

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Columbus Steel Castings Co., Successor to Buckeye Steel Castings Company,	:	
	:	
Appellant-Appellee,	:	
	:	
v.	:	No. 11AP-932
	:	(ERAC No. 255266)
[Scott Nally], Director of Environmental Protection,	:	(REGULAR CALENDAR)
	:	
Appellee-Appellant.	:	

D E C I S I O N

Rendered on September 27, 2012

*Porter, Wright, Morris & Arthur, LLP, Robert L. Brubaker
and David E. Northrop, for appellee.*

*Michael DeWine, Attorney General, Gregg H. Bachmann,
Samuel C. Peterson and Clint R. White, for appellant.*

APPEAL from the Environmental Review Appeals Commission

TYACK, J.

{¶ 1} Appellant, Scott Nally, the director of the Ohio Environmental Protection Agency ("appellant" or "Director"), appeals from an order of the Environmental Review Appeals Commission ("ERAC") concluding that the Director acted unlawfully in issuing a Title V permit to Buckeye Steel Castings Company ("Buckeye Steel") with new substantive requirements in the federally enforceable section thereof and granting Columbus Steel Castings Company's ("appellee" or "CSC"), Buckeye Steel's successor, motion for

summary judgment. Because the evidence and applicable law support ERAC's determinations, we affirm ERAC's order.

{¶ 2} CSC's facility is a steel foundry on approximately 90 acres of land with 22 of those acres under roof that is permitted through the Ohio Environmental Protection Agency's ("Ohio EPA") central district office. (Affidavit of Bryon Marusek, ¶ 3, 6.) The foundry has been in operation since before Ohio's air pollution control regulations were in effect. (Marusek affidavit, at ¶ 5.) Therefore, the majority of the air emission sources were not required to have a permit to install ("PTI"). (Marusek affidavit, at ¶ 8.) The foundry contains numerous air emission sources that emit a variety of air contaminants. (Marusek affidavit, at ¶ 6.)

{¶ 3} In 1990, the United States Congress enacted amendments to the Federal Clean Air Act, 42 U.S.C. 7661-7661(f), which included a federal operating permit program, or "Title V" program. On July 21, 1992, the United States Environmental Protection Agency ("U.S. EPA") promulgated final rules for the Title V program, codified at 40 C.F.R. Part 70. (Affidavit of James Orlemann, at ¶ 3.) R.C. 3704.036 grants the Director of the Ohio EPA the authority to create a federally approvable Title V program for the state. The Director of the Ohio EPA adopted Ohio Adm.Code Chapter 3745-77, which contains administrative rules governing Ohio's Title V permit program. (Orlemann affidavit, at ¶ 6.) On August 15, 1995, the U.S. EPA formally approved Ohio's Title V permit program and its effective date was October 1, 1995. (Orlemann affidavit, at ¶ 7.)

{¶ 4} Buckeye Steel applied to the Director for a Title V permit for its steel foundry on January 7, 1999. (Certified Record, at 9.) The Director issued a Title V permit on December 18, 2002, but because of a clerical error, an amended Title V permit was issued on December 30, 2002, effective on January 8, 2003. (Certified Record, at 1.)

{¶ 5} The Title V permit contains terms and conditions in the state and federally enforceable section of the permit for the following emissions units: F002, F006, F007, F008, F009, F010, K001, K002, K004, P007, P009, P011, P012, P023, P029, P030, P032, P033, P041, P042, P043, P044, P046, P047, P048, P049, P051, P052, P053, P055, P901, P902, P903, P904, P905, P906, P907 and P908. (Certified Record, at 1.)

{¶ 6} "These terms and conditions generally fall into three categories: 1) terms imposing requirements to capture a numerical percentage of fugitive dust emissions and

to eliminate visible emissions of the dust using [reasonable available control measures ("RACM")]; 2) operational restrictions on certain air emissions sources; and 3) miscellaneous requirements such as emission limits or limits on production." (ERAC Sept. 29, 2011 Decision, at ¶ 16.)

{¶ 7} Buckeye Steel filed a notice of appeal to the permit terms and conditions and raised several assignments of error, the pertinent one at issue here is that the Title V permit is unlawful under R.C. 3704.036(K) because it imposes new substantive requirements beyond the federally enforceable requirements applicable to the facility. In 2003, CSC purchased the facility and was substituted as the appellee in this matter.

{¶ 8} On April 12, 2010, CSC filed a motion for summary judgment. In its motion, CSC argued that the terms and conditions contained in the federally enforceable section of the Title V permit are new substantive requirements and violate R.C. 3704.036. Attached to the motion was an affidavit from Daniel Prater, an environmental policy analyst from Porter, Wright, Morris & Arthur LLP. Mr. Prater compiled a table listing all substantive requirements in the Title V permit that do not appear in prior permits.

{¶ 9} The Director filed two memoranda in opposition arguing that the terms and conditions contained in the federally enforceable section of the Title V permit are not new substantive requirements because the disputed terms reflect RACM and best available technology ("BAT"), as contained in reports submitted from Buckeye Steel to the Director. Moreover, the Director argued that the terms contained in the federally enforceable section of the Title V permit were derived from CSC's Preventative Maintenance and Malfunction Abatement Plan ("PMMAP") and thus, are not new substantive requirements.

{¶ 10} Since many of the emission sources at CSC's foundry pre-dated Ohio's permit installation program, RACM requirements became applicable to those sources in June 1980. RACM is defined as "the control technology which enables a particular fugitive dust source to achieve the lowest particulate matter emission level possible and which is reasonably available considering technological feasibility and cost-effectiveness." Ohio Adm.Code 3745-17-01(B)(18).

{¶ 11} Buckeye Steel submitted its RACM studies for all applicable sources at the steel foundry, except two electric arc furnaces, to the Ohio EPA between April 1990 and

October 1992. (Marusek Affidavit, at ¶ 23.) Buckeye Steel represented to the Director the achievable emissions limits its emission sources could attain, which were subsequently incorporated into the Title V operating permit.

{¶ 12} Buckeye Steel was also required to develop and implement a PMMAP under Ohio Adm.Code 3745-15-06. (Marusek affidavit, at ¶ 25.) The PMMAP is a plan to "prevent, detect and correct malfunctions or equipment failures which could result in emissions exceeding any applicable law." Ohio Adm.Code 3745-15-06(D). If a facility has an excessive number of malfunctions, then the Director has the authority to require the facility to develop a plan to minimize the occurrence of malfunctions and the emissions that exceed any applicable law. Once a plan has been developed and approved, the plan's requirements must appear in all subsequent permits for that facility. Ohio Adm.Code 3745-15-06(D)(2). Buckeye Steel submitted their PMMAP in two parts in 1990 and 1991. They revised it in 1995, and it was approved. (Marusek affidavit, at ¶ 26-27.)

{¶ 13} In his proposed findings of fact and conclusions of law, the Director conceded that the terms and conditions contained in the federally enforceable section of the Title V permit for the following emissions units were erroneous: K002, P046, P047, P048, P905, and P906. The Director also conceded that the opacity limit for emission unit P053 was erroneous. The Director conceded that emission units K004, P049, P051, P052, and P907 have been permanently shut down and presented no evidence to rebut the contentions raised by CSC in its motion with respect to those units.

{¶ 14} ERAC concluded that the terms and conditions in the federally enforceable section of the Title V permit were new and substantive requirements in violation of R.C. 3704.036(K) and granted CSC's motion for summary judgment. The Director has filed a timely notice of appeal and raised the following assignment of error:

The Commission erred by finding certain terms and conditions in the Title V operating permit were "new, substantive requirements" in violation of R.C. 3704.036.

