ILLINOIS POLLUTION CONTROL BOARD
April 8, 1976

HYON WASTE MANAGEMENT SERVICES, INC.	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 75-413
	)	
ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

Mr. George Bullwinkel, Attorney, appeared for the Petitioner;
Mr. Peter E. Orlinsky, Attorney, appeared for the Respondent.

OPINION AND ORDER OF THE BOARD (by Mr. Zeitlin):

This matter is before the Board on a Permit Appeal Petition filed by Petitioner Hyon Waste Management Services, Inc. (Hyon) on October 22, 1975. The Environmental Protection Agency (Agency) filed its record of permit application on December 2, 1975. Hearings were held in the matter on January 26 and 27, 1976 in conjunction with another Hyon Permit Appeal, PCB 75-457. (PCB 75-413 and 75-457 are not consolidated cases. An Interim Order of the Board dated December 11, 1975, specifically denied a Motion for Consolidation. To avoid duplication of effort, however, the January 26 and 27 hearings were held to jointly consider the two matters; this case, like PCB 75-457, is decided on the combined Record.)

This case concerns Hyon's attempt to obtain an operating permit for an incinerator used at Hyon's Chicago facility, located on the shore of Lake Calumet, on the city's south side. Characterized by Petitioner as an "integrated treatment facility for industrial wastes," (R.6), Hyon's Chicago plant has facilities for the treatment, disposal, destruction, or other elimination of many kinds of industrial liquid wastes, (e.g., R.62-72, 93, 98, 200). Approximately 40-50,000 gallons of various types of waste are treated or otherwise disposed of at the Hyon plant, (R.57).

Hyon's application to the Agency for an operating permit under Ch. 2: Air Pollution, of the Board's Rules and Regulations, for the incinerator at the Chicago plant was submitted on July 18, 1975, (Hyon, Ex.15). That permit application was denied by the Agency in a letter dated October 15, 1975, (Hyon, Ex.16). Following is the reason given by the Agency for that denial:

> The liquid waste incinerator operating at 4500 pounds per hour of liquid waste is allowed to emit up to 0.08 gr/scf adjusted to 12% CO_2. Your permit indicates that up to 0.198 gr/scf adjusted to 12% CO_2 may be emitted. This amount is in excess of the amount allowed.

This is not the first time that Hyon's incinerator has been before this Board on a Permit Appeal. On February 27, 1975 we entered an Order dismissing as moot a similar Permit Appeal filed November 20, 1974; however, that Order also granted Hyon Variances for its incinerator from Rules 103(a), 103(b), 202(b), and 203(e)(2) of Chapter 2. Hyon Waste Management Services, Inc. v. EPA, PCB 74-433, 15 PCB 605 (1975) (Supplemental Statement by Mr. Dumelle, 15 PCB 609). The background information given in the Board's Opinion there is, however, disputed in this case; our decision on those disputed facts will, in part, be determinative of the issues in this case. In addition, the Board's assumptions in granting the Variances in PCB 74-433, particularly with regard to the applicability of Rule 203(e)(2) to Hyon's incinerator, are also in issue here.

The issues in this case are twofold:

1. Is the particulate limitation of Rule 203(e)(2) applicable to the type of incinerator operated by Hyon at its Chicago facility?

2. If the particulate limitations of Rule 203(e)(2) are indeed applicable, was the Agency's rejection of Hyon's permit application proper?

The pleadings, exhibits, and testimony offered by the parties with regard to the second of those issues were highly complex and technical. These included discussions of the propriety of applying the 12 per cent carbon dioxide correction in Rule 203(e)(2) to an incinerator like Hyon's, the possibility or propriety of making fuel-based adjustments to arrive at such a correction factor, and various questions concerning the acceptability of certain stack testing procedures.

DISCUSSION

The Rules and Regulations Governing the Control of Air Pollution, promulgated by the Air Pollution Control Board, defined an incinerator as a,

> Combustion apparatus designed for high temperature operation in which solid, semi-solid, liquid, or gaseous combustible wastes are ignited and burned efficiently and from which the solid residues contain little or no combustible material. § 1, Definitions.

