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**Datasheet for the decision  
of 14 May 2025**

**Case Number:** T 2025/23 - 3.3.05

**Application Number:** 16182448.7

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**Language of the proceedings:** EN

**Title of invention:**

WASTE ACTIVATED SLUDGE PHOSPHORUS AND MAGNESIUM STRIPPING  
PROCESS

**Patent Proprietor:**

Clean Water Services

**Opponent:**

August Debouzy

**Headword:**

WAS PHOSPHORUS AND MAGNESIUM STRIPPING/Clean Water Services

**Relevant legal provisions:**

EPC Art. 69, 76(1)

EPC R. 106

RPBA 2020 Art. 13(2)

**Keyword:**

Divisional application - added subject-matter (yes) - subject-matter extends beyond content of earlier application (yes)

Obligation to raise objections - objection raised (yes)

Amendment after summons - exceptional circumstances (no)

**Decisions cited:**

T 2271/17, T 0005/14, T 0493/09, T 1582/08, T 1408/04,

T 0190/99

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

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**Case Number:** T 2025/23 - 3.3.05

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.05**  
**of 14 May 2025**

**Appellant:**

(Opponent)

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**Representative:**

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**Decision under appeal:**

**Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
17 October 2023 concerning maintenance of the  
European Patent No. 3156372 in amended form.**

**Composition of the Board:**

**Chairman**

E. Bendl

**Members:**

J. Roider

R. Winkelhofer

## Summary of Facts and Submissions

- I. The appeal by the opponent lies from the interlocutory decision of the opposition division to maintain European patent EP 3 156 372 B1 on the basis of what was then auxiliary request 1, the present main request.
- II. In a communication under Article 15(1) RPBA of 14 January 2025, the board expressed the preliminary opinion that the patent should be revoked, *inter alia* because the main request and auxiliary requests 1 to 3, as filed with the reply to the appeal, did not meet the requirements of Article 76(1) EPC.
- III. By a submission of 14 February 2025, the patent proprietor (respondent) requested postponement of the oral proceedings, in view of this preliminary opinion and the (then-)pending referral under G 1/24, until a decision of the Enlarged Board of Appeal (EBoA) had been handed down.
- IV. In a communication of 20 February 2025, the board informed the parties that there was no reason to grant this request.
- V. By a submission of 24 March 2025, the respondent filed auxiliary requests 4 to 7.
- VI. Claim 1 of the main request reads as follows:

*"1. A method of treating a first mixture of waste solids and microorganisms containing phosphorous [sic] and magnesium comprising the steps of:  
i) inducing the mixture to release phosphorous and magnesium from the microorganisms;*

*ii) thickening the mixture and tapping off the released phosphorous and magnesium to produce a phosphorous and magnesium-rich liquid and a phosphorous and magnesium reduced treated mixture;*  
*iii) placing the phosphorous and magnesium reduced treated mixture in an anaerobic digester to produce a high ammonia mixture;*  
*iv) dewatering the high-ammonia mixture to produce a high ammonia-rich liquid;*  
*v) combining the high ammonia-rich liquid and the phosphorous and magnesium-rich liquid to form struvite."*

VII. Claims 1 of auxiliary requests 1 and 2 were unchanged with respect to claim 1 of the main request.

Claim 1 of auxiliary request 3 was amended to add the feature "*, wherein the first mixture of solids and microorganisms containing phosphorous and magnesium is waste activated sludge (WAS).*" at the end of step v).

VIII. Claims 1 of auxiliary requests 4 to 7 correspond to claims 1 of the main request and of auxiliary requests 1 to 3, respectively, step iii) containing additional text such that it reads (addition underlined):

*"iii) placing the phosphorous and magnesium reduced treated mixture in an anaerobic digester to produce a high ammonia mixture where the ammonia combines very little with phosphorous or magnesium present in the phosphorous and magnesium reduced treated mixture as the phosphorous and magnesium present in the phosphorous and magnesium treated mixture have been greatly reduced in concentration;"*

IX. The respondent's key arguments can be summarised as follows:

(a) Request to postpone the oral proceedings/objection under Rule 106 EPC

The outcome of the pending referral before the EBoA, G 1/24, was pertinent to the assessment of the present case. In addition, the following objection was submitted by the respondent in the oral proceedings before the board:

*"We request postponement of the present proceedings until the Enlarged Board of Appeal presiding over G1/24 hands down their written decision.*

*Claim construction is central to the position taken in the provisional opinion (dated 14 January 2025) that the claims add subject matter (Article 100(c) EPC) and are not novel over D3 (Article 100(a) EPC in conjunction with Article 54 EPC). We respectfully submit that the Board are construing the claims in isolation and not in accordance with Article 69(1) EPC and its Protocol on Interpretation.*

*If the Board refuse the request for postponement, we wish it to be minuted pursuant to Rule 106 EPC that, in our view, the Board's refusal to postpone the proceedings constitutes a fundamental violation of Article 113 EPC (under Article 112a(2)(c) EPC). That is, the patentee's right to be heard under the correct application of the EPC is infringed."*

(b) Main request, auxiliary requests 1 to 3: amendments, Article 76(1) EPC

The amendments in claim 1 of the main request,

*inter alia*, originated from paragraph [0009] of the parent application as (originally) filed. It was the same with auxiliary requests 1 to 3.

- (c) Auxiliary requests 4 to 7: admission, Article 13(2) RPBA

In view of the development of the case and the nature of the amendments, these auxiliary requests should be admitted.

- X. The appellant's key arguments can be summarised as follows:

- (a) Request to postpone the oral proceedings

There was no reason to postpone the oral proceedings. G 1/24 was not pertinent to the present case.

- (b) Main request: amendments, Article 76(1) EPC

The extent by which the phosphorus was reduced according to paragraph [0009] of the application as filed was not included in claim 1.

- (c) Auxiliary requests 1 to 3: amendments, Article 76(1) EPC

Claim 1 of these requests had the same deficiency as claim 1 of the main request.

- (d) Auxiliary requests 4 to 7: admission, Article 13(2) RPBA

The objection under Article 76(1) EPC had been

raised already in the opposition, paragraph 11, in the reply of 19 April 2023 to the preliminary opinion of the opposition division, on pages 2 and 3, and in the statement of grounds of appeal on pages 7 and 8. Auxiliary requests 4 to 7 should not be considered in the appeal proceedings.

XI. Substantive requests:

- (a) The appellant requests that the decision under appeal be set aside and amended such that the patent is revoked.
- (b) The respondent requests that the appeal be dismissed (main request), or that the patent be maintained on the basis of one of auxiliary requests 1 to 3, filed with the reply to the appeal, or of one of auxiliary requests 4 to 7, filed on 24 March 2025.

**Reasons for the Decision**

- 1. Request to postpone the oral proceedings
- 1.1 The EBoA's decision on the questions referred to it is not decisive for the assessment under Article 76(1) EPC. There was thus no reason to postpone the oral proceedings as requested (i.e. to effectively stay the proceedings).
- 1.2 The questions to the EBoA in G 1/24 are:
  - 1. Is Article 69(1), second sentence, EPC and Article 1 of the Protocol on the Interpretation of Article 69 EPC*



*to be applied to the interpretation of patent claims when assessing the patentability of an invention under Articles 52 to 57 EPC?*

*2. May the description and figures be consulted when interpreting the claims to assess patentability and, if so, may this be done generally or only if the person skilled in the art finds a claim to be unclear or ambiguous when read in isolation?*

*3. May a definition or similar information on a term used in the claims which is explicitly given in the description be disregarded when interpreting the claims to assess patentability and, if so, under what conditions?*

- 1.3 Therefore G 1/24 is about whether the description and the figures of a patent may be consulted when assessing the patentability of an invention under Articles 52 to 57 EPC.

The question to be assessed in the case at issue is, though, whether the subject-matter of claim 1 of (all) the requests was originally disclosed in the parent application as filed as a whole, i.e. including the description and the figures (Article 76(1) EPC). This is something different.

The answers to the questions in G 1/24 are therefore irrelevant to the assessment of compliance with Article 76(1) EPC.

