ILLINOIS POLLUTION CONTROL BOARD
December 6, 1991

THE GRIGOLEIT COMPANY, Petitioner v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	PCB 89-184 (Permit Appeal)

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

On November 13, 1989, the Grigoleit Company ("Grigoleit") filed a petition for permit appeal to contest the Illinois Environmental Protection Agency's ("Agency") denial of its July 12, 1989 application for renewal of its air operating permit. On November 29, 1990, this Board issued an Opinion and Order remanding the matter to the Agency to determine whether Grigoleit was in compliance with 35 Ill. Adm. Code 215.301.

On October 2, 1991, Grigoleit filed a motion asking the Board to impose sanctions upon the Agency for exceeding the scope of the Board's November 29, 1990 Opinion and Order. The motion now before the Board is Grigoleit's second motion for sanctions, the first being filed on May 30, 1991 and ruled upon by the Board on June 20, 1991. In the current motion, Grigoleit requests the Board to find that it has complied with 35 Ill. Adm. Code 215.301 and order the Illinois Environmental Protection Agency ("Agency") to issue Grigoleit's operating permit, to bar the Agency from filing any other pleadings in this matter, to bar the Agency from maintaining its claim in enforcement case PCB 91-157, to enter a judgment by default in PCB 91-157 because the claims asserted therein relate to issues raised in this case, and to direct the Agency to pay Grigoleit's reasonable expenses in connection with this motion. On October 9, 1991, the Agency filed its response to the motion as well as a motion to file the response instanter.

At the outset, the Board hereby grants the Agency's motion to file its response instanter. Before proceeding any further on the substantive issues currently before the Board, however, we will first summarize the relevant sequence of events leading up to the current motion.

On October 12, 1989, the Agency denied Grigoleit's application for renewal of its air operating permit. Grigoleit appealed the denial on November 13, 1989. On November 29, 1990, the Board struck all of the Agency's denial reasons except the following:

2. Your application fails to provide proof of compliance with 35 Ill. Adm. Code 215.204(h), (j) and 215.301. The following information is required to assess compliance with these rules:

   a. Provide usage and percentage by volume for each ingredient in ink and solvent used for each coating application.

   b. Provide the weight percentage of the volatile organic compound in the ink and solvent and the amount of ink and solvent used per hour.

With respect to this reason, the Board determined that the Agency failed to apprise Grigoleit, prior to its October 12, 1989 permit denial, that it was not in compliance with 35 Ill. Adm. Code 215.204(h), (j) and 215.301. The Board also determined that Grigoleit was not in violation of 35 Ill. Adm. Code 215.204(h) and (j), and that, due to the lack of information in the record, it could not determine whether Grigoleit was in compliance with 35 Ill. Adm. Code 215.301. Accordingly, the Board remanded the case to the Agency so that the Agency could elicit the information that it requested in subparagraphs 2(a) and (b) of its October 11, 1989 permit denial letter in order to determine whether Grigoleit was in compliance with 35 Ill. Adm. Code 215.301.

Upon remand, in a letter dated January 10, 1991, the Agency attempted to elicit the information specified in subparagraphs (a) and (b) above in order to determine whether Grigoleit was in compliance with 35 Ill. Adm. Cod 215.301. It specifically cited the above subsections without any further explanation. It also attempted to obtain additional information relating to new process operations at the facility, the issue of Grigoleit's compliance with 35 Ill. Adm. Code 215.204(h) and (j), and the issue of possible land violations at the facility. On January 25, 1991, Grigoleit provided information to the Agency which it claims demonstrated that it is in compliance with 35 Ill. Adm. Code 215.301. On April 25, 1991, the Agency again denied Grigoleit's application for renewal of its operating permit because Grigoleit had not proven that it would "...not cause a violation of Sections 9, 21 and 39 of the Illinois Environmental Protection Act, and 35 Ill. adm. Code 201.157, 201.160, 215.301, 215.204, 703.121, 703.150, 703.151, 722.112, and Subtitle G generally". On May 30, 1991, Grigoleit filed a motion for sanctions in response to the Agency's January 10, 1991 letter and April 25, 1991 permit denial.

