

ILLINOIS POLLUTION CONTROL BOARD
November 7, 1985

NATIONAL MARINE SERVICE, INC.,)
)
 Petitioner,)
)
 v.) PCB 85-108
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

MARTIN, CRAIG, CHESTER & SONNENSCHNEIN (MR. JOSEPH S. WRIGHT, JR., OF COUNSEL) APPEARED ON BEHALF OF THE PETITIONER.

MR. WILLIAM D. INGERSOLL, ATTORNEY AT LAW, APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by W. J. Nega):

This matter comes before the Board on the July 23, 1985 Petition for Permit Review filed by National Marine Service, Inc. (National Marine). The Petitioner has asked the Board to review the Illinois Environmental Protection Agency's denial on June 18, 1985 of an air operating permit for National Marine's six-hundred horsepower boiler (Boiler #1) that services its Hartford, Illinois barge cleaning facility. Boiler #1 is located on a barge, approximately 40 feet x 120 feet in size, which is presently moored to the river bank and now floating on the Mississippi River. (R. 19-20).

On October 1, 1985, a hearing was held at which testimony was heard and exhibits were received. No members of the public or press attended this hearing. (R. 10; R. 68).

On October 3, 1985, the Agency filed a Motion to Dismiss this case as not ripe for decision because the relief for which the Petitioner asks is, allegedly, in essence, an "advisory opinion". In its motion to dismiss, the Agency states that National Marine does not challenge the Agency's denial of the permit application or the sufficiency or reasonableness of the Agency's reasons for denial, but instead only asks for a determination that no permit is necessary. However, the Board believes that National Marine is challenging the Agency's denial of the permit application, for if the Agency had issued the requested permit, it is likely that National Marine would not have filed its Petition for Review of the Agency's decision. The Board hereby denies the Agency's motion to dismiss, as we believe that an actual case or controversy exists.

On October 9, 1985, the Petitioner filed its Post-Hearing Argument and the Respondent filed its Post-Hearing Brief.

On October 18, 1985, the Agency filed a Motion to Strike which requested that the Board overturn the Hearing Officer's decision to admit National Marine's Exhibits "A" and "B" into evidence and to strike these exhibits from the record in this matter. Petitioner's Exhibit A is a letter, dated February 15, 1985, from National Marine's engineering manager, Mr. David J. Miller, to attorney William D. Ingersoll of the Agency. Petitioner's Exhibit B is a letter dated February 22, 1985 from Mr. Ingersoll to Mr. Miller. At the hearing, National Marine's Exhibits A and B were admitted into evidence over the Agency's objection. (R. 8-9). The Agency has contended that the letters in question merely contain arguments and viewpoints of each of the respective parties pertaining to the applicability of 35 Ill. Adm. Code 201.146(c) to Boiler #1, and that these exhibits played no part in the actual permit review process, since the Agency reviewer analyzed National Marine's permit application and the applicable facts in the Agency record and had never seen Petitioner's Exhibits A and B before the October 1, 1985 hearing. (R. 44-45).

On October 25, 1985, National Marine filed a Memorandum in Response to the Agency's Motion to Strike which strenuously argued that the Agency's Motion to Strike should be denied and urged the Board to find that the exemptions apply and that no permit is required.

In analyzing the respective positions of the parties vis-a-vis this issue, the Board believes that the Agency has made a strong argument that the exhibits in question, which were not considered in the permit review process, should not have been admitted in evidence. However, even if the Board were to consider these two letters, it would not change the outcome of this case, because the letters merely set forth the respective legal (and other) arguments of the parties, which the Board has already evaluated in depth. It is well-established that the Agency must only consider matters in the record before it, and if a party wishes the Agency to consider new facts, evidence, scientific reports, etc., it is possible to file a new or amended permit application with the Agency if a company believes that such measures are warranted to establish a stronger record or position for Agency review.

Accordingly, the Board hereby grants the Agency's Motion to Strike and hereby overturns the Hearing Officer's decision to admit the Petitioner's Exhibits A and B into evidence and will hereby strike these exhibits from the record in this matter.

On October 25, 1985, National Marine filed a letter from its engineering manager, Mr. David J. Miller, which contains various typographical corrections relating to Mr. Miller's testimony at the hearing. The Agency has filed no motion or other legal documents in opposition to the suggested stenographic corrections, and therefore the Board will construe the Petitioner's filing as a Motion to Correct Typographical Errors

in the Hearing Transcript. Thus, the Board hereby grants National Marine's Motion to Correct Typographical Errors in the Hearing Transcript.

