

ILLINOIS POLLUTION CONTROL BOARD

July 18, 1996

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

CONCURRING OPINION (by J. Yi):

Although I believe that the Agency's decision of permit application incompleteness should be affirmed, I am concurring with the majority today because I disagree with the majority's reasoning. On November 2, 1995 the Agency issued its Notice of Incompleteness, stating that Color Communication Inc.'s (CCI) two facilities must be considered one source for the purposes of CAAPP permitting. The Agency's denial letter states that "Section 39.5(5) of the Act specifically requires an owner or operator of a CAAPP source to submit a single complete CAAPP application covering all emission units at the source." The Agency proceeds to state that the two buildings' emissions should be considered one source and since CCI submitted two CAAPP applications it "failed to address source-wide operations in the necessary single CAAPP application." Therefore the issue, as framed by the Agency denial letter, is whether CCI's two applications are incomplete.

I agree with most of the majority's reasoning and findings in the discussion portion of the opinion. I disagree with the majority's incorporation of the concept of support facility into the State CAAPP program's definition of "source" concerning facilities which do not share the same Standard Industrial Classification (SIC) code.¹ The majority reasons that, since the State's CAAPP program definition of "source" shares identical language and history with the federal definition, and since the intent of the legislation adopting the State CAAPP program is to implement the federal program, then the concept of support facility was also adopted by the

¹ Section 39.5(1) of the Act defines "source" to mean "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 "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." (415 ILCS 5/39.5(1).)

legislature when creating the State CAAPP program. The majority does not state that the plain language of the Act is ambiguous, but instead argues that the intent of the legislature by adopting the plain language was to adopt a definition consistent with the federal CAAPP program and that to conclude otherwise would place a contradictory burden on the Agency and the regulated community.² The majority concludes therefore that the concept of support facility, which appears only in a preamble to the federal regulations which adopted the definition of “source” and not in a preamble to State regulations or the Act, was also adopted by the State’s legislature when it adopted the language of Section 39.5(1) of the Act.

The primary rule of statutory construction is to ascertain and effectuate the legislature’s intent. (*Piatak v. Black Hawk College Dist.* # 503, 207 Ill.Dec. 586, 269 Ill.App.3d 1032, 647 N.E.2d 1079 (3rd Dist. 1995).) The initial source for determining legislative intent is the plain meaning of the language used, and where unambiguous, the plain meaning of the language controls. (*Id.* at 589.) The courts must take the words found in a statute in their ordinary usual meaning and give them a sensible meaning consonant in the context in which they are used. (*Id.* at 589.) Finally, where such a literal reading would defeat the legislature’s obvious and clearly expressed purposes, the courts need not adhere to the literal reading. (*Village of Woodridge v. DuPage County*, 144 Ill.App3d 953, 98 Ill.Dec. 935, 494 N.E.2d 1262.)

Here the plain meaning of the language of Section 39.5(1) of the Act would define “source” to mean a stationary source or group of stationary sources that are located on one or more contiguous or adjacent properties, and that are under the common control, shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources belong to the same SIC code. The literal reading would not defeat the legislature’s obvious and clearly expressed purposes of defining “source”, however, the statutory language does not mention the federal CAAPP program’s support facility concept. Here, unlike the federal CAAPP program (where the United States Environmental Protection Agency (USEPA) when adopting its definition of “source” included in its preamble to the regulation a discussion of the support facility concept and its intent to consider two sources one

² The State CAAPP program places a burden on the Agency to issue CAAPP permits consistent with the Clean Air Act (CAA) and the regulations promulgated thereunder and this Act and the regulations promulgated thereunder. (See 415 ILCS 5/39.5(3)(a).) The federal CAAPP program has incorporated the concept of support facility, thereby, under the federal program CCI would be defined to have one source and would be required to submit one CAAPP application for both of its facilities. If the State CAAPP program does not incorporate the federal concept of support facility then CCI would have two sources and thus may submit two CAAPP applications for its two facilities. This would result in the possible violation of Section 39.(3)(a) of the Act if the Agency issues two CAAPP permits to CCI, because of the requirement placed on the Agency to issue CAAPP permits consistent with the CAA and the regulations promulgated thereunder which, as stated above, would require only one application and one permit. Therefore a contradictory burden would be placed on the Agency and regulated community.

regardless of SIC codes, if one source is a support facility and which received public comments) we have no legislative discussion, findings, preamble, or any other clear indication that the State CAAPP program is also incorporating this concept.

I do not believe we may lawfully incorporate the concept of support facility in the State's CAAPP program in the absence of either adopted regulations pursuant to the Administrative Procedure Act (APA) (5 ILCS 100/1-1) or clear legislative definition of the support facility concept in Section 39.5 of the Act. I simply cannot agree with the majority that since the intent of the legislature was to adopt a State program consistent with the federal CAAPP program that means the program must be administered and interpreted exactly as is the federal program. I especially cannot agree if it means that in order to fully understand what is required under the Illinois' law, one must have the federal law and any rulemaking adopted on the federal level pursuant to the federal law and the corresponding preambles in hand to understand the full implication of Illinois' law. Such an interpretation would set a bad precedent in the State of Illinois concerning environmental law, as public notice and participation has been a guiding factor in this State's environmental regulations and laws to date. To adopt the concept of support facility as part of the definition of "source" in such a manner does not allow for the same public participation on the state level that was afforded to the public on federal level.

However, I would have affirmed the Agency's decision that the application is incomplete due to the statutory language requiring the applicant to provide sufficient information to allow the Agency to determine all applicable requirements pursuant to the CAA, and regulations promulgated thereunder, have been met. Section 39.5(5)(c) of the Act states in pertinent part "[t]o be deemed complete, a CAAPP application must provide all information, as requested by the Agency application forms, sufficient to evaluate the subject source and its application and to determine all applicable requirements, pursuant to the CAA, and regulations promulgated thereunder, this Act and regulations promulgated thereunder." Affirming the Agency's decision, yet not including the federal concept of support facility in the State CAAPP program, would leave the State's CAAPP program in question in situations such as these, and would require a legislative amendment to Section 39.5 of the Act or require the Agency to propose a rulemaking to the Board to include the concept of support facility. However, I would much rather cause an inconvenience to the State's CAAPP program than to adopt what amounts to a rule through the use of statutory interpretation and thereby circumvent public participation.

While I believe that statutory interpretation is an important authority or tool of this Board or any adjudicatory body, I feel that including the concept of support facility goes beyond such authority in this case. Additionally, I believe the result of this interpretation blurs the separate authority of the State to implement its own State CAAPP program or any other environmental program which tracks a federal program. Finally, as mentioned above, such use of the authority circumvents the role of public participation which has been clearly spelled out in the Act.

For the reasons stated above I respectfully concur.

Joseph Yi
Board member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above concurring opinion was submitted on the ____ day of _____, 1996.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board