{¶ 15} In reviewing ERAC orders, R.C. 3745.06 provides that this court "shall affirm the order" if we find "upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, * * *

[the court] shall reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law." "Reliable evidence is evidence which can be trusted. In order for evidence to be reliable, there must be a reasonable probability that it is true. Probative evidence is evidence which tends to prove the issue in question, while substantial evidence is evidence which carries weight, or evidence which has importance and value." *Perrysburg v. Schregardus*, 10th Dist. No. 00AP-1403, (Nov. 13. 2001), citing *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992). In determining whether an ERAC order is supported by reliable, probative, and substantial evidence, this court must weigh and evaluate the credibility of the evidence. *Parents Protecting Children v. Korleski*, 10th Dist. No. 09AP-48, 2009-Ohio-4549, ¶ 10. However, in doing so, we must remember the fact that the General Assembly created these administrative bodies to facilitate certain areas of the law by placing the administration of those areas before members with special expertise and thus, we afford due deference to ERAC's interpretation of rules and regulations and resolution of evidentiary conflicts. *Id.*

{¶ 16} The Ohio Rules of Civil Procedure apply with some exceptions to all courts of the state, but not to administrative bodies. Civ.R. 1(A); *Village of Harbor View v. Jones*, 10th Dist. No. 10AP-356, 2010-Ohio-6533, ¶ 54. Therefore, Civ.R. 56 may guide ERAC when it decides motions for summary judgment but the rule does not bind ERAC's review. *Waste Mgt. of Ohio, Inc. v. Bd. of Health of Cincinnati*, 159 Ohio App.3d 806, 2005-Ohio-1153, ¶ 93 (10th Dist.). To prevail on a motion for summary judgment, the moving party must demonstrate that, when the evidence is construed most strongly in favor of the non-moving party, no genuine issue of material fact remains to be litigated and that it is entitled to judgment as a matter of law. Civ.R. 56(C). A genuine issue of material fact exists unless it is clear that reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 151 (1974).

{¶ 17} Since the Director conceded that the terms and conditions contained in the federally enforceable section of the Title V permit for the following emissions units were erroneous, K002, P046, P047, P048, P905 and P906 and the opacity limit for emission unit P053 was erroneous and that emission units K004, P049, P051, P052, and P907 have

been permanently shut down, ERAC appropriately granted CSC's motion for summary judgment regarding those emission units.

{¶ 18} The only issue involved in this appeal is whether ERAC erred by finding certain terms and conditions in the Title V operating permit were new, substantive requirements in violation of R.C. 3704.036. R.C. 3704.036(K) provides, as follows:

A Title V permit shall address all existing federally enforceable requirements applicable to the permitted facility and shall not impose new substantive requirements beyond the federally enforceable requirements except for terms and conditions that are identified as not federally enforceable as provided in division (A) of this section. A Title V permit shall specify the regulatory citation for federal requirements addressed in the permit and shall identify any difference in form as compared to the federally enforceable requirement on which it is based.

{¶ 19} In construing R.C. 3704.036(K), we must be cognizant that in *Sears v. Weimer*, 143 Ohio St. 312, (1944), paragraph five of the syllabus, the court stated, as follows: "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for [resort] to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted." Thus, "[i]t is only where the words of a statute are ambiguous or are based upon an uncertain meaning or there is an apparent conflict of some provisions that a court has the right to interpret a statute." *Drake-Lassie v. State Farm Ins. Cos.*, 129 Ohio App.3d 781, 788 (10th Dist.1998), citing *Kroff v. Amrhein*, 94 Ohio St. 282 (1916); R.C. 1.49.

{¶ 20} In *Gen. Elec. Lighting v. Koncelik*, 10th Dist. No. 05AP-310, 2006-Ohio-1655, ¶ 19, this court stated that pursuant to the requirements of R.C. 3704.036(K), a Title V permit can: "(1) incorporate existing substantive federally enforceable requirements; (2) incorporate new non-substantive federally enforceable requirements; or (3) impose new substantive requirements under state law, as long as those terms and conditions are separately identified as not enforceable under federal law."

