BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

TACOMA NEWS TRIBUNE, Appellant,	)	PCHB No. 87-188
v.	)	
State of Washington, DEPARTMENT OF ECOLOGY, Respondent.	)	ORDER GRANTING APPELLANT'S SUMMARY JUDGMENT MOTION

This matter involves appellant Tacoma News Tribune's ("TNT") motion for summary judgment and dismissal, and respondent Department of Ecology's ("DOE") cross-motion for summary judgment, in PCHB No. 87-188. The motions address the issue of WAC 173-303-071-(3)'s exemption applicability. At the Board's request, the City of Tacoma filed an amicus brief.

Oral argument was held in Lacey, Washington on June 16, 1988. Present for the Board were: Judith A. Bendor (Presiding), Wick Dufford (Chairman), and Lawrence J. Faulk (Member). Attorney Thomas J. Newlon

of Perkins Coie, represented appellant TNT. Assistant Attorney General Jay J. Manning represented respondent DOE. City Attorney Robert Backstein represented amicus City of Tacoma.

We have considered the oral argument and the following filings:

1. Appellant TNT's Motion and Memorandum in Support with exhibits;
2. Respondent DOE's Cross Motion and Memorandum in Support with declarations and exhibits;
3. Appellant's Reply Memorandum with affidavit;
4. The City of Tacoma's Amicus Brief;
5. Appellant's Reply to Amicus;
6. The City of Tacoma's NPDES Permit No. WA-003708-7 and the City's Sewage Disposal Regulations (including the Industrial Wastewater Pretreatment Program).

From the foregoing filings, the Board determines that the following facts are not disputed:

UNDISPUTED FACTS

I

TNT publishes a daily newspaper at its plant in Tacoma, Washington. On October 26, 1986, a DOE employee conducted an inspection of the TNT plant. During the inspection he observed that several photographic processing machines were connected by hoses directly to the sanitary sewer system into which machines' wastes were being discharged. In the sewer system, the machines' wastes mixed

with other TNT domestic sewage. The combined wastes flowed by sewer line to the City of Tacoma publicly-owned primary sewage treatment plant ("treatment plant").

II

On November 26, 1986, DOE sent a letter to TNT stating that TNT is required to sample its' waste stream by December 31, 1986 and to provide a "waste stream designation" under Chapt. 173-303 WAC to DOE by January 31, 1987. The letter outlined other specific actions TNT had to undertake under the State hazardous waste regulations. An extension to submit designation test data until February 14, 1987 was subsequently granted.

III

On December 18, 1986 DOE returned to the plant and assisted in collecting waste samples. Test results sent to DOE on January 26, 1987 revealed that some of the wastes had the following chemical concentrations:

a. Photo lab fixer wastes contained 1510 parts per million ("ppm") of silver;

b. Loge fixer wastes contained 3,430 ppm silver; and

c. Loge developer wastes contained 500 ppm cadmium.

EP toxicity levels for extremely hazardous wastes are 500 ppm silver and 100 ppm cadmium.

Some time between December 18, 1986 and January 1, 1987 TNT

apparently stopped discharging its' photo processing wastes to the sanitary sewer. As of May 19, 1987, TNT had not provided all the designation test data outlined in the DOE November 1986 letter.

IV

On May 19, 1987, pursuant to RCW 70.105.080, DOE issued to TNT a Notice of Penalty Incurred and Due (No. DE 87-S146) for $6,000. The Notice alleged a violation of RCW 70.105.05, for failure inter alia to provide test data waste stream designation. TNT filed a timely appeal with this Board.

V

Prior to these events, on November 30, 1984, the United States Environmental Protection Agency had approved the City of Tacoma's Industrial Pretreatment Program, giving the City the authority to regulate industries which discharge to the City's sewer system.

The City's treatment plant's own discharges to waters of the state are regulated under its' NPDES permit's terms and conditions. The permit was issued by the State of Washington in 1985 pursuant to Chapt. 90.48 RCW and the federal Clean Water Act as amended, P.L. 95-217 (33 U.S.C. Sections 1251 et seq.).

At all times relevant, herein, the permit was in effect. The NPDES permit has a specific section, S.8.e., which deals with pretreatment, listing specific requirements at length. The permit requires the City to implement, enforce and obtain remedies for

discharges to its' system which fail to comply with the EPA approved Pretreatment Program and EPA promulgated General Pretreatment Regulations (40 C.F.R. Part 403). S.8.e.(3). The permittee is also required to annually file a report with DOE on its' pretreatment program, to include a list of industrial users inspected, those issued industrial waste discharge permits, and those industrial users not complying with federal, state, or local pretreatment standards. S.8.e.(5). Under the permit, DOE explicitly reserves the right to take corrective action against an industrial source and/or NPDES permittee. S.8.e.(3).