On June 20, 1991, the Board granted Grigoleit's motion for sanctions, declared the Agency's January 10, 1991 letter and April 25, 1991 denial letter null and void, and again remanded the matter to the Agency for the sole purpose of eliciting the information requested in subparagraphs (a) and (b) of denial reason 2 of the Agency's October 11, 1989 denial letter in order to determine whether Grigoleit is in compliance with 35 Ill. Adm. Code 215.301. In response to the Board's order, in a letter dated July 29, 1991, the Agency stated that it could not determine if Grigoleit was in compliance with 35 Ill. Adm. Code 201.157, 201.160, or 215.301. It also cited the above two subsections and stated that the information previously submitted about coating usage and composition was inadequate because:

a. Petitioner's exhibits nos. 47 and 49 indicate the VOC content of some but not all of the coatings used,

b. Petitioner's exhibits nos. 47 & 49 give the content of photochemically reactive and non-reactive organic material present in some of the coatings but do not give the solvent composition of the coatings to enable the Agency to verify the reactive/non-reactive breakdown, and

c. Petitioner's exhibits nos. 47 and 49 do not indicate the maximum amount of coating used per hour. Consequently, compliance with Section 215.301 cannot be determined.

On October 2, 1991, the Agency then issued another permit denial letter. Such letter was a duplicate of its July 29, 1991 letter.

In its current motion for sanctions, Grigoleit claims that the Agency, via its July 29, 1991 letter, exceeded the scope of the Board's remand order in that it advised Grigoleit that it lacked information necessary to determine Grigoleit's compliance with 35 Ill. Adm. Code 201.157 and 201.160, and also requested specific citations to the record with descriptions of how those portions of the record demonstrate compliance with 35 Ill. Adm. Code 215.301 even though Grigoleit had previously provided such information.

In its response, the Agency states that, in its July 29, 1991 letter, it asked Grigoleit to provide the following information regarding compliance with 35 Ill. Adm. Code 215.301: a) usage and percentage by volume for each ingredient in ink and solvent used for each coating, and b) the weight percentage of the volatile organic compound in the ink and solvent and the amount of ink and solvent used per hour. The Agency also notes that the letter specified why the information about coating usage and composition that was previously submitted by Grigoleit in its

January 25, 1991 letter was inadequate.

A review of the Agency's July 29, 1991 letter indicates that rather than focusing solely on 35 Ill. Adm. Code 215.301, the Agency cited two additional regulatory sections. Specifically, the Agency attempted to elicit information regarding Grigoleit's compliance with 35 Ill. Adm. Code 201.157 and 201.160. It appears that the Agency waited until its July 29, 1991 letter and until after the Board's November 29, 1990, and June 2, 1991 remand orders to express its concern over these additional regulatory sections. The Agency cannot now express concern about these additional regulations in this permit appeal at this juncture, nor can it argue that the Board did not require the Agency to base its review only on the state of affairs at Grigoleit's facility as of the date of its earlier permit application. Although we did not explicitly state that our November 29, 1990 mandate was limited in scope, it is implicit in any remand order that the order is limited to only those facts that were before the Agency when it denied the permit. To hold otherwise would allow the Agency, in effect, to conduct a de novo permit review on remand. Earl Bradd v. IEPA, PCB 90-173, p. 6 (May 9, 1991). As for the Agency's argument that Section 39(a) of the Environmental Protection Act would not allow the Agency to issue a permit if Grigoleit's operations would cause violations, we remind the Agency that it already made its 39(a) determination in this case when it reviewed Grigoleit's permit application and chose not to list its concerns about Grigoleit's additional operations in its October 11, 1989 permit denial letter. Accordingly, we will strike the Agency's citation in its July 29, 1991 denial letter to these two regulatory sections.

The Agency, however, did not go beyond the Board's mandate when it attempted to elicit information regarding the violation of 35 Ill. Adm. Code 215.301. Rather, the Agency simply reiterated subparagraphs 2(a) and 2(b) of its October 11, 1989 denial letter and specified the type of information that it needed to verify Grigoleit's compliance with 35 Ill. Adm. Code 215.301. In response to the Agency's requests for information, Grigoleit, via a January 25, 1991 letter (and in its current motion for sanctions), refers to information that is already contained in the Agency's permit record.