The Petitioner is a corporation which is in the business of rendering various repairing and cleaning services to owners of barges and tugboats* operating on the Mississippi River. In addition to cleaning, repairing and servicing barges and tugboats, National Marine occasionally, in the past, sold some diesel engine parts and deck fittings. (R. 21). Although National Marine often employs over 400 people in its operations during busy times, the company's present employment is about 120 people. (R. 36). The Petitioner's Hartford Shipyard is located on the Mississippi River near Hartford, Illinois in an industrial area with the nearest residential areas over one mile away in the City of Hartford and separated from the National Marine facility by dikes. (R. 35).

Boiler #1 is utilized to generate steam and hot water for cleaning the insides of river-going barges in order to facilitate a change of cargo or to expedite necessary barge repairs and maintenance. Boiler #1 has a maximum firing rate capacity of about 20 million Btu per hour and is fitted with an appropriate burner designed to burn the #6 fuel oil and other hydrocarbons and miscellaneous substances which are recovered from the barge cleaning operations.

As previously indicated, National Marine's barge cleaning operations are primarily conducted from a mobile barge which floats in the Mississippi River and is moored to the river bank. Boiler #1 is installed on this barge and the barge itself can be moved from place to place if necessary.

On April 27, 1985, the Petitioner applied to the Agency for an air operating permit for Boiler #1. A report dated April 23, 1985 on emission tests of Boiler #1 was included as part of National Marine's permit application. These emission tests, which were conducted on April 10, 1985 by Environmental Science and Engineering, Inc. (ESE), indicated that the average "particulate concentration" in the tests was 0.506 lb/mmBtu, while the average "sulfur dioxide concentration" in the tests was 1.25 lb/mmBtu. (See: ESE report, p. 2). On June 18, 1985, the Agency denied the Petitioner's application for an operating permit for Boiler #1 citing the exceedance of the requisite particulate and sulfur dioxide emission limitation standards as reasons for denial.

*Webster's Seventh New Collegiate Dictionary defines a barge as a "roomy, usually flat-bottomed boat used chiefly for the transport of goods on inland waterways" and defines a tugboat (also called "towboat") as a "strongly built, powerful boat used for towing and pushing".

In its July 23, 1985 Petition for Permit Review, National Marine claimed that "because National is a commercial establishment and because Boiler #1 uses gas and fuel oil exclusively with total capacity of less than 14.6 MW, it is exempt from permit requirements pursuant to 35 Ill. Adm. Code 201.146(c)." (Pet., at 2). National Marine's petition for review requested that the Board enter an order "reversing the Agency's denial for the reason that no permit is required". (Pet., at 2).

In its pre-trial memorandum of September 25, 1985, the Petitioner also contended that Boiler #1 was exempt from Agency operating permit requirements because it is a "marine installation" within the purview of 35 Ill. Adm. Code 201.146(e). The Respondent, however, has asserted that the Petitioner's Boiler #1 is not exempted as a "marine installation" as that term is used in 35 Ill. Adm. Code 201.146(e).

The threshold issue involved in this permit appeal is whether or not an air operating permit is required for Boiler #1. The Petitioner claims that the boiler falls within either or both of two exceptions from permit requirements [i.e., 35 Ill. Adm. Code 201.146(c) and 201.146(e)], while the Respondent argues that the boiler does not fall within either of the two exceptions. Accordingly, National Marine asserts that its Boiler #1 is not required to have an air operating permit because it is exempted from such a requirement because its barge cleaning facility is a "commercial establishment" and its boiler uses "gas and/or fuel oil exclusively"; thereby placing Boiler #1 within the exception delineated in 35 Ill. Adm. Code 201.146(c). Additionally, National Marine claims that its Boiler #1 is a "marine installation" within the exception set forth in 35 Ill. Adm. Code 201.146(e) because the boiler is installed on a vessel floating in a navigable water and is currently moored on the Illinois side of the Mississippi River.

The pertinent portions of the Board's Air Pollution Regulations as codified in 35 Ill. Adm. Code 201.146 are as follows:

"Section 201.146 Exemptions From Permit Requirement

No permit is required for the following classes of equipment:

...c) Fuel burning emission sources for indirect systems and for heating and reheating furnace systems used exclusively for residential or commercial establishments using gas and/or fuel oil exclusively with a total capacity of less than 14.6 MW (50 mmbtu/hr) input;...

e) Mobile internal combustion and jet engines, marine installation,* and locomotives;..."

The parties both agree that Boiler #1 is a fuel burning emission source for an indirect system with a total capacity of less than 14.6 MW (50 mm Btu./hr) input, but strongly disagree as to whether the Petitioner's facility is "commercial" and whether it burns "fuel oil exclusively."

