

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 2001- 05 -CWP

In the Matter of the Petition of
**CARROLL BELCHER, PAUL BURGNER, ALFREDO FAJARDO,
MANUEL LOVIO, CRISTOBAL MARCOS, ROY CORY OVIEDO,
JORDAN SIPLON, ROLANDO UMALI, AND NICANOR VALDEJUEZA**
for review of a Determination by the
Division of Clean Water Programs,
State Water Resources Control Board
Regarding Denial of Operator-In-Training Certificates

BY THE BOARD:

Mr. Carroll Belcher, Mr. Paul Burgener, Mr. Alfredo Fajardo, Mr. Manuel Lovio, Mr. Cristobal Marcos, Mr. Roy Cory Oviedo, Mr. Jordan Siplon, Mr. Rolando Umali, and Mr. Nicanor Valdejeza (Appellants) seek review of the Division of Clean Water Programs' (Division) Final Division Decision (Decision) to deny their applications for wastewater treatment plant Operator-in-Training (OIT) certificates. The Division's Decision was based on a finding that at the time their OIT applications were submitted, Appellants were not performing the duties of an operator and therefore were not eligible for certification. After a review of the record and for the reasons set forth below, the State Water Resources Control Board (SWRCB or Board) finds that the Division's Decision was proper. (Cal. Code Regs., tit. 23, § 3715, subd. (a)(2).)

**I. STATUTORY, REGULATORY, PROCEDURAL
AND FACTUAL BACKGROUND**

Chapter 9, Division 7, of the Water Code governs the certification of wastewater treatment plant operators and supervisors. (Wat. Code, § 13625 et seq.) The Chapter mandates that “[s]upervisors and operators of wastewater treatment plants shall possess a certificate of appropriate grade in accordance with, and to the extent recommended by [an] advisory committee and required by, regulations adopted by the state board.” (*Id.* § 13627, subd. (a).) The Chapter further provides that the SWRCB “shall classify types of waste water treatment plants for the purpose of determining the levels of competence necessary to operate them” and

that the SWRCB shall adopt regulations setting forth the type of plants and the factors on which the SWRCB bases its classification. (*Id.* § 13626.) The SWRCB is also required to “develop and specify in its regulations the training necessary to qualify a supervisor or operator for certification for each type and class of plant.” (*Id.* § 13627, subd. (a).) The Chapter also directs the SWRCB to appoint an advisory committee made up of specified representatives of the wastewater treatment training and operation industry. (*Id.* § 13632.) The advisory committee is to assist the SWRCB in carrying out its responsibilities under the Chapter and to review and make recommendations on all proposed regulations and amendments to regulations prior to adoption. (*Id.* §§ 13631, 13633.)

Pursuant to authority granted by statute, the SWRCB promulgated regulations governing the certification of plant operators and supervisors (Regulations). (Wat. Code, § 13626.) The regulations provide in relevant part that “wastewater treatment plant” means “any facility owned by a state, local, or federal agency and used in the treatment or reclamation of sewage and industrial wastes.” (Cal. Code Regs., tit. 23, § 3671, subd. (y).)

The regulations set forth criteria for classification of wastewater treatment plants. Using the following criteria, wastewater treatment plants are assigned a class number of I-V:

<i>Class</i>	<i>Treatment Process</i>	<i>Design Flow (in million gallons per day)</i>
I	Pond	All
	Primary	1.0 or less
II	Primary	Greater than 1.0 through 5.0
	Biofiltration	1.0 or less
	Extended Aeration	All
III	Primary	Greater than 5.0 through 20.0
	Biofiltration	Greater than 1.0 through 10.0
	Activated Sludge.....	5.0 or less
	Tertiary	1.0 or less

<i>Class</i>	<i>Treatment Process</i>	<i>Design Flow (in million gallons per day)</i>
IV	Primary	Greater than 20.0
	Biofiltration	Greater than 10.0 through 30.0
	Activated Sludge.....	Greater than 5.0 through 20.0
	Tertiary	Greater than 1.0 through 10.0
V	Biofiltration	Greater than 30.0
	Activated Sludge.....	Greater than 20.0
	Tertiary	Greater than 10.0

(Cal. Code. Regs., tit. 23, § 3675.)