{¶ 21} The Director argues that the challenged terms are existing federally enforceable requirements because they are part of Ohio's approved State Implementation Plan ("SIP") and they are necessary to implement the requirements of the Clean Air Act; thus, they are not barred by R.C. 3704.036(K). The Director also contends that he has the

statutory authority pursuant to R.C. 3704.036(A) to take all necessary and appropriate action to enforce the requirements of the Clean Air Act.

{¶ 22} The purpose of the Title V program is to "generally clarify, in a single document, which requirements apply to a source and, thus, should enhance compliance with the requirements of the Act." 57 Fed.Reg. 32250 effective July 21, 1992. A single operating permit for an operating source enables "the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* That should result in increased source accountability and better enforcement. *Id.* See also Orlemann affidavit, at ¶ 4.

{¶ 23} CSC argues that *Gen. Elec. Lighting* determines this action. Neither party questions ERAC's finding that the terms and conditions are "requirements," because the permit demands that CSC comply with them. In *Gen. Elec. Lighting* at ¶ 22, this court defined a statute as substantive "if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation, or liabilities as to a past transaction, or creates a new right." *Id.*, citing *State v. Cook*, 83 Ohio St.3d 404, 411 (1998). ERAC found the requirements "substantive," because they create and define a duty imposed upon CSC and define the conditions under which the emission units may operate. Moreover, CSC is exposed to liability to federal penalties for failure to comply with the permit. Finally, ERAC determined that the requirements are new, following the reasoning in *Gen. Elec. Lighting*.

{¶ 24} In *Gen. Elec. Lighting*, this court found operational restrictions placed in General Electric Lighting's ("GEL") Title V operating permit were unreasonable and unlawful. In addition to other restrictions, the permit required GEL to operate its electrostatic precipitator ("ESP") on a glass-production furnace within a certain range. The ESP controls the emission of particulate matter from the glass-production furnace by using voltage and current to create electric fields in three groups of plates and needles. Each group of plates and needles is a "field" and collects particulate matter from flue gas as it passes through the plates and needles. See *Gen. Elec. Lighting* at ¶ 3. The ESP is an air pollution device designed to remove particulate matter from furnace gases and reduce the emissions of particulate matter into the air. See *Dayton Power & Light Co. v. Jones*, ERAC No. 574950 at n. 3 (Aug. 21, 2003). The ESP requirement was in a section of the

permit that was federally enforceable by the U.S. EPA and violations could result in daily penalties to GEL of approximately \$30,000. The Ohio EPA argued that the requirement was a more economical alternative to increasing the number of stack tests, each of which costs approximately \$10,000.

{¶ 25} This court noted that even though the Ohio EPA argued that the operational restrictions were "existing" under federal law because they assured compliance, neither party disputed ERAC's finding that these specific operational restrictions had not been imposed upon, nor held applicable, to GEL previously. Therefore, this court found that the operational restrictions were "new." *Gen. Elec. Lighting* at ¶ 20.

{¶ 26} This court looked at several definitions of substantive and applied them to R.C. 3704.036(K) and concluded that the operational restrictions were substantive. This court then determined that even if R.C. 3704.036(K) were ambiguous and subject to the rules of statutory construction, the conclusion would be the same, that the operational restrictions are substantive. This court then looked to several legal interpretations of the term "substantive" in contexts outside of Title V and concluded that the rationale underlying those decisions aided what the term substantive commonly is understood to mean. This court concluded that the operational restrictions contained in the GEL permit were not procedural or policy statements or interpretations of existing rules but imposed duties and obligations on GEL and created legal liabilities and therefore were substantive requirements, and being new and substantive requirements, violated R.C. 3704.026(K).

{¶ 27} Relying on the reasoning in *Appalachian Power Co. v. E.P.A.*, (C.A.D.C.2000), 208 F.3d 1015, this court reasoned that if monitoring restrictions were substantive changes, so were operational restrictions. However, the argument that the *Appalachian Power* case held that the Clean Air Act does not authorize state and local authorities to supplement inadequate monitoring requirements was expressly rejected in *Sierra Club v. E.P.A.*, 536 F.3d 673 (2008).