In its Opinion adopting the air pollution regulations, the Board noted that certain classes of sources are exempted from the permit requirements and that the exempted classes are basically numerous small sources. The Agency has indicated that it believes that the exemption of 35 Ill. Adm. Code 201.146(c) was designed to "relieve the multitude of small stores, whose heating systems are probably environmentally insignificant, from the burden of permit requirements." (R. 66; see: Respondent's pre-trial memorandum, page 3). The Agency has suggested that the term "commercial establishment" should be strictly construed to eliminate facilities like the Petitioner's which are "more in the nature of an industrial service establishment". The Agency has interpreted the term "commercial establishment", which is not specifically defined by the Board's Air Pollution Regulations, to mean "a place where commodities are exchanged, bought, or sold".

On the other hand, National Marine has argued that the actual intent of the Board's exemptions is to relieve the permit "burden" from "small sources" such as its Boiler #1, since its Boiler #1 is rated at 20 mmBtu/hr and would need to be two and one-half times larger before exceeding the 50 mmBtu/hr numerical standard set by 35 Ill. Adm. Code 201.146(c). Moreover, National Marine contends that the definition of "commercial establishment" as interpreted by the Agency is far too restrictive in that it would eliminate most service establishments from the exemption and would defeat the alleged purpose of the exemption. National Marine argues that its Hartford facility is a "commercial establishment" because it provides for the needs of river commerce both by providing needed repair and cleaning services for barges and tugboats and by occasionally selling goods (i.e., parts and fittings for vessels) which are utilized in the course of daily commercial activities. National Marine asserts that the definition of "commercial" as interpreted by the Agency would place a "burden" on various small businesses to obtain permits and place an undue burden on the Agency to administer the permit program for small sources.

*As pointed out in the Petitioner's post-hearing argument, the two aforementioned exceptions have remained unchanged since their adoption on April 13, 1972 and a comma following the phrase "marine installation" was contained in the regulation originally adopted by the Board and apparently inadvertently omitted as a typographical error in the current printed edition of Title 35, Subtitle B. However, the Board finds that the deletion or insertion of the comma does not significantly change the context or the inherent meaning of the term "marine installation" itself.

The Board believes that the record clearly indicates that National Marine's facility is more in the nature of an industrial service establishment than a "commercial establishment" within the commonly accepted meaning of the term. Although National Marine's engineering manager, Mr. David J. Miller, testified at the hearing that the Petitioner occasionally, in the past, sold some few things like deck fittings and diesel engine parts (R. 21) as an adjunct to its primary business, it is crystal clear that such minor sales are a minuscule portion of the Petitioner's business and are completely incidental to its main business of cleaning and repairing barges, tugboats, and other river-going vessels. Thus, the company is actually selling industrial services, and there is nothing in the Board's Air Pollution Regulations which is intended or designed to give a "free pass" or exemption to such large industrial service establishments as the Petitioner's. National Marine's facility, as an industrial service establishment involved in a substantial business and having between 120 and 400 employees at various times, simply does not fall within the accepted definition of a "commercial establishment" and is clearly not in the same category as a small store or other small source with an environmentally insignificant heating system.

Accordingly, the Board believes that the Agency has correctly interpreted the "commercial establishment" exemption in the present case to exclude the Petitioner's facilities. While National Marine's arguments on the potential effects of the Agency's interpretation of this exemption to other sources are interesting, they are not germane--for, in the present case, we are only considering the Petitioner's facility and whether or not the exception is applicable to that specific industrial service operation. Other cases involving different facilities and perhaps other factual considerations will be decided on a case-by-case basis in the general framework of a strict construction of the exemption language.

Thus, in ascertaining whether the Petitioner's facility is indeed a "commercial establishment" within the purview of the exception in 35 Ill. Adm. Code 201.146(c), the Board believes that it is very clear that National Marine's facility does not come within the contemplated exemption.

In reference to the mixed factual and legal issue of whether National Marine's Boiler #1 uses fuel oil "exclusively" or not, the Agency has pointed out that, because the fuel oil burned in Boiler #1 is recovered from the Petitioner's barge cleaning operations, many substances which are rinsed from the barges ultimately find their way into the boiler fuel, and therefore the fuel utilized by National Marine does not legally fit the fuel oil "exclusively" requirement.

Mr. David J. Miller, Engineering Manager for the Petitioner's Shipyard Division, testified that:

"...The products that are coming in on the barges, the products' residues are washed from the compartments and sent to a lagoon. The floating materials are reclaimed and sent back to the cleaning facility where they are burnt for fuel...the rust and dirt that is carried in with the fuel certainly has an impact on the particulate level of the boiler...the boiler could be fueled with a commercially available 6 oil. However, for us to remain in business, it would not be economically viable for us to purchase fuel oil to support this boiler... National Marine Service is currently constructing a new cleaning facility which will, as a sort of side result, will end up cleaning up our fuel. A big part of this new cleaning plant will be the immediate treatment and rust removal, filtering of the water that is used to clean the barges. In cleaning it, it goes into a wastewater treatment plant. The water gets cleaned up, and we will recycle that water back into the cleaning process and run it through the system again. The reason that our particulate level is high is due to two factors that we have identified, one being the rust from the barges, and the second is the mud that is in the water that we use for washing right now which comes out of the Mississippi River...With the new cleaning plant we will be able to filter out the particulates and not use the water out of the river...makeup water from the City of Hartford...will lend itself to reducing the particulate levels in the boiler...we are under construction right now. I would estimate within three weeks it will be ready for startup...However, we have an amount of oil from our ponds that we will continue to use until we build up the supply of oil. It takes awhile...you build a supply of oil to burn. (Emphasis supplied). (R. 21-39).

In his testimony, Mr. Miller admitted that: (1) many substances listed in Exhibit 1 of the Agency's record (i.e., such as gasoline, aviation gas, asphalt, lubrication oil, benzene, xylene, styrene, and even soybean oil) are assorted hydrocarbons which are cleaned from barges and recovered for use as fuel in Boiler #1 (R. 23-26); (2) National Marine's operations add river mud, rust particles, and dirt to the fuel and affect particulate emissions from boiler (R. 28-29); (3) the purer #6 commercial fuel oil is not used because it is too expensive, so the company has unilaterally made a trade-off between environmental protection and economics in which concern over its expenses took the place of environmental concerns (R. 30); (4) the particulate and sulfur dioxide standards were exceeded on the day that the tests were taken (R. 30-31); (5) the new filtration unit of its new cleaning facility will eliminate the environmental problems previously admitted by Mr. Miller (R. 31-36); (6) the company has not applied to the Agency for any permits for the construction or

operation of any of its new facilities (R. 37-38); and (7) National Marine intends to burn residual oil from its ponds (thereby exceeding the requisite standards) even after its new cleaning facility is in operation until it builds up its supply of cleaner oil (R. 34). Accordingly, the testimony of National Marine's own witness seems to indicate that the company's policy is to burn whatever is recoverable from whatever cargo was contained in the barges, regardless of what impurities or other substances become mixed in, or contaminate, the fuel oil.

The Board believes that the Agency was entirely correct in its interpretation that the operations of National Marine's Boiler #1 did not come within the purview of the burning "fuel oil exclusively" exemption of 35 Ill. Adm. Code 201.146(c). And, while it appears that the Petitioner's new cleaning facility will hopefully eliminate future environmental problems in reference to exceeding the particulate and sulfur dioxide standards, National Marine would be well-advised to consult with the Agency and apply for any and all necessary permits before installing and operating new equipment to avoid costly delays and retrofitting at a later date.

National Marine has also argued that its Boiler #1 should be exempted as a "marine installation" as that term is used in 35 Ill. Adm. Code 201.146(e) since its boiler is installed on a vessel floating in a navigable water and is currently moored on the Illinois side of the Mississippi River.

The Agency states that the Petitioner did not raise this issue in its initial Petition for Review and indicates that the Respondent was only advised of this claim approximately seven to ten days before the hearing of October 1, 1985. In response to the Petitioner's argument that it qualifies under the "marine installation" exemption, the Agency correctly notes that National Marine is attempting to read the phrase "marine installation" out of context and twist its interpretation to cover the Petitioner's facilities. Section 201.146(e) exempts "mobile internal combustion and jet engines, marine installation, and locomotives" from the necessity of obtaining an Operating Permit from the Agency. The comma after marine installation, which the Company itself has insisted is appropriate, merely indicates that various items in a series are being exempted. Accepted grammatical usage provides that a comma may (or may not) be placed before the conjunction "and" joining the last item in a sequence or series; it does not change the fundamental meaning of the series itself. In the present case, the parties are arguing over the intent and purpose of the exemption, rather than the correct placement of the comma.