- 1.4 The respondent, however, argued that the words "*broader than justified by the description*" on page 6, paragraph 5 of the board's preliminary opinion in the communication under Article 15(1) RPBA indicated that the objection on page 6 was based on a broad

interpretation and therefore on a lack of clarity. The preliminary opinion had already pointed to paragraph [0009] of the application as filed, stating *"It is only from paragraph [0009] that the required degree of reduction becomes apparent."*

Consultation of the description could have clarified the scope of claim 1. The answer to the questions referred to the EBoA in G 1/24 were thus pertinent to the present case, contrary to the board's conclusion.

- 1.5 This is not persuasive. Even if the patent in suit, in particular paragraph [0008], were to be consulted, no different conclusion on claim interpretation in the present context would be reached.

Comparing paragraph [0008] of the patent in suit with claim 1, steps ii) and iii) simply reveals that the claimed subject-matter is broader than what is disclosed in paragraph [0008] because claim 1 of the main request also allows for a phosphorus or magnesium reduced mixture which does not combine only very little with ammonia.

However, to draft the claims more broadly than what is disclosed in the description is not objectionable in itself if a basis for the broad definition can be found in the application and parent documents as filed.

In addition, the amendment does not introduce a lack of clarity.

Reducing the level of phosphorus or magnesium by only a small amount still has the effect of reducing struvite build-up in steps iii) and iv), albeit to a lesser extent. Such interpretation is not technically nonsensical. Contrary to the respondent's view, such an embodiment cannot be disregarded.

The present issue is that the parent application as filed contains claims different from those of the main request. Claim 1 of the main request contains features for which the respondent cited paragraph [0009] of the parent application as filed as the basis (reply to the appeal, page 2). However, paragraph [0009] requires very little struvite formation, necessitating a great reduction in phosphorus or magnesium.

The wording of claim 1 of the main request cannot be interpreted in a way so as to exclude technically sensible embodiments that can be derived from the claim itself. This applies equally when interpreting the claim in the light of paragraph [0008] of the patent in suit. Paragraph [0008] only discloses the most desirable embodiment covered by claim 1 of the main request.

However, claim 1 of the main request must be given its broadest technically sensible meaning because it is the decisive basis for the claimed invention (Case Law of the Boards of Appeal, 10th edn., 2022, II.A.6.1). It is not a mere guideline for determining the subject-matter for which the respondent appears to seek protection, in the light of the description.

Irrespective of the fact that the UPC Court of Appeal decision APL\_39664/2024, Point 37, which in turn cites UPC\_CoA\_335/2023, is not decisive for the present proceedings, these decisions do not seem to contradict the board's view, anyway.

- 1.6 Therefore the questions referred to the EBoA in G 1/24 are not pertinent to the present case. As stated above, there was thus no reason to postpone (stay) the (oral)

proceedings.

2. Objection under Rule 106 EPC

The request for staying/postponing the (oral) proceedings was discussed in the oral proceedings before the board, as were the requirements of Article 76(1) EPC, the appellant and the respondent always having the possibility of presenting their views without any qualification whatsoever.

As apparent from the above, the answers to the questions underlying G 1/24 are not pertinent to the assessment under Article 76(1) EPC of the present case. Refusing the request for postponement was therefore not depriving the respondent of its right to be heard.

There is no violation of Article 113(1) EPC: the objection thus had to be refused.

3. Amendments, Article 76(1) EPC

3.1 In substance, the appellant argued that claim 1, steps ii) and iii) was an intermediate generalisation. They allowed for a concentration of phosphorus and magnesium in the phosphorus and magnesium reduced mixture which could not be considered greatly reduced, contrary to paragraph [0009] of the parent application as filed, the indicated basis for this feature.

3.2 The respondent argued that the amendment objected to was based on paragraph [0009] of the parent application as filed (reply, page 4, first two lines). Since step ii) related to the phosphorus and magnesium reduced

mixture, the phosphorus and magnesium would not react with the ammonia that was being produced. Step iii) of claim 1 did not present the skilled person with new information because it explicitly stated that it was the phosphorus and magnesium reduced treated mixture that was placed in the anaerobic digester. The phosphorus and magnesium removed from the mixture in step ii) could not react to form struvite with the ammonia that was being produced by the action of the anaerobic digester so as to cause struvite fouling. The subject-matter of claim 1, when construed through the eyes of the skilled person on a technical and reasonable basis, was directly and unambiguously derivable from the root parent application as filed. It was established case law of the Boards of Appeal that the skilled person, when considering a claim, should rule out interpretations which were illogical or which did not make technical sense. They should try, with synthetical propensity, i.e. by building up rather than tearing down, to arrive at an interpretation of the claim which was technically sensible and took into account the whole disclosure of the patent. The patent had to be construed by a mind willing to understand, not a mind desirous of misunderstanding (*inter alia* T 190/99, point 2.4).

