

ILLINOIS POLLUTION CONTROL BOARD  
April 6, 1989

FEDDERS - USA, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 86-47  
 )  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondent. )

MR. DANIEL F. O'CONNELL, GARDNER, CARTON & DOUGLAS, APPEARED FOR PETITIONER;

MR. WILLIAM D. INGERSOLL, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED FOR RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board upon a petition originally filed on April 1, 1986, by Fedders-USA ("Fedders") "to extend and modify the variance which the Board granted in PCB 83-47" on January 9, 1986. (Third Amended Pet. p. 1.) On May 13, 1987, the Illinois Environmental Protection Agency ("Agency") filed its final recommendation. Public hearing was held on January 20, 1989 in Effingham, Illinois. The Board today grants Fedders variance from 35 Ill. Adm. Code 215.204(h) until September 30, 1989, subject to certain conditions.

BACKGROUND

Fedders operates a plant in Effingham, Illinois at which it paints the outside sheet metal parts of air conditioning units in one of two flowcoaters. Both flowcoaters are regulated under 35 Ill. Adm. Code 215.204(h) which limits the volatile organic material (VOM) content of the paint mixture to 2.8 lbs. per gallon. Fedders has been unable to find a paint mixture which can comply with this limitation and at the same time produce an acceptable product in the flowcoater.

On January 9, 1986 the Board granted Fedders, in PCB 83-47, a variance from 35 Ill. Adm. Code 215.204(h) from October 1, 1982 to April 1, 1986. Therein, the Board found that Fedders had been diligent in seeking a compliance coating and that immediate compliance requiring the installation of a new paint system would be financially unattainable at that time. Further, the Board found that, as the environmental impact of Fedders' emissions would be minimal, denying the variance request would

impose an arbitrary and unreasonable hardship on Fedders. See Fedders-USA v. Illinois Environmental Protection Agency, PCB 83-47, January 9, 1986.

On the expiration date of that variance, April 1, 1986, Fedders filed a petition to extend the variance from 35 Ill. Adm. Code 215.204(h). In this variance request, Fedders requests variance until September 30, 1989 to allow time to design, fabricate, and install an Electrocoat or E-coat paint system which will bring Fedders into compliance. Fedders states that once the E-coat system is on line, it will no longer use the flowcoaters. (Third Amend. Pet. p. 8.)

#### COMPLIANCE EFFORTS

During the prior variance proceeding the Agency and Fedders disagreed on the emission levels at that time. Fedders maintained that its emission level was 5.2 lbs. VOM per gallon, based on the mixture of four parts paint to one part SC100 thinner in the paint mixture as it is delivered to the flowcoater nozzles. The Agency, using a mass balanced approach, contended that Fedders used 6.48 lbs. VOM per gallon, based on the total amount of thinner and paint that Fedders purchased for use in the flowcoater. In its Prior Variance Order, the Board found that it would be arbitrary and unreasonable for Fedders to have to install a new paint line at its plant and, therefore, allowed Fedders to continue what the Board apparently believed were Fedders' then current emissions of 6.48 lbs. per gallon. This figure was taken from the Agency's variance recommendation. Both the Agency and Fedders' calculations were based on data contained in Fedders' previous ACS permit applications. These applications, in turn, took their data from thinner and paint purchase figures for the first six months of 1984.

Fedders states that, unfortunately, reliance on these purchase figures has turned out to be an inaccurate method of determining Fedders' actual paint and thinner usage. After filing the First Amended Variance Petition in this proceeding, Fedders became aware that the figures used by both the Agency and Fedders were unreliable because Fedders' thinner and paint purchase records do not accurately reflect the paint and thinner actually used in the painting system. Fedders discovered substantial discrepancies between the amounts of materials which Fedders' figures show were ordered by Fedders, the amounts that the suppliers have told Fedders were shipped, and the amount that Fedders' receiving records show were actually received. Rather than relying on these records, Fedders has instead based the figures contained in this petition on Fedders' production records which show the actual amounts of thinner and paint added to the system.

In addition, after filing its amended petition in this proceeding, Fedders became concerned that the figures used in its previous ACS permits were inconsistent with the actual paint and thinner usage figures. As a result, Fedders reviewed its paint and thinner usage records for the entire period involved, October, 1982 through the present. These records indicate that the painting process was fairly stable during the period of time used as a basis for the ACS permit applications and, thus, for the pleadings and testimony in the prior variance proceeding. However, before and after that period, Fedders' operational personnel experienced significant production difficulties with the paint system. In addition, several different reformulations of the paint itself were made as well as different formulations of the paint with different thinners and other additives. All of these factors contributed to a greater variability in the amount of VOM per gallon than was apparent from the data used as the basis for the prior proceedings.

Before Fedders decided to use the E-coat system, Fedders explored the use of other new paint systems. According to Fedders, however, none proved feasible. (Third Amend. Pet. p. 20.) Fedders also consulted with a paint manufacturer to reduce the solvent ratio in its paint mixture. Fedders believed that by using the proper mixture and by modifying the delivery system to the paint nozzles it would be able to increase viscosity of the paint mixture up to 32 seconds and reduce the solvent ratio back down to the levels used in the first six months of 1989. Also, Fedders began a system of weekly reports from its production personnel to management regarding the status of the paint system and the solvent usage so that management could monitor and attempt to maintain the lowest solvent ratio achievable. Fedders states that it will continue this system until the E-coat system comes on line and use of the flowcoater system is discontinued. (Third Amend. Pet. p. 22).

Although Fedders had, at one point, decided to relocate the facility because of its inability to achieve compliance, in May of 1988 Fedders entered into an arrangement with the Illinois Department of Commerce and Community Affairs (DCCA) to obtain financing to continue to operate the facility in Illinois. Id. Fedders was given a package with approximately \$9.6 million including funds for building and equipment renovation and the establishment of an enterprise zone.

Fedders plans to start up the E-coat system by June 2, 1989. At that time, Fedders will shut down the main flowcoater. However, the flowcoater will be available for standby use. Fedders hopes it will not be needed. (Third Amend. Pet. p. 24.) From June 2, 1989 to August 1, 1989 production will be run on the E-coat system. However, the assembly line conveyors will not be connected. Therefore, the product will be hand transferred between the E-coat conveyor and the production

line conveyors until the August plant shut down. At that time, the conveyor systems will be connected. The E-coat system will run at full production from startup on September 1, 1989. On September 30, 1989, the E-coat system will be released for full production and the main flowcoater will no longer be needed. Third Amend. Pet. p. 24

#### ENVIRONMENTAL IMPACT

Effingham County and the surrounding counties are designated attainment for ozone. Fedders states that there has never been a recorded excursion of the ambient air quality standard for ozone at the Effingham monitor. Fedders maintains that its past emissions under the prior variance had no adverse impact on the attainment or maintenance of the ambient air quality standard for ozone. Further, Fedders asserts that the estimated emissions under the terms of the variance it is requesting will not have an adverse impact on the ambient air quality standard for ozone in Effingham County. Finally, Fedders states that "no identifiable environmental impact would occur if this variance were granted." (Third Amend. Pet. p. 28.) The Agency does not contest any of these statements. Therefore, the Board finds that the environmental impact of granting Fedders variance would be minimal.

#### VARIANCE EXTENSION

Although Fedders' petition requests the Board to extend and modify the prior variance, the Board finds nothing in the record specifically addressing a showing of satisfactory progress, which is required by Section 36(b) of the Environmental Protection Act ("Act"). Before the Board can grant an extension of variance, satisfactory progress must be shown. In this case, however, the Board is able to determine from the evidence in the record that satisfactory progress has been shown. Although Fedders was unable to comply with the provisions of its prior variance, as discussed above, the Board finds Fedders' explanation not unreasonable. Under the circumstances presented herein, the Board believes that Fedders' compliance efforts during its prior variance, also described above, resulted in satisfactory progress. Thus, the variance extension can be granted consistent with Section 36(b) of the Act.

#### HARDSHIP

Fedders argues that compliance with 35 Ill. Adm. Code 215.204(h) would impose an arbitrary and unreasonable hardship on its operation. As Fedders was unable to find a water-based coating for use in its flowcoater which would satisfy the limits of Section 215.204(h), use of compliance coatings is argued to be not technically feasible. Further, Fedders argues in light of the minimal impact on the environment and of Fedders' economic

situation, add-on pollution control devices were not economically reasonable. However, once Fedders was able to obtain financing, Fedders committed itself to installing a new paint system in order to comply. The remainder of the variance period is to allow time in which to implement that system. The Agency does not dispute Fedders' position. In fact, because the Agency recommends a grant of the variance, the Board believes the Agency concurs in a finding of arbitrary or unreasonable hardship in this case.

Regarding the grant of variance retroactively, Fedders gave no explanation for its request. The Board is reluctantly granting Fedder's request solely because of unusual circumstances in this case, particularly related to the long time this variance, as well as the prior variance was allowed to remain pending. Leaving both variance petitions in limbo for the length of time that occurred here is unacceptable; the Board emphasizes that it will not in the future agree to back-date variances unless the variance is timely filed (i.e. 120 days prior to the termination of the prior variance, absent unusual circumstances and absent good reasons for subsequent delay in the proceeding).

#### CONCLUSION

The Board finds that compliance with Section 215.204(h) would impose an arbitrary or unreasonable hardship on Fedders. Thus, variance will be granted. However, certain conditions are imposed upon this grant of variance. In its Third Amended Petition, Fedders sets forth suggested conditions. With one slight modification suggested at hearing, the Agency recommends grant subject to the conditions requested by Fedders. The Agency's suggestion is that the first of the reports required by Condition No. 3 in the Order be submitted by June 15, 1989 rather than January 11, 1989. The Board has incorporated this suggestion into the Order.

The Board concurs with the requested Order except for three provisions. First, the suggested Order grants variance through June 2, 1989. The Board notes that suggestion No. 3 in the Third Amended Petition (No. 2 in the Order, see below), requires full compliance by September 30, 1989. Moreover, the compliance schedule sets out September 30, 1989 as the date of full compliance. Thus, rather than granting variance until June 2, the Board grants variance to September 30, 1989, which appears to be the accurate date of compliance.

Second, in the recommended Condition No. 1, Fedders would be limited to emissions of 6.75 lbs VOM per gallon, provided:

that Fedders may exceed this limitation during periods of upset when the condition or make-up of the paint from its supplier makes it

infeasible for Fedders to produce an acceptable product and still limit its emissions to 6.75 lbs. per gallon.

Third Amend. Pet. p. 28.

The Board finds this exception to the condition too vague; it fails to explain when a period of upset would exist, and it fails to explain how Fedders would determine the infeasibility of producing an acceptable product within the 6.75 lbs. per gallon emission range. As Fedders has been able to maintain VOM emissions at a level below the proposed limit of 6.75 lbs. VOM per gallon (See Third Amend. Pet. p. 19), the Board believes that this exception is unnecessary. Further, the Board is not inclined to grant unlimited variance on so speculative an occurrence. Thus, the Board has omitted the exception provision in Condition No. 1.

Third, the requested Order includes as Condition No. 2 that the "prior variance PCB 83-47 is modified so that Fedders' VOM emissions from its flowcoaters are limited as set forth in this Order." The Board fails to see the necessity of this provision. The prior variance ended on April 1, 1986; the conditions set forth therein are no longer applicable. The Board has not included this condition in its Order.

Finally, the Board must note for the record that part of the record is incomplete. At hearing, Exhibits 1a, 1b, and 1c were offered and admitted. Thereafter, a trade secret question arose as to those exhibits. Fedders withdrew the exhibits and stated that within two weeks it would file an amended trade secret claim and submit new copies of the exhibits. (R. at 54.) These filings have not been submitted. The Board does not have Exhibits 1a, 1b, or 1c. However, it appears that these exhibits were offered to evidence Fedders' intent to proceed with installation of the E-coat system. As this is not in dispute, the Board does not believe that these exhibits are a condition precedent to a decision on the variance. Moreover, the Board is faced with the rapid approach of a decision deadline. Thus, despite the Board's preference for complete records, the Board will in this case proceed to decision.

This Opinion constitutes the Board's findings of facts and conclusions of law.