As the Agency has correctly noted, Section 201.146(e) is designed to exempt several types of mobile energy sources and those energy sources which provide the motive force for the mobile source are exempted. For example, the jet engine powers the jet plane and the internal combustion engine powers

locomotives. In the Petitioner's case, Boiler #1 does absolutely nothing to provide any power to make National Marine's barge mobile; that is not its function. Mobility of the Petitioner's barge, if desired, would be provided by separate tugboats and absolutely no mobility would be provided by the boiler itself. As the Agency has concisely stated, it is possible that a boiler on a riverboat which provides steam to drive the riverboat would fall within the scope of the Section 201.146(e) exemption; but that is not the case here.

The Board believes that the term "marine installation" should properly be read in the context of the related grouping of mobile energy sources which provide the motive power such as jet engines and railroad engines, rather than being taken out-of-context as the Petitioner has attempted to do. Moreover, as previously stated, the Board believes that a more strict construction of exemptions is generally applicable in this case. Additionally, although both parties failed to bring up this point, it is worth noting that the term "marine" commonly relates to "the navigation of the sea" (see: Webster's Seventh New Collegiate Dictionary) and therefore operations on a river might, under a strict construction of the rules, not be exempted under the "marine" installation exception of Section 201.146(e). For the previously mentioned reasons, the Board hereby finds that the Petitioner's facilities are not exempt under the "marine installation" exemption delineated in 35 Ill. Adm. Code 201.146(e).

In summary, since the Petitioner's barge cleaning facility and Boiler #1 are not exempt from permit requirements under the "commercial establishment", burning "fuel oil exclusively", or "marine installation" exceptions to 35 Ill. Adm. Code 201.144, the Board believes that the Agency quite properly reviewed National Marine's application as a request for an air operating permit for Boiler #1 and correctly denied the Petitioner's request. The Board believes that the emission test results which were submitted by National Marine as part of its permit application clearly show that Boiler #1 exceeded both the particulate emission limits of 35 Ill. Adm. Code 212.206 and the sulfur dioxide emission limits of 35 Ill. Adm. Code 214.161. Therefore, the Agency could not legally or properly grant an operating permit for Boiler #1. Testimony by the Agency's permit reviewer, Mr. James D. Cobb, P.E., clearly indicated that he considered whether or not National Marine was exempted from the requisite permit requirements and reached a proper determination that the Petitioner was not eligible for exemptions under Sections 201.146(c) and/or 201.146(e). (R. 45-46).

After carefully considering the respective positions of both parties in this case, the Board believes that the Agency was correct in requiring an air operating permit for Boiler #1 and we believe that the Agency was correct in denying the Petitioner's permit application. Although the Petitioner has pointed out alleged flaws in the operation of the Agency's permit review

system, testimony at the hearing revealed that the experienced professional engineer who reviewed National Marine's permit application considered whether or not the Petitioner's facility came within any recognized exceptions to the permit requirements and decided that it did not. In reviewing all the facts and circumstances of this case, the Board is compelled to reach the same conclusion as the Agency's reviewer. The Board finds that National Marine's Boiler #1 is required to have an air operating permit from the Agency and finds that it is not exempted from such requirement by either 35 Ill. Adm. Code 201.146(c) (since it is not a "commercial establishment" which uses "fuel oil exclusively") or 35 Ill. Adm. Code 201.146(e) (since it is not a "marine installation" as those words are used in the Section 201.146(e) exemption). The Agency's June 18, 1985 denial of an air operating permit for Boiler #1 citing the exceedance of the requisite particulate and sulfur dioxide emission limitation standards is hereby affirmed.

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

ORDER

It is the Order of the Illinois Pollution Control Board that:

1. The Agency's June 18, 1985 denial of an air operating permit for the Petitioner's Boiler #1 that services National Marine Service, Inc.'s Hartford, Illinois barge cleaning facility is hereby affirmed.
2. The Board hereby finds that Boiler #1 is not exempted from permitting requirements pursuant to 35 Ill. Adm. Code 201.146(c) and/or 35 Ill. Adm. Code 201.146(e).
3. The Agency's October 3, 1985 Motion to Dismiss this case is hereby denied.
4. The Agency's October 18, 1985 Motion to Strike which requested that the Board overturn the Hearing Officer's decision to admit the Petitioner's Exhibits A and B into evidence is hereby granted. Petitioner's Exhibits A and B are hereby stricken from the record.
5. National Marine Service, Inc.'s October 25, 1985 Motion to Correct Typographical Errors in the Hearing Transcript is hereby granted. The hearing transcript shall be modified accordingly to take into account the typographical corrections as indicated by the Petitioner.

IT IS SO ORDERED.

Board Members J. Anderson and J. Marlin concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 7th day of November, 1985 by vote of 7-0.

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