VI

The state regulation at issue, WAC 173-303-071, as it existed from October 1986 through May 1987, states in pertinent part:

> Excluded categories of waste.
> (1) Purpose. Certain categories of waste have been excluded from the requirements of chapter 173-303 WAC, except for WAC 173-303-050, because they generally are not dangerous waste, are regulated under other state and federal programs or are recycled in ways which do not threaten public health or the environment. WAC 173-303-071 describes these excluded categories of waste. [. . .]
> (3) Exclusions. The following categories of waste are excluded from the requirements of chatper 173-303 WAC, except for WAC 173-303-050;
> (a) Domestic sewage, and <u>any mixture of domestic sewage and other wastes</u> that passes through a sewer system to a publicy-owned treatment works (POTW) for treatment. "Domestic sewage" means untreated sanitary wastes that pass through a sewer system; [. . .]
> (Emphasis added)

In June 1987, WAC 173-303-071(3)(a) was amended to read as follows:

> (3) Exclusions. The following categories of waste are excluded from the requirements of chapter 173-303 WAC, except for WAC 173-303-050:
>
> (a) Domestic sewage, and any mixture of domestic sewage and other wastes that passes through a sewer system to a publicy-owned treatment works (POTW) for treatment. "Domestic sewage" means untreated sanitary wastes that pass through a sewer system. <u>This exclusion does not apply to the generation, treatment, recycling, or other management of dangerous wastes prior to discharge into the sanitary sewage system</u>. (Amendment underlined)

This amendment was <u>not</u> extant during the period in question.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these undisputed Facts the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over this appeal. Chapt 43.21B RCW

II

We conclude WAC 173-303-071(3), as extant between October 1986 and May 19, 1987, is clear and unambiguous. Under that regulation, TNT's photographic wastes were "other wastes" which were combined with domestic wastes which then flowed to the City's publicly-owned treatment works. Therefore, under the relevant regulation as it was in force then, these photographic wastes were exempt from regulation

under Chapt. 173-303 WAC.[1] Because we conclude the language is clear, we do not engage in statutory construction.

Furthermore, because the regulatory language is clear, we decline to engage in a hunt for legislative intent. The regulated community has a right to expect that clear regulations be enforced as written. To do otherwise in this instance would be to engage in statutory "leger de main" - sewer or otherwise.

While so concluding, we note that it is within DOE's authority to adopt a different regulation, if it choses to limit the exclusion, as it did in June 1987. In reaching this result, We conclude DOE was not left without enforcement alternatives. Chapt. 90.48 RCW and the City of Tacoma's NPDES permit provided alternate avenues for the Department.

III

DOE argues that to the extent WAC 173-303-071(3) conflicted in 1986-1987 with RCW 70.105.050, it was an invalid regulation and should be so declared by the Board. The Department further argues that the penalty was issued for a violation of RCW 70.105.050, and not the regulations, and therefore the penalty survives any invalidation of the regulation.

We conclude these arguments must fail. RCW 70.105.050 states in

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1 Neither party has contended that WAC 173-303-050 applies, therefore we do not address that issue.

pertinent part:

> (1) No person shall dispose of designated extremely hazardous wastes at any disposal site in the state other than the disposal site established and approved for such purpose under provisions of this chapter, except when such wastes are going to a processing facility which will result in the waste being reclaimed, treated, detoxified, neutralized, or otherwise processed to remove its harmful properties or characteristics.

The purpose of the Chapt. 173-303 RCW hazardous waste regulations is to implement the statute. The regulations excluded combined wastes from the regulations' reach, including the designation requirement. Since alternative enforcement avenues existed then, we cannot conclude that RCW 173-303-071(3)'s exemption was invalid. Moreover, the statute itself employes the word "designated" extremely hazardous wastes. Every word of a statute is to be given meaning, if possible; none is surplusage. Unless "designation" was required, RCW 70.105.050 was not contravened. These DOE contentions must, therefore, also fail.

IV

DOE further contends that since TNT's wastes were untreated, such action does not constitute "all known, available, and reasonable methods of treatment," and the discharges were therefore illegal under Chapts. 90.48 and 90.54 RCW. See RCW 90.48.010 and RCW 90.54.020(3)(b). We decline to rule on that argument, as the Notice of Penalty solely alleges a violation of Chapt. 70.105 RCW. See, City of Marysville v. Puget Sount Air Pollution Control Authority, 104 Wn.2d 115, 702P.2d 459(1985)

ORDER

The Tacoma News Tribune's Motion for Summary Judgment is GRANTED, and Notice of Penalty No. DE-S146 is VACATED.

DONE this 23rd day of June, 1988.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Presiding

WICK DUFFORD, Chairman

LAWRENCE J. FAULK, Member 6/23/88