Mailed:
September 22, 2003

Paper No. 12
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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Sewage Aeration Systems, Inc.

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Serial No. 76/254,783

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Christine Lebron Dykeman and Edmund J. Sease of McKee, Voorhees & Sease, P.L.C. for Sewage Aeration Systems, Inc.

Tricia McDermott Thompkins, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).[1]

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Before Walters, Drost and Rogers,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Sewage Aeration Systems, Inc. has applied to register WET COMBUSTION as a mark on the Principal Register for goods identified as "sewage treatment aeration units to enhance decomposition of waste water sludge," in International Class 11. The application is based on applicant's allegation that it has a bona fide intention to

[1] William J. Sauers issued the initial and final refusals. Ms. Thompkins issued a summary denial of applicant's request for reconsideration and briefed the appeal.

use the designation on or in connection with the identified goods in commerce.

The examining attorney refused registration under Section 2(e)(1) of the Lanham Act, 15 U.S.C. §1052(e)(1), on the ground that the designation is merely descriptive of the identified goods. When the refusal was made final, applicant appealed and requested reconsideration. The examining attorney denied the request for reconsideration without comment on applicant's arguments yet used the denial as a means to introduce additional evidence. Applicant and the examining attorney have filed briefs, but applicant did not request an oral argument.

The question whether a term is merely descriptive is determined not in the abstract, but in relation to the goods for which registration is sought, the context in which the term will be used, on or in connection with those goods and the possible significance that the term would have to the average purchaser or user of the goods. *See* In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979) and In re Recovery, 196 USPQ 830, 831 (TTAB 1977). Moreover, in considering the nature of the identified goods, we consider the full range of products that can be encompassed by the identification. In re Cryomedical Sciences Inc., 32 USPQ2d 1377 (TTAB 1994).

A mark is considered merely descriptive of goods, within the meaning of Section 2(e)(1) of the Lanham Act, if it immediately describes an ingredient, quality, characteristic or feature thereof, or if it directly conveys information regarding the nature, function, purpose or use of the goods. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-218 (CCPA 1978); *see also* In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). It is not necessary that a term describe all of the properties or functions of the goods in order for it to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. In re Venture Lending Associates, 226 USPQ 285 (TTAB 1985). Finally, to be refused as descriptive the term need not describe all products that could be encompassed by the identification; it is sufficient if it describes any product that would be within the scope of the identification. *Cryomedical Sciences, supra*, 32 USPQ2d at 1379 (TTAB 1994) (With an application based on intent-to-use and where the exact nature of goods was not finally determined, the designation SMARTPROBE was refused registration because it would have descriptive significance if used on or in connection with certain types of goods within the scope of the identification).

In this case, the original examining attorney introduced into the record excerpts from various patents, an excerpt from the Sanitary Engineering and Public Health Handbook[2], the "hit list" or results pages from a search of the Internet for "wet combustion sewage," and an excerpt from what appears to be a World Wide Web listing of terms used by the World Intellectual Property Organization (WIPO) in patent documents. The second examining attorney, when denying applicant's request for reconsideration, attached to her order article excerpts retrieved from the NEXIS database, from such publications as "Hydrocarbon Processing," a "Public Works" journal, an apparent United Kingdom-based publication called "Chemistry and Industry," and "Chemical Week." She also attached three documents of unexplained origin, apparently formatted by the examining attorney into fixed image [i.e., jpeg] documents. Applicant, in its brief, refers to one of these as a reprint of a page from its web site. Thus, we have considered that item because of applicant's acknowledgment of it; but the other two image documents are of little probative value in the absence of an explanation by the examining attorney of their source. Applicant, in response

[2] The patent and handbook excerpts were retrieved from the NEXIS database.

to a request by the examining attorney for information detailing the nature of applicant's product, explained that it did not have any such material and that applicant was not aware of any competing goods of the same type. However, applicant submitted "a brochure for another type of sewage treatment product known as the Aerob-a-Jet™, sold by applicant." Response to initial office action, p. 3.

In this case, the record is clear that "wet combustion," however incongruous it might appear to be to a layperson, is a term of art in certain industries. As applicant notes, certain patent excerpts and the WIPO excerpt reveal that it refers to a process used in the papermaking industry.[3] One of the NEXIS article excerpts refers to use of a wet combustion process in oil recovery; another refers to use of the process to remove mercury from liquid hydrocarbons. The majority of the patent and NEXIS article excerpts, as applicant acknowledges, refer to a wet combustion process used on sludge that employs high temperatures and high pressures. The lengthy excerpt from the Sanitary Engineering and Public Health Handbook, discussing conditioning methods for treatment of sludge, to facilitate separation of water and organic or inorganic

[3] Another patent refers to a process used in conjunction with treatment of combustion exhaust gas, but it appears to be a

solids, aptly explains the high temperature, high pressure process:

> The wet air oxidation process has been commercialized and patented as the ZIMPRO process. This process has also been known as wet incineration, wet combustion, and wet oxidation processes. Wet air oxidation does not require preliminary dewatering or drying as required by conventional combustion processes. Water can be present up to 99 percent in this process, whereas in conventional combustion it must be reduced to much lower levels to make incineration practical.