{¶ 28} This court then concluded that even if the operational restrictions were not new substantive requirements, they were unlawful and unreasonable because they do not assure compliance since the evidence did not have a correlation with emissions to such a degree that imposing such limitations would assure compliance.

{¶ 29} We find *Gen. Elec. Lighting* is not controlling because it only addresses whether the permit terms are substantive and in this case, the issue is really whether the permit terms are new. *Gen. Elec. Lighting* did not directly address "new." This court simply found that they were new because neither party in that case disputed ERAC's finding that these specific operational restrictions had not been previously imposed upon GEL in a permit. Therefore, this court found that the operational restrictions are "new."

{¶ 30} The Director argues that *Gen. Elec. Lighting* is not controlling in this case because it was fact specific and the permit terms had no direct correlation to the existing applicable requirements, whereas in this case, the challenged terms do have a direct correlation to existing applicable federal requirements. The Director contends the challenged terms are the RACM and PMMAP requirements and the Ohio EPA included the requirements in the operating permit. The Director argues there cannot be a stronger and more direct correlation between the permit terms and the existing RACM requirements because they are the restrictions that Buckeye Steel developed.

{¶ 31} The Director argues that the requirements were required to be part of the permit because they were applicable requirements. The term "applicable requirement" is defined in Ohio Adm.Code 3745-77-01(H)(1)-(12) and includes, "[a]ny standard or other requirement provided for in the applicable implementation plan approved or promulgated by the administrator through rulemaking under Title I of the act that implements the relevant requirements of the act, including any revisions to that plan promulgated in 40 CFR Part 52." See Ohio Adm.Code 3745-77-01(H)(1). All state rules that have been approved by the U.S. EPA and that are part of the SIP satisfy this definition. All requirements established pursuant to Section 504(b) of the Clean Air Act (42 U.S.C. 7661(c)) also satisfy this definition. Thus, the requirement that operating permits contain enforceable emission limitations and standards and "other conditions as are necessary to assure compliance with applicable requirements of this Act" would fit within this definition. 42 U.S.C. 7661(c)(a).

{¶ 32} RACM is an existing federal requirement that is a part of Ohio's SIP. See Ohio Adm.Code 3745-17-08(B). The Director argues that, as an existing federal requirement, the RACM requirements were properly included in the Title V operating permit. Ohio Adm.Code 3745-77-01(H). See *Sierra Club v. Johnson*, 436 F.3d 1269, 1273

(11th Cir.2006) (state permitting authorities must comply with EPA-approved state implementation plans when issuing Title V permits pursuant to 40 C.F.R. Part 70).

{¶ 33} All sources are required to implement RACM, even those that existed or received permits-to-install before RACM rules became law. *See* Ohio Adm.Code 3745-17-04(A). For those existing sources, there were two options: (1) certify in writing that they were already complying with RACM requirements to "minimize or eliminate visible particulate emissions of fugitive dust." Ohio Adm.Code 3745-17-08(B). Or option (2) is to submit either an application for an operating permit, or an application to modify an existing operating permit and identify RACM-level controls in the application. Ohio Adm.Code 3745-17-04(A)(1)(b).

{¶ 34} CSC did neither of the options. (Marusek affidavit, at ¶ 11-12, 17.) CSC did not meet the deadlines for certifying compliance with RACM requirements and did not meet deadlines for submitting operating permit applications. It did not comply with the RACM requirements within the time frame established by Ohio Adm.Code 3745-17-04. (Marusek affidavit, at ¶ 11-12, 17.) Ohio EPA ordered CSC to perform RACM studies for the emissions sources. (Marusek affidavit, at ¶ 18.) In 1990, 1991, and 1992, CSC submitted the RACM studies and the Ohio EPA included the RACM requirements from those studies in the Title V permit.