When the Board enacted its own emission Regulations for incinerators (which include limitations other than those for particulates under Rule 203), it defined "incinerator" as a, "[c]ombustion apparatus in which refuse is burned." PCB Regs., Ch. 2, Rule 201, Definitions. No further reference was made to that definition in the accompanying Opinion, which stated that the definitional section of the Regulations is "largely self-explanatory." In the Matter of Emission Standards, R 71-23 (April 13, 1972), Opinion at 12. Nor was any further explanation of the definition given elsewhere in the Regulations themselves or in other sections of the Board's Opinion.

In attempting to determine the Board's intended coverage in that definition, we must examine, first, possible refinement of this definition; and second, the Board's concept of what was to be achieved under the Regulations limiting emissions from incinerators.

When the Board promulgated its definition of "incinerator," the term "refuse" was itself defined in the Environmental Protection Act as, "any garbage or other discarded solid materials." Ill. Rev. Stat., Ch. 111-1/2, §1003(k) (1975). It would seem from that refinement of the "incinerator" definition that the incinerators controlled by Rule 203(e) are limited to those in which "garbage or other... solid materials" is burned.

However, as the Agency points out in its Brief, the Illinois Legislature changed the Environmental Protection Act's definition of "refuse" in 1975. Illinois Public Act 79-762 amended the definition in §3(k) of the Act to include, "any garbage or other discarded materials with the exception of [certain radioactive materials]. . . . " In light of that redefinition by the Legislature, the Agency argues that the definition of an incinerator controlled by our Regulations now includes one which burns either liquid or solid waste. Hyon, however, argues that the Board's definition of "incinerator" must use the word "refuse" as it was defined when the definition of "incinerator" was written, i.e., solid materials only.

We find that Hyon's contention is correct. The Agency's attempt to distinguish the cases cited by Petitioner on the subject of statutory interpretation is incorrect. The Agency's statement that these cases would not apply because the terms here are not "subject to unclear meanings or gradually changing usages," (EPA Brief, at 5), begs the question: As the Agency also points out, the definition actually has changed.

Nor do we feel that the Legislature's change in definition reflects any conscious attempt to affect the coverage of our Air Pollution Regulations as they relate to refuse or incinerators. No such intent is expressed in the new definition. Without such express intent, we find that the general rule of statutory interpretation, giving to words of art or words subject to changing definitions, the definition in effect at the time of enactment is controlling.

Even without that statutory interpretation, there are other compelling arguments presented by Hyon which would lead us to the same conclusion, i.e., that Rule 203(e) applies only to incinerators burning primarily solid waste.

First, what little guidance which does exist in the Opinion accompanying the Emission Regulations is found in the section accompanying Rule 203(e) itself. As pointed out by Hyon, the Board there stated that the particulate limitation of 0.08 gr/scf for incinerators "tracks the Federal New Source Standards...." R 71-23, supra, citing 40 CFR §60.51. The Federal New Source Standards definitions, id., specifically limit the coverage of "incinerators" to those "burning solid waste," "solid waste" itself being defined as "refuse, more than 50% of which is municipal type waste consisting of a mixture of paper, wood, yard wastes, food wastes, plastics, leather, rubber, and other combustibles, and noncombustible materials such as glass and rock." Were our own standards to include in their definition of "incinerators" those burning largely liquid wastes, they would hardly "track" the Federal New Source Standards.

Second, Hyon argues persuasively that the correction factor in Rule 203(e)(2), to 12% CO_2, would be inappropriate for application to incinerators burning largely liquid wastes of the type burned in Hyon's incinerator. There was considerable discussion of this issue at the hearings, (eg., R. 145-147, 205-209, 215, 225, 228, 372-373), and in both parties' Briefs. Although portions of that discussion concerned correction factors to be applied if the Board were to decide that Rule 203(e)(2) did apply to Hyon's facility, the discussion is nonetheless applicable here.

