

Appearing on behalf of the Secretary of the Department of Natural Resources and Environmental Control were Robert Zimmerman, Supervisor, Water Pollution Branch, Division of Environmental Control, and Alan Simpson, Environmental Engineer, Water Pollution Branch, Division of Environmental Control. June MacArtor, Deputy Attorney General, represented the Secretary.

Appearing on behalf of Doxsee Food Corporation was Michael Downes, a Vice President. Stephen Herrmann, Esquire, represented Doxsee Food Corporation.

SUMMARY OF THE EVIDENCE

All exhibits introduced into the records are incorporated herein.

Doxsee Food Corporation has been operating a mechanical clam processing facility in Lewes, Delaware for a number of years. Prior to December 14, 1982, the departmental permit under which it operated did not place any restrictions on the amount of oil and grease that could be discharged into the Broadkill River in Lewes. On December 14, 1982, Doxsee, after months of negotiations, was issued a permit by the Department which included, for the first time, a limitation on the amount of oil and grease discharged pursuant to the regulations adopted by the Department of Natural Resources and Environmental Control. That limitation was 10 mg/l for average daily concentration per month and 25 mg/l for maximum instantaneous concentration. Such limitation was consistent with §8.03(b) of the Regulations

Governing the Control of Water Pollution, issued by DNREC under which the limit on average oil and grease discharge was set at 10 mg/l.

Michael Downes, who is in charge of the waste disposal systems at Doxsee in Lewes and who testified on behalf of Doxsee, described the nature of the waste disposal system in the Lewes plant. Significantly, there was no evidence presented that Doxsee could not meet the permit limitations. It was further stated that the oil and grease in the discharge did not come from the clams that were processed but came from the equipment used in the process.

The witnesses from the Department testified that Doxsee Food Corporation did not meet the standards under §8.03(c) for getting an exemption from the 10 mg/l standard found in §8.03(b) of the regulations. They testified that the reason for their conclusion was that a prior mechanical clam processing facility in Lewes had easily met the 10 mg/l figure and that it is clear from the EPA manuals that figure was easily attainable with the equipment possessed by Doxsee. In addition, the witnesses testified that of the existing permits in Delaware with oil and grease limits in them, 26 were set at the 10 mg/l standard; three are being set at 10 mg/l upon reissuance; and one is set at 11 mg/l. The testimony further indicated that approaching the 5 mg/l standard, the accuracy of the test becomes questionable.

FINDINGS OF FACT AND CONCLUSION OF LAW

In this appeal, Doxsee has raised two issues. The first issue was the meaning of the term "practicable" found in the State's regulations. According to Doxsee, since the United States Environmental Protection Agency had found that the "best practicable technology" allows 556.9 mg/l of oil and grease to be discharged, then it follows that since the word that is used is the same, the State is required to adopt the federal standard as the definition for that term. The Board disagrees with this argument. A federal definition does not govern the meaning of a term in a state regulation. A state is free to adopt stricter definitions than the federal ones, especially where, as here, the State standards have pre-existed the federal standards.

Doxsee's second argument was that it could not meet these standards set by the Department. However, Doxsee did not adequately demonstrate that they could not meet the monthly average of 10 mg/l daily concentrate. They have supplied a series of figures to the Board showing the amount of oil and grease in their discharge. However, these were isolated, random samples and did not, in any way, show that a monthly average of 10 mg/l average daily concentrate could not be attained. Moreover, the source of the oil and grease was not from the product of the facility, i.e., processed clams,

but was from the machines used in the facility. Since, of the other 30 departmental permits, 26 are set at 10 mg/l, the Board was not persuaded, in the absence of evidence to the contrary, that Doxsee could not meet the standard, and that Doxsee should be treated any different than any other industry. In short, Doxsee did not demonstrate to the Board that it was not practicable for them to meet the permit limit.

Accordingly, notwithstanding that the Department failed to adequately show that the 10 mg/l level was a practicable level, because the burden of proof was on the appellant, the Doxsee Food Corporation, to prove their case on appeal as well as to show that they should be exempt from the regulation, the Board concluded that Doxsee has not shown reversible error in the Department's decision and, therefore, the decision of the Department must be affirmed.

However, because of the testimony of the Department regarding testing procedures, the Board is very concerned about the lack of precision in such testing procedures and the possibility that an inaccurate test might lead to an improper imposition of a fine. The Board wishes the Department would consider developing guidelines on the tolerances of the testing method in order to insure that only true violations of the standards are punished.

DECISION AND ORDER

IT IS HEREBY ORDERED that the decision of the Secretary in placing a limitation of 10 mg/l for average daily concentrate and 25 mg/l for maximum instantaneous concentrate on Doxsee Food Corporation for oil and grease discharge be affirmed.

Cynthia M. Greenwood

Clifton W. Hubbard 4/8/83

Ray K Woodward 4/11/83

Thomas J. Keas

Earl B. Tull

DATED: