CAAPP permitting. (Ag. Rec. Vol. 1 at 9A-9B; see Tr. at 105.)

The Board finds that the Agency properly found that a support relationship exists between CCI’s two facilities. The output from the 4242 facility represents an intermediate product, which is subsequently finished at the 4000 facility. The majority of product from the 4242 facility is sent to the 4000 facility. The record demonstrates that the facilities operate in an integrated fashion to produce color boards and color sample systems. The integration of operations is indicated in the fact that the “package” for each job includes customer specifications and directs what needs to be done in every department, across both facilities. Since the output from the 4242 facility supports the final production efforts at the 4000 facility, the two facilities constitute a single source despite the fact that CCI designated each with a different SIC code.

Request for Alternative Relief

In its petition for review, CCI, asks that if the Board refuses to reverse the Agency's determination, that it grant CCI a reasonable amount of time to amend its applications, and that the applications be declared eligible for the protection afforded by 35 Ill. Adm. Code 270.304(a) if accepted by the Agency. (Pet. at 7, Pet. Post - Hrg. Br. at 14, Reply Br. at 13.) This regulation is the procedural rule which implements the requirements of Section 39.5(5)(h) of the Act, which provides protection from enforcement for CAAPP sources which have submitted complete CAAPP applications. Section 39.5(f) of the Act provides in relevant part:

If the owner or operator of a CAAPP source submits a timely and complete CAAPP application, the source's failure to have a CAAPP permit shall not be a violation of this Section until the Agency takes final action on the submitted CAAPP application. . . .

(Section 39.5(f) of the Act.)

In its post-hearing brief, the Agency states that Section 39.5(5)(f) mandates that the Agency evaluate a CAAPP application for completeness within 60 days. A determination of completeness ensures that the applicant is not in violation of the statutory requirement to obtain a permit. (Ag. Br. at 6.) This protection is commonly referred to as an "application shield." An Agency determination of incompleteness under Section 39.5 of the Act is appealable as a final action. The Agency asserts that if the Board affirms its incompleteness determination, CCI is not entitled to the protection of the Section 39.5(5)(h) the application shield, and can be found in violation of the requirement to obtain a CAAPP permit. (Id.)

CCI had made a good faith argument that it was entitled to submit separate CAAPP applications for its two facilities. While in this decision we agree with the Agency that one permit is required pursuant to the states CAAPP, CCI did not have the benefit of that decision at the time it was required to submit its CAAPP application. There is no issue as to whether CCI failed to submit all the technical and operational information necessary for the Agency to make a decision on the merits of the permit applications. There is only an issue as to whether CCI could submit two permit applications or was required to submit one. Based upon the facts of this case, we find the application of the Section 39.5(5)(h) enforcement shield appropriate. The shield shall remain in force and effect for 120 days from the date of this order, which time shall allow CCI to submit a single permit application consistent with this decision.

CONCLUSION

Having found that a support relationship exists between the facilities, and having found that the facilities are adjacent, we conclude that the Agency properly determined that the facilities should be considered one source for purposes of CAAPP permitting. We therefore affirm the Agency's denial of the CAAPP applications submitted by CCI on the grounds that CCI failed to submit a single complete CAAPP application covering all emission units at the source, in violation of Section 39.5(5) of the Act.

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

ORDER

The decision of the Illinois Environmental Protection Agency (Agency) finding the Clean Air Act Permit Program (CAAPP) applications submitted by Color Communications, Inc. (CCI), for CCI's facilities located at 4000 W. Fillmore (the 4000 facility) and 4242 W. Fillmore (the 4242 facility), to be incomplete, in violation of the requirements of Section 39.5 of the Environmental Protection Act (415 ILCS 5/39.5), is hereby affirmed. CCI is directed to submit one complete CAAPP application covering both its 4000 facility and its

4242 facility, in accordance with the terms outlined in the Agency's November 2, 1995 Notice of Incompleteness, within 120 days of the date of this order. CCI shall be entitled to a shield from enforcement during this 120-day period.

IT IS SO ORDERED.

Board Members J. Theodore Meyer and Emmett E. Dunham dissented, and Board Member Joseph Yi concurred.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill.Adm.Code 101.246 "Motions for Reconsideration.")

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the ____ day of _____, 1996, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board