The sum of those discussions at hearing indicates that the particulate limitations of Rule 203(e)(2) were based, particularly with regard to the 12% CO_2 correction factor on emissions likely to be generated from the burning of solid waste, whether those likely emissions are generated from burned coal (as Hyon attempted to show at hearing, R.144), or from municipal wastes (as exemplified by the definitions cited above in the Federal New Source Standards). The Agency's contrary argument, to the extent that it is not empowered to compensate whether a Regulation is to a source's "advantage or disadvantage" is inapropos. Petitioner properly shows that, under such an application of the Rule, it is conceivable that under certain conditions, with certain fuels, no particulate emissions would be allowed. While a laudable goal, our Regulations cannot, as presently constituted, be construed in such a manner.

Similarly, the Agency's argument that Hyon's proper relief in this regard should be a Petition for regulatory change is not applicable here. Our Regulations do not require that every imaginable source be covered under the existing emission limitations. Where the existing Regulations do not provide for a specific limitation, we need not apply a tangential limitation due to that lack of provision.

We find no foundation for the Agency's statement that, "the Board's particulate regulations are intended to cover all particulate sources," (Brief, p. 7), which is cited only to §9(a) of the Act. To agree with that statement is tantamount to proclaiming our omniscience, particularly when the statement is viewed in light of the Act's requirement that the Board examine technical and economic feasibility in enacting Regulations.

Having decided that the particulate limitations of Rule 203(e)(2) were meant to apply to incinerators burning solid wastes, and not liquid wastes, we must then determine the nature of Hyon's incinerator.

Neither of the parties dispute the fact that what Hyon operates is an "incinerator," in the sense of it being used to burn wastes, (e.g., R.90, 158, 180). Arguing that Rule 203(e)(2) must therefore be applicable, the Agency cites the recent case of People and EPA v. Ruben Metal Co., Inc., PCB 75-20 (Supplemental Opinion, Jan. 14, 1976), which stated that "in determining which emission standard would apply to a given 'incineration' source, the primary purpose of that source is determinative. The determination of what is the primary purpose of the source must be made on a case by case basis."

While the primary purpose of Hyon's incinerator is certainly 'incineration,' as the word was used in Ruben, the primary purpose here is actually the incineration of liquid wastes. As a result, the particulate emission limitations of Rule 203(e)(2) do not apply to Hyon's "incinerator."

The Agency argues that the Record does not show the proportion of liquid to solid wastes incinerated by Hyon, and that Rule 203(e)(2) should apply unless no solid wastes are burned. However, such an analysis is contradictory to that in Ruben, supra. The Record in this case makes it clear that the primary purpose of Hyon's incinerator is the destruction of liquid wastes, (e.g., R.132, 133, 158).

In light of all of the above, we find that the particulate limitation of Rule 203(e)(2) is inapplicable in Hyon's case. Each of the grounds put forward by Hyon for this decision would be sufficient, individually; collectively, they are compelling.

Our decision to this effect troubles us. It is evident that some control over the incineration process operated by Hyon is necessary; the materials destroyed in Hyon's incinerator are certainly capable, as the Agency points out, of causing considerable environmental and public health damage. It is unfortunate that Hyon's operations are not, as the Agency would have it, controlled by our particulate Regulations. But, as is pointed out above, we are unable to find any real relationship between those Regulations and Hyon's operations.

This decision is not a "free ticket" for Hyon, however. Hyon remains bound by the provisions of the Act and our Regulations prohibiting air pollution. In addition, Hyon's incinerator remains subject, as an "emission source," to the operating permit requirement. We would hope that, to obtain the protection of §49(e) of the Act, Hyon will itself propose applicable regulations. We likewise hope that the Agency will either propose such Regulations or provide guidance and technical assistance to the Board in its consideration of any other proposal, whether from Hyon or some other source.

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

ORDER

IT IS THE ORDER OF THE POLLUTION CONTROL BOARD that the decision of the Environmental Protection Agency, dated October 15, 1975, denying Petitioner Hyon Waste Management, Inc., an operating permit for its liquid waste incinerator, be reversed, and that said Petitioner is entitled to an operating permit therefor.

Mr. James Young and Mr. Jacob Dumelle abstained.

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Opinion and Order were adopted on the 8th day of April, 1976, by a vote of 3-0.

Christan L. Moffett
Christan L. Moffett, Clerk
Illinois Pollution Control Board