{¶ 35} Not all the requirements that CSC challenged were RACM; some were part of CSC's PMMAP, which was the result of some malfunctions and noncompliance from which the Director ordered Buckeye Steel to develop a PMMAP in 1989. (Marusek affidavit, at ¶ 25.) When the PM & MAP was approved, Buckeye Steel was informed that Ohio EPA expected "all air pollution control devices to be operated and maintained according to this approved PM&MAP. All future permits will refer to this approval as the facility plan to be followed." (Marusek affidavit, at ¶ 27.) The PMMAP requirements are to be specified in the terms and conditions of any permit issued for a source covered by the PMMAP. *See* Ohio Adm.Code 3745-16-06(D)(2). This requirement is a part of Ohio's SIP and also an existing applicable requirement pursuant to Ohio Adm.Code 3745-77-01(H)(1). Thus, the Director argues that any operational restrictions identified as part of RACM or PMMAP must be included in the Title V operating permit.

{¶ 36} However, R.C. 3704.036(K) prohibits the operational restrictions which are new substantive requirements beyond the federally enforceable requirements from the federally enforceable portion of the permit and requires that "[a] Title V permit shall specify the regulatory citation for federal requirements addressed in the permit and shall identify any difference in form as compared to the federally enforceable requirement on which it is based."

{¶ 37} In common usage, "new" means "having recently come into existence." Merriam-Webster's Collegiate Dictionary (11th ed.2003) 834. Black's Law Dictionary (9th ed.2009) 1140-41, defines "new" as "recently come into being." Neither party disputes that the terms and conditions arose from the RACM studies and PMMAP previously developed by Buckeye Steel and sent to the Ohio EPA. In *Gen. Elec. Lighting*, the operational restrictions were derived from documents previously submitted by the permit holder. Ohio EPA imposed the limitations for the ESP based upon historical emission test reports submitted by GEL to Ohio EPA that showed GEL was complying with the limitations that were subsequently imposed upon GEL in GEL's Title V permit. Here, following the *Gen. Elec. Lighting* reasoning, ERAC found the restrictions were new and substantive for purposes of R.C. 3704.036(K), even if they were derived from RACM and PMMAP.

{¶ 38} Attached to the Director's second memorandum in opposition was the affidavit of James Orlemann, the assistant chief of SIP Development and Enforcement for the Ohio EPA. Orlemann explained the relationship between RACM and BAT and how such requirements are considered when a Title V permit is issued. "[S]ource-specific RACM requirements are not defined by statute or rule, but are instead determined on a case-by-case basis." (Orlemann affidavit, at ¶ 14.) "General rules that provide for case-by-case source determinations of requirements that are carried through into permit terms are not unusual. Defining RACM follows a wide range of case-by-case permitting determinations under the Clean Air Act, including those for BAT, Maximum Achievable Control Technology (for 112j), Best Available Control Technology, and Lowest Achievable Emissions Rate determinations for major sources, as well as specific gap-filling requirements in Title V permits." (Orlemann affidavit, at ¶ 16.) Orlemann continued and stated: "In all of these cases, the rule requirements are general in nature. Source-specific

and/or facility-specific, case-by-case determinations must be made for the control requirements and emission limitations in order to fully implement the rules. Once those determinations have been made, the details are then specified in the terms and conditions of the applicable permits to make the determinations enforceable. Hence, although the rules are general in nature, detailed requirements, that are embodied within permit terms and conditions, flow from those general rules." (Orlemann affidavit, at ¶ 17.)

{¶ 39} These statements from Orlemann indicate that the operational restrictions in the Title V permit were not enforceable until they were placed in the Title V permit despite the existence of RACM, BAT, or the PMMAP. And the statements indicate that the rules are general and the restrictions are specific which violates R.C. 3704.036(K). Since the terms and conditions were not enforceable until they were placed in the Title V permit, they were new.

{¶ 40} Having found that the terms and conditions in the federally enforceable section of the Title V permit are new substantive requirements within the definition of R.C. 3704.036(K) and since 3704.036(K) provides that a Title V permit shall not impose new substantive requirements, we find that ERAC did not err in finding a violation of R.C. 3704.036, and granting CSC's motion for summary judgment. The Director's assignment of error is overruled.

Order affirmed.

BRYANT and DORRIAN, JJ., concur.