The plant classification number is used to establish the grade of wastewater treatment plant operator certificate that must be held by supervisors and operators of each class of plant. (Cal. Code. Regs., tit. 23, § 3680.)

The regulations set forth the experience and education necessary to qualify for various grades of certification. With the exception of an OIT certificate, applicants for each grade of certificate are required to have a specified number of years of experience “performing the functions of a wastewater treatment plant operator” at any grade level or a lesser number of years performing the functions of a wastewater treatment plant operator while certified as an operator at a grade level immediately below the grade being sought. (Cal. Code Regs., tit. 23, § 3683.) In addition, applicants may be credited with one year of qualifying experience if they have had two or more years of full-time experience in the operation of a water treatment plant regulated by the California Department of Health Services or by a government agency in another state and while in possession of a valid water treatment plant operator certificate, if: (1) the water treatment plant where the experience was gained uses two or more of the following processes: coagulation, sedimentation, aeration, filtration, oxidation, or disinfection and (2) at the time of their application they have had one year of full-time experience in the operation of a wastewater treatment plant. (*Id.* § 3684.)

An OIT certificate may be issued to a person who is acting in the capacity of a certified operator if the OIT is under the direct supervision of a certified operator of the same or higher grade and is performing the duties of the grade of operator for which the certificate was issued. (Cal. Code Regs., tit 23, § 3707.) The regulations provide that “operator” means “any

person operating a wastewater treatment plant and who occupies a position and performs duties for which the Office of Operator Certification requires an operator certificate.” (*Id.* § 3671, subd. (p).) “Operates” means “the performance of day-to-day activities primarily consisting of the control of any process which may affect the quality of the discharge of a wastewater treatment plant.” (*Id.* § 3671, subd. (o).)

This petition arises from a decision by the Office of Operator Certification to reject Appellants’ applications for wastewater treatment plant OIT certificates on the basis that Appellants were not performing the duties of the grade of operator for which the certificate would be issued.

At the time of their applications for OIT certificates Appellants were employed by the City of Los Angeles (City) as Energy Recovery Facility Operators (ERF Operators) at an Energy Recovery Facility (ERF) associated with the Hyperion Wastewater Treatment Plant. The City’s Hyperion Wastewater Treatment Plant is located south of the Los Angeles International Airport and has been classified by the SWRCB as a Class V Facility. In addition to the traditional wastewater processes (primary (physical) treatment, secondary (biological) treatment, sludge digestion, sludge dewatering), Hyperion has both a Cryogenic Facility and an ERF. The Cryogenic Facility separates oxygen from air, and then transmits the pure oxygen to the activated sludge process for use by microorganisms treating the waste. The ERF provides steam to heat the anaerobic digesters and was originally designed to produce power for much of the plant equipment. An agreement between the City and Operating Engineers Local 501 (representing both ERF Operators and Wastewater Treatment Plant Operators) prevents the City from rotating Wastewater Treatment Plant Operators through the ERF and from rotating ERF Operators through the wastewater treatment plant facilities.

Since the startup of the ERF in the 1980s it has been operated by persons who have not been certified as Wastewater Treatment Plant Operators. ERF Operators in the past have told the Division that they are not Wastewater Treatment Plant Operators, but are City certified steam boiler operators.¹ In November 1997 a shift superintendent at the Hyperion Wastewater Treatment Plant returned four OIT certificates issued by the Division. The shift

¹ See memos from the City Cryogenic Supervisor to Operation Plant Manager, dated January 19, 1995 and from Ric Vardel, Shift Superintendent II, Hyperion Treatment Plant to James Giannopoulos, Supervising Engineer, SWRCB dated December 18, 1992.

superintendent returned the certificates because the persons to whom they were issued were transferred to the ERF and they were no longer "working in wastewater operations."²

In an effort to consolidate facilities and reduce costs, the City has placed the ERF in a nonoperational "standby mode." Staffing at the facility has been reduced from 40 to 16.³ ERF Operators have been given an opportunity by the City to become "transitional workers" by moving into the wastewater treatment portion of the Hyperion facility where they would rotate through the plant to learn the treatment plant process and become certified wastewater treatment plant operators. For those ERF Operators who chose to become "transitional workers," the Division issued OIT certificates at the time those Operators began working in the new positions. "Transitional workers" lost whatever seniority they had with the City and began accruing seniority from the time they started in the new positions. For this reason, some of the ERF Operators who were concerned about possible future layoffs chose not to become transitional workers and retained their positions in the ERF.

At the time of their applications for OIT positions, Appellants (who remained in the ERF) performed duties consisting of operation and maintenance of pumps, compressors, gas turbine engines, diesel electric generators, and boilers that produced steam used to heat the digesters. The steam was transmitted from the ERF to the anaerobic digester facility where a certified wastewater treatment plant operator monitored and managed heat application to the digesters. Generator units operated by the ERF Operators also produced power for the plant equipment. Because the ERF was in standby operation, digester gas from the wastewater treatment plant portion of the Hyperion facility was conveyed to an adjacent City of Los Angeles Department of Water and Power generation facility that uses the gas to produce electrical energy. In return for the gas produced electrical energy, the Hyperion Wastewater Treatment Plant received electricity at a reduced rate.

On February 9, 1998, the Division of Clean Water Programs received a request from the Hyperion Acting Wastewater Treatment Plant Manager that the Division issue ten OIT

² See letter of November 5, 1997 to Mr. Cleo Hartman from Hiddo D. Netto.

³ On February 12, 2000, the City consolidated the ERF with the Hyperion Wastewater Treatment Plant. The remaining ERF Operators have become "transitional" workers and now rotate throughout the plant, operating all wastewater treatment plant facilities. Since that time, the ERF Operators have been eligible for OIT certificates. The issues raised by the petition have not, however, become moot since the ERF Operators are still seeking credit towards certification for their time working at the ERF.

wastewater treatment plant operator certificates for the ERF Operators who remained in the ERF. On May 20, 1998, the Office of Operator Certification (OOC) responded by asking for additional information regarding the plant organization, complete job descriptions for the ERF Operators, and written assurances that the ERF Operators would be supervised by certified operators of appropriate grade. The Division's response also stated that the OOC would expect the ERF Operators to be able to move freely from one treatment plant process facility to another within the organizational structure if they were issued OIT certificates.⁴ On August 26, 1998, the Plant Manager responded, asserting that because the proper operation of the ERF was essential to regulatory compliance, even operators confined to the ERF should be certified wastewater treatment plant operators.⁵ In September of 1998, after reviewing the information submitted, making site visits, and undertaking discussions with various Hyperion plant personnel, the OOC notified the plant management and the ERF Operators who were seeking OIT certificates that, because the ERF Operators were not employed in the operation of a wastewater treatment plant, no OIT certificates could be issued.

Appellants appealed the Office of Operator Certification decision to the Chief of the Division of Clean Water Programs (Division Chief) on or about October 21, 1998. The Division Chief issued a Final Division Decision on January 8, 1999, upholding the Office of Operator Certification decision. Appellants appealed the Final Division Decision to the SWRCB on or about February 4, 1999.

Because the appeal raised issues related to the interpretation of regulations that were reviewed by the advisory committee prior to adoption, the Division asked the advisory committee to review the issue at its next scheduled meeting on July 7, 1999. The committee considered whether the work being performed by the ERF Operators where those operators were not assigned to perform any functions of a wastewater treatment plant operator should be accepted as qualifying experience towards wastewater treatment plant operator certification. The Advisory Committee members agreed that where the ERF Operators were working solely in an

⁴ The Office of Operator Certification traditionally has not excluded from qualifying experience time spent by wastewater treatment plant operators for minor maintenance, lab, or other activities where those activities are a very small part of the operator's duties and where a major part of the operator's time is spent operating the wastewater treatment plant.

⁵ See letter from Varouj Abkian to Donna Barnickol dated August 26, 1998.

ERF and did not rotate through other facilities at the plant, those operators should not be given qualifying time towards wastewater treatment plant operator certification.⁶

Two of the advisory committee members who were employed at plants that had separate Energy Recovery Facilities agreed to provide the Division with written statements concerning the policy of their respective agencies with regard to ERF Operators. The written statements were dated October 1, 1999 and December 2, 1999.⁷ Both indicated that where the sole function of an operator was to operate an ERF, the operator should not be required to have a wastewater treatment plant operator certificate, nor should the operator gain qualifying experience toward wastewater treatment plant operator certification.

II. CONTENTIONS AND FINDINGS

1. Contention: In their petition, Appellants request a formal hearing to present evidence regarding the Division's decision to reject their OIT certificate applications.

Findings: Because the Division and Appellants have reached agreement on the material facts in this matter, an evidentiary hearing is unwarranted.

All adjudicative proceedings before the Board are governed by Chapter 4.5 of the Administrative Procedure Act (APA) (commencing with section 11400 of the Government Code). (Cal. Code Regs., tit. 23, § 648 subd. (b).) Subdivision (b) of section 11445.20 of the APA provides that an oral evidentiary hearing is not required if there are no disputed issues of material fact. (*See Sierra Ass'n for the Environment v. FERC* (9th Cir. 1984) 744 F.2d 661, 664.). In the absence of any disputed issue of material fact, the Board may resolve a petition as a matter of law.

On March 9, 2000, the Division sent Appellants a draft factual statement, anticipating that, if agreed upon, the statement would be made part of this Order.⁸ The Division requested that Appellants review the draft statement and submit any suggestions or corrections, in writing, within 20 days. Appellants offered no suggested revisions or corrections to the draft statement, therefore an evidentiary hearing is unnecessary.

⁶ See minutes of July 7, 1999 meeting.

⁷ See letters from Philip Friess and Wendell Kido.

⁸ See letters from Dorothy Jones to Appellants dated March 9, 2000 and draft fact statement. With only minor, nonsubstantive changes, Ms. Jones' fact statement has been incorporated into this Order.

2. Contention: Appellants contend that because they are employed at a Municipal Wastewater Treatment Facility, are under the direct supervision of a certified operator, and perform the "operation" of a wastewater treatment plant, they should be issued OIT certificates.

Findings: The Board finds that even though Appellants are employed at a Municipal Wastewater Treatment Facility and work under the direct supervision of a certified operator, the Division properly determined that Appellants did not perform duties for which certification is required at the time of their OIT applications and therefore were not eligible for certification.

The regulations provide that an agency may employ a person to act in the capacity of a certified operator provided the person is certified as an operator-in-training, is under the direct supervision of a certified operator of the same or higher grade, and is performing the duties of the grade of operator for which the certificate was issued. (Cal. Code Regs., tit 23, § 3707.) In order to perform the duties of an operator a person must be "operating" the plant by performing day-to-day activities primarily consisting of the *control of any process which may affect the quality of the discharge of a wastewater treatment plant*. [Emphasis added.] (Cal. Code Regs., tit 23, § 3671, subd. (o).) While the term "control" is given no specific definition in either statute or regulation, it is commonly defined as "to exercise restraining or directing influence over." (Merriam-Webster's Collegiate Dictionary (10th ed. 1995) p. 252.) A "process" includes any wastewater treatment process which modifies characteristics such as biological or chemical oxygen demand, total suspended solids, or pH, usually for the purpose of meeting effluent guidelines and standards. (See 40 C.F.R. § 61.61., subd. (k); In the absence of any definition of a term used in state law, it is appropriate to look to federal law for guidance. *California Public Utilities Comm'n v. California Energy Resources Conservation* (1984) 150 Cal.App.3d 437 [197 Cal.Rptr. 866].)

At the time of their applications, Appellants' duties included the operation and maintenance of pumps, compressors, gas turbine engines, diesel electric generators, and boilers that produced steam used to heat Hyperion's anaerobic digesters. Equipment units operated by Appellants also provided power for various plant equipment. Appellants contend in their petition that their job of producing heat for the digesters is essential to the Plant's maintaining regulatory compliance and thus deserving of certification. The regulations, however, do not condition the issuance of an OIT certificate on the level of importance of an applicant's duties. Rather, to

determine whether an OIT certificate should be issued, the OOC must consider, among other things, whether the applicant will be "operating" the plant under the direct supervision of a certified operator of the same or higher grade. (Cal. Code Regs., tit. 23, § 3707.) At the time of their applications, Appellants did not operate the plant by controlling a wastewater treatment process. While Appellants may have been providing indispensable heat to the digesters, they were not controlling or monitoring the application of that heat. As Appellants' note in their petition, the heat transported to the digesters was controlled and managed by a certified Wastewater Treatment Operator. It is the regulation of the heat application to the digesters that constitutes the "control of a process" and thus the "operation" of the Plant. (*Id.*, § 3671, subd. (o).) Appellants, in their capacity as ERF Operators confined to the ERF, do not operate any treatment process at the Hyperion Plant for which certification is appropriate.

The Division properly denied Appellants' applications for OIT certificates based on a finding that, at the time their OIT applications were submitted, Appellants were not performing duties for which certification is appropriate.

3. Contention: Appellants contend that their duties as ERF Operators parallel those of Hyperion's Cryogenic Facility Operators (Cryogenic Operators), and maintain that since the OOC issued OIT certificates to Cryogenic Operators in 1996, they should also be issued OIT certificates.

Findings: It is not necessary for the Board to compare the duties of Hyperion's ERF Operators with the duties of its Cryogenic Operators in order to resolve the issues raised in this petition. As discussed above, the Division correctly determined that Appellants were not performing duties for which certification is required, and therefore were not eligible for certification. If the duties of the Cryogenic Operators were parallel, in that they did not perform duties for which certification is required, that would indicate that it was error to issue certificates to the Cryogenic Operators, not that certificates should be issued to Appellants. The Appellants did not challenge the issuance of OIT certificates to the Cryogenic Operators at the time those certificates were issued, and do not ask that we reopen the issue now.

Issuance of certificates to the Cryogenic Operators did not establish a precedent that may be relied on by Appellants. An agency's decision cannot be expressly relied on as precedent unless the agency has designated the decision as a precedent decision. (Gov. Code § 11425.60, subd. (a).) The Board has designated as precedent only those orders and decisions

that were adopted by the Board itself, not those actions taken by staff pursuant to delegated authority. (SWRCB Order WR 96-1 at 17, fn. 11.) Of course, the Board may consider any legal analysis or policy arguments made in connection with prior actions, to the extent they are persuasive, so long as the Board does not give precedential effect to decisions that have not been designated as precedential. But Appellants do not identify such analysis or policy arguments, and appear to rely solely on the fact that certificates were issued in a situation where, Appellants contend, the facts were parallel to those before us now. Whether or not Appellants are correct about the facts relating to the Cryogenic Operators, we find nothing in that action that provides a persuasive basis for interpreting the applicable regulations to allow issuance of certificates to the Appellants.

4. Contention: Appellants contend that the Division has unfairly discriminated against them by denying their OIT applications based on their job classification as ERF Operators rather than the merits of their job duties. Appellants maintain that they perform duties similar to those of Hyperion's Cryogenic operators, and reason that since the OOC issued OIT certificates to Cryogenic Operators in 1996, it has no grounds for now denying their OIT applications. Appellants also point out that OIT certificates have been issued to operators of a similar Energy Recovery Facility at Los Angeles County Sanitation District's Joint Water Pollution Control Plant (JWPC Plant). Appellants further speculate that the OOC's decision to deny their OIT applications was influenced by some of Hyperion's Wastewater Treatment Operators who have openly lobbied against the issuance of OIT certificates to Appellants.

Findings: Appellants' contentions are without merit. Nothing in the record supports a finding that the denial of Appellant's OIT applications was based on anything other than Appellants' duties in accordance with criteria set forth in the regulations. Appellants have failed to allege and the record is devoid of any evidence that the OOC's denial of OIT applications was in any way invidiously discriminatory.

In order to sustain their claim of discrimination, Appellants must show that they have been treated differently than other similarly situated individuals, and that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure. (*See Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 297 [124 Cal.Rptr. 204].)

In their petition, Appellants repeatedly contend that the OOC denied their OIT applications based solely on their job classifications as ERF Operators rather than the merits of their duties.⁹ However, nothing in the record supports this contention. In fact, the record plainly shows that the OOC considered Appellants' job duties very carefully before deciding to deny certification. Similarly, there is no support for Appellants' allegation that the OOC was influenced by Hyperion's Wastewater Treatment Operators who lobbied against the issuance of OIT certificates to Appellants. The record appropriately contains comment letters from interested persons. However, there is nothing to indicate that these submittals unduly influenced the OOC's decision. In any event, consideration of these submittals would have no impact on whether the ultimate action of the OOC was discriminatory. The record clearly shows that the OOC's decision was correctly directed by a consideration of Appellants' duties as ERF Operators.

Appellants' contention that they perform duties analogous to Hyperion's Cryogenic Operators, even if true, does not establish discrimination. As previously discussed, the issue of whether ERF Operators perform duties similar to Cryogenic Operators does not need to be reached in order to resolve the issues raised in this petition. However, even if Appellants' contention that they perform duties analogous to Hyperion's Cryogenic Operators is accepted as true, that alone does not support a finding of discrimination. Rather, that assumption would only suggest that the OOC erred when it issued OITs to Cryogenic Operators in 1996. There is no evidence of any unlawful pattern or practice by the OOC of knowingly issuing certificates to otherwise ineligible applicants, nor is there evidence of any kind of orchestrated campaign of vindictiveness, sheer malice or spite against Appellants. Without more, a single erroneous application of the regulations by the OOC, conferring a benefit to one, does not constitute a denial of equal protection to those similarly situated who are denied the same. (*See Sunday Lake Iron Co. v. Wakefield* (1918) 247 U.S. 350 (mere errors of judgment by officials will not support a claim of discrimination violative of constitutional guarantees of equality).)

Finally, Appellants' comparison between themselves and Operators of the Co-Generation Facility at the JWPC Plant is misleading. While both groups operate Energy Recovery Facilities, Appellants are not similarly situated to the Co-Generation Operators at the

⁹ Appellants do not allege that the OOC's decision to deny them OIT certificates was based on any invidious criterion.

JWPC Plant because JWPC's Co-Generation Operators are not confined to the Co-Generation Facility, but rotate throughout the plant and thus have control over, and therefore "operate" various wastewater treatment processes throughout the plant.¹⁰ Because Appellants are not similarly situated to the JWPC's Co-Generation Operators, their claim of discrimination on this basis fails.

III. SUMMARY AND CONCLUSION

After a review of the record and consideration of the issues raised by the Appellants, and for the reasons previously discussed, we conclude as follows:

1. Because the Division and Appellants reached agreement on the material facts in this matter, an evidentiary hearing is unwarranted.
2. The Division properly denied Appellants' OIT certificate applications because at the time of their OIT applications, Appellants did not perform the duties of a certified wastewater treatment plant operator.
3. It is not necessary for the Board to compare the duties of Hyperion's ERF Operators with the duties of its Cryogenic Operators in order to resolve the issues raised in this petition.
4. Appellants have failed to demonstrate that the Division's denial of OIT certificates was based on any invidious discrimination.

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¹⁰ In their petition, Appellants admit that Operators of the Co-Generation Facility at the JWPC Plant rotate throughout the plant to maintain familiarity with the other traditional wastewater processes.

IV. ORDER

IT IS HEREBY ORDERED THAT Appellants applications for OIT certification are denied.

CERTIFICATION

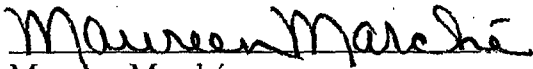
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on March 7, 2001.

AYE: Arthur G. Baggett, Jr.
John W. Brown
Peter S. Silva

NO: None

ABSENT: None

ABSTAIN: Richard Katz


Maureen Marché
Administrative Assistant to the Board