This record does show that the method of calculation that Grigoleit relies upon to determine compliance with 35 Ill. Adm. Code 215.301 was previously accepted by the Agency during its review of Grigoleit's previous permit applications. However, this is not to say that the Agency is thereafter prohibited from requesting additional information to re-review compliance with a particular regulation. A review of the Board's regulations indicates that, as time goes on, many regulations are amended, one reason being to reflect more stringent compliance standards. This also holds true for the various calculation or test methods

used for determining compliance with a particular standard. In other words, a calculation or test method that is acceptable at one time may not be acceptable at a later point in time.

Section 39(a) of the Act requires the Agency to provide a detailed statement as to the reasons why a permit application was denied. Moreover, Section 39(a)(4) of the Act provides that such statements shall include "...a statement of specific reasons why the Act and the regulations might not be met if the permit were granted." In this case, however, there is no articulation by the Agency, in either this record or in the Agency's correspondence to Grigoleit subsequent to our November 29, 1990 Order, as to why Grigoleit's method of calculation is unacceptable at this point in time or how the Agency intended to use the information that it is now requesting when it did not need that information for its earlier permit reviews. Although the Agency has delineated the information that it believes that it needs to determine Grigoleit's compliance with 35 Ill. Adm. Code 215.301, it has not provided Grigoleit, or the Board for that matter, with any explanation of how the requested information would be used in the calculation of compliance with 35 Ill. Adm. Code 215.301. Without this articulation, it is not unreasonable for Grigoleit to rely upon the same method to calculate its compliance with 35 Ill. Adm. Code 215.301 that it used in the past (i.e., a method that was previously accepted by the Agency) as well as the data that it has already submitted.

As previously stated, in the Agency's July 29, 1991 letter, one reason given for the inability of the Agency to determine compliance with 35 Ill. Adm. Code 215.301 is that "Petitioner's exhibits 47 & 49 do not indicate the maximum amount of coating used per hour." However, the Board notes that the standard in 215.301, although expressed in pounds per hour, does not explicitly state that only hourly data must be used to show compliance. We also note that the Agency allowed the use of yearly usage data in Grigoleit's prior permit approval. If the method of calculation used in the past, which allowed averaging of organic material usage over a year and across Grigoleit's six sources (A1-A6), has not changed, the Board can only conclude that the requested information is unnecessary. The Agency has not indicated that averaging of the six sources is incorrect since it did not ask for information that would verify that the six emission sources operate for approximately equal periods of time over a year. Moreover, Grigoleit has not provided operational data (i.e., the number of hours each of the six sources are in operation). The Board must assume that Grigoleit did not supply such information because it considered sources A1-A6 to be similar enough in operation to justify averaging.

Based on the above, we find that Grigoleit supplied the necessary information to the Agency to show that it is in compliance with 35 Ill. Adm. Code 215.301 and, as a result, has

met its burden of proving that its facility will not cause a violation of the Act or regulations. See Section 39(a) of the Act, Ill. Rev. Stat 1989, ch. 111½, par. 1039(a). The purpose of the Board's remand was to afford Grigoleit the opportunity during the remand period to provide the Agency with the required information in order to rebut the original denial reason. Without any articulation by the Agency as to why it needed the additional information, Grigoleit chose to stand on the data and methodology that it submitted to the Agency because the Agency found such information satisfactory in its earlier permit reviews. Notwithstanding this, however, we again note that at no time subsequent to our November 29, 1990 remand has the Agency given a statement pursuant to Section 39(a)(4) of the Act (other than what it gave in its July 12, 1989 denial) of the specific reason(s) why 35 Ill. Adm. Code 215.301 itself might not be met if the permit were granted. Accordingly, for the foregoing reasons, the Board grants, in part, Grigoleit's motion for sanctions. We believe that the appropriate sanction at this juncture is to reverse the Agency's denial of Grigoleit's application for an operating permit and order the Agency to issue Grigoleit's operating permit rather than dismissing PCB 91-157 or ordering the Agency to pay Grigoleit's expenses associated with this motion.

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

ORDER

For the foregoing reasons, the Board strikes the Illinois Environmental Protection Agency's citation to 35 Ill. Adm. Code 215.157 and 215.160 in its July 29, 1991 denial letter. The Board also grants, in part, Grigoleit's motion for sanctions, reverses the Agency's denial of Grigoleit's application for an operating permit, and directs the Agency to issue Grigoleit's operating permit.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111½, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

Board Members J. Dumelle and B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution control Board, hereby certify that the above Opinion and Order was adopted on the 6th day of December, 1991 by a vote of 5-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board