When solving the problem of the patent that was to prevent struvite build-up, it was not technically sensible or logical for the phosphorus and magnesium reduced treated mixture to include only a minor reduction in phosphorus and magnesium such that there could be a substantial amount of struvite build-up at step iii). That was at odds with the teaching of the patent and was not an embodiment of the invention (T 5/14, point 13).

3.3 This is not persuasive, though: contrary to the respondent, the requirements of Article 76(1) EPC are not met.

3.3.1 Claim 1, steps ii) and iii) of the main request reads:

*"ii) thickening the mixture and tapping off the released phosphorous and magnesium to produce a phosphorous and magnesium-rich liquid and a phosphorous and magnesium reduced treated mixture;  
iii) placing the phosphorous and magnesium reduced treated mixture in an anaerobic digester to produce a high ammonia mixture;"*

Paragraph [0009] of the parent application as filed reads (underlining added):

*"[0009] The present invention may take the form of a method of treating a first mixture of waste solids and microorganisms containing phosphorus and magnesium, by first inducing the mixture microorganisms to release phosphorus and magnesium which is then tapped off as the mixture is thickened, to produce phosphorus and magnesium-rich liquid and phosphorus and magnesium-reduced treated mixture. This treated mixture is placed in an anaerobic digester where ammonia is formed but combines very little with phosphorus or magnesium as these elements have been greatly reduced in concentration. Next the high-ammonia mixture is dewatered, to produce an ammonia-rich liquid, which is combined with the phosphorus and magnesium-rich liquid. In one preferred embodiment a useable struvite product is harvested from this combination."*

3.3.2 As apparent from the underlined part of paragraph [0009], the concentration of phosphorus and

magnesium of the mixture that has been treated by thickening is greatly reduced, such that the ammonia formed in the anaerobic digester combines very little to form struvite.

This is however not what claim 1 of the main request requires. As argued by the appellant, the reduction according to claim 1 is not necessarily to a greatly reduced concentration of phosphorus and magnesium such that ammonia combines very little to form struvite. Claim 1 also covers embodiments wherein the concentrations of phosphorus and magnesium have been somewhat reduced in the treated mixture, to an extent such that there is still enough phosphorus and magnesium to combine with ammonia in a substantial amount to form struvite (statement of grounds of appeal, page 7, last paragraph to page 8, second paragraph).

3.3.3 The respondent was of the further view that this was an interpretation of step iii) in isolation, which did, moreover, not solve the technical problem and could therefore not be considered to be technically logical. It completely ignored the teaching of the patent in suit, including the paragraph corresponding to paragraph [0009] of the parent application as filed, as the basis for the disputed feature of steps ii) and iii) (submission of 24 March 2025, page 17).

3.3.4 This is not persuasive, either. The respondent indicated paragraph [0009] of the parent application as filed as the basis for the disputed feature of steps ii) and iii). When assessing the requirements of Article 76(1) EPC, claim 1 is not to be considered in isolation. When comparing the latter with paragraph [0009] of the parent application as filed, it

becomes apparent that paragraph [0009] of that application has a narrower scope than steps ii) and iii) of claim 1 of the main request.

The present issue is therefore that the specific disclosure of paragraph [0009] of the parent application as filed would serve as the basis for the broader scope of claim 1, which is not allowable (Article 76(1) EPC).

As correctly argued by the appellant (statement of grounds of appeal, page 8), claim 1 contains only method steps which do not indicate concentrations or yields. It also does not quantify the reduction of struvite formation in steps iii) and iv). Therefore a reduction in the phosphorus and magnesium concentration which cannot be considered a "great" reduction is also encompassed by claim 1.

Contrary to the respondent's view, such interpretation is not technically unreasonable, and neither illogical nor an interpretation with a mind wishing to misunderstand (T 190/99).

The technical problem to be solved or the extent to which the desired effect should be achieved is not apparent from claim 1. It is only from paragraph [0009] of the parent application as filed that the desired degree of reduction by becomes apparent. In fact, reducing the concentration of phosphorus or magnesium to a level at which ammonia combines very little with them is the key to solving the problem to the extent as described in paragraph [0009] of the parent application as filed. Nothing in that application suggests otherwise.



The fact that the wording of claim 1 is broader than justified by the description of the parent application as filed, in particular paragraph [0009], does not mean that only those interpretations which solve the technical problem to the extent presented as desirable in that paragraph can be considered technically sensible or logical.

It should also not be confused with the concept of a mind wishing to (mis-)understand.

An embodiment with an undefined reduction of phosphorus or magnesium in the treated mixture in step ii) that yields struvite in step v) is encompassed by claim 1. It is conceivable that this struvite is not available for equipment fouling in steps iii) and iv).

It is therefore not convincing that in this case a technical effect could not be observed at all, as argued by the respondent. It will only be observable to a lesser extent than presented as desirable in paragraph [0009] of the parent application as filed.

The respondent aims at narrowly interpreting the scope of the broad feature in claim 1 so as to overcome the objection under Article 76(1) EPC. This is however not allowable. All possible technically reasonable interpretations must be considered in the assessment of a patent claim. The principle that a broad feature cannot be interpreted more narrowly is well-established case law, as also emphasised in several decisions cited by the respondent in its submission of 24 March 2025 (T 5/14, reasons 13; T 493/09, reasons 13; T 1582/08, reasons 16; T 1408/04, page 16, last paragraph to page 17, first paragraph).

Therefore the subject-matter of claim 1 presents new information to the skilled person, contrary to Article

76(1) EPC.

4. Auxiliary requests 1 to 3

Claim 1 of auxiliary requests 1 and 2 is identical to claim 1 of the main request. The above considerations apply accordingly, so Article 76(1) EPC is not complied with.

Claim 1 of auxiliary request 3 defines that the first mixture is WAS. This does not overcome the issues under Article 76(1) EPC.

The respondent did not challenge this conclusion.

5. Auxiliary requests 4 to 7

Auxiliary requests 4 to 7 were filed with the submission of 24 March 2025.

The respondent argued that the amendments in these auxiliary requests were in line with the language of paragraph [0009] as originally filed. The amendment addressed the concerns with Article 76(1) EPC and was a direct response to the board's preliminary opinion, where this objection had been raised for the first time.

Further, the objection had not been discussed substantially in the proceedings leading to the decision under appeal and the amendment was not complicated.

This is not convincing.

Auxiliary requests 4 to 7, for the first time, address the objection under Article 76(1) EPC, which had been

raised by the appellant in the opposition, paragraph 11, in the reply of 19 April 2023, to the preliminary opinion of the opposition division, on pages 2 and 3, and in the statement of grounds of appeal on pages 7 and 8. It was also addressed in the decision under appeal on page 4, last paragraph and page 5, first paragraph.

The respondent also could not specify the allegedly new arguments by the board, nor are they apparent.

All these auxiliary requests were filed for the first time in the appeal proceedings, after notification of the board's preliminary opinion, and thus represented an amendment to the respondent's case. The admittance of these requests was at the board's discretion under Article 13(2) RPBA, which applies to the case at hand.

In accordance with Article 13(2) RPBA, any amendment to a party's appeal case made after notification of a communication under Article 15, paragraph 1 RPBA must, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

However, the board agreeing with the other party's arguments does not amount to exceptional circumstances: this may happen and has to be expected in any *inter partes* proceedings. Therefore auxiliary requests 4 to 7 should have been filed in the opposition proceedings or at the latest with the reply to the appeal.

No exceptional circumstances can be seen during the whole appeal proceedings which might justify the late filing of the auxiliary requests shortly before the oral proceedings. The unfavourable preliminary opinion

does not qualify as such an exceptional circumstance  
(see T 2271/17, Reasons 2.7).

For these reasons, the auxiliary requests cannot be  
considered and admitted into the proceedings, in  
accordance with the requirements of Article 13(2) RPBA.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



C. Vodz

E. Bendl

Decision electronically authenticated