Applicant, while acknowledging that "wet combustion" is a term of art in various industries or when used in conjunction with certain processes or products, denies that the term has any descriptive significance when used in conjunction with applicant's product. Specifically, applicant argues that its product does not use percloric acid, as does the process utilized to remove mercury from liquid hydrocarbons; and its product does not use high pressure or high temperatures, as other sludge treatment products/processes do. Applicant asserts that its product is "a device that may be fitted into any conventional septic tank" and uses a motor to draw "tiny air bubbles … into the tank waste water," with the oxygen from the air providing support for aerobic bacteria that promotes the

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reference not to a wet combustion process used on exhaust gas but, rather, to a wet process used on combustion exhaust gas.

breakdown of sludge and odor causing elements in waste water. Brief, p. 4.

The precision of this description of applicant's product is, however, a bit mystifying, as it aptly describes the Aerob-A-Jet product for which applicant submitted a brochure. However, when applicant submitted the brochure, it said this was for a different product than that which it intends to market under the WET COMBUSTION designation. Accordingly, we do not find applicant's description of its product and its AEROB-A-JET brochure very probative in establishing that its "sewage treatment aeration units to enhance decomposition of waste water sludge" are markedly different from products of others alluded to by the evidence of record and that utilize the type of "wet combustion" process also referred to as the "wet incineration" or "wet oxidation" process.[4]

In addition, we note that the AEROB-A-JET products appear to be units that are added to a septic tank or waste lagoon (for an agricultural or industrial application) and do not involve movement of the sewage or wastewater into the AEROB-A-JET units so much as the units act on the sewage or wastewater at collection points. It does not

[4] In its response to the examining attorney's initial office action, applicant admitted that its product involves oxidation.

appear that the high pressure, high temperature process products or systems discussed in the various items of evidence in the record could operate in the same manner as the AEROB-A-JET products and, instead, require movement of the sewage or wastewater through a tank or unit that is constructed to provide the necessary treatment as the aqueous material flows through the unit.

While it does not appear that the AEROB-A-JET units are capable of effecting a high pressure, high temperature "wet combustion" process of the type alluded to in the evidence, we do not read the identification of goods in applicant's application as necessarily restricted to the AEROB-A-JET type of unit. "Sewage treatment aeration units" is a phrase that can encompass both equipment fitted to an existing septic tank or wastewater lagoon as well as aeration tanks that can be utilized in sewage or wastewater treatment systems.[5]

[5] We take judicial notice of the following:

aeration tank [engineering] A fluid-holding tank with provisions to aerate its contents by bubbling air or another gas through the liquid or by spraying the liquid into the air.
McGraw-Hill Dictionary of Engineering 10 (1997)
aeration Bringing air into contact with a fluid by bubbling through or by agitation. Compressed air, providing oxygen to promote bacterial action, is blown into a reagent tank in the treatment of sewage. …
Science & Technology Encyclopedia 8 (2000).

In short, while applicant views the product it intends to market under the WET COMBUSTION designation as distinctly different in type from products that utilize compressed air and high heat to react with wastewater as it passes through a tank or processing unit, we view applicant's identification as encompassing tanks or units of this type.

Applicant argues that the designation WET COMBUSTION is a "tongue-in-cheek" reference to a process that does not involve combustion and individuals without knowledge of applicant's sewage treatment aeration units would have difficulty determining the nature of the goods merely by viewing the mark. Of course, as already noted, the designation is not to be considered in the abstract but in conjunction with the identified goods. For prospective purchasers of such a sophisticated product, WET COMBUSTION will not be viewed as a tongue-in-cheek designation for a process that does not involve combustion but, rather, as a term of art with a readily understood meaning.

The examining attorney must establish a reasonable predicate for the refusal, based on substantial evidence, i.e., more than a scintilla of evidence. In re Pacer Technology, __ F.3d __, 67 USPQ2d 1629 (Fed. Cir. 2003). In this case, we find that the examining attorney has

established a prima facie case for refusal. Applicant has not overcome this showing.

Decision: The refusal of registration under Section 2(e)(1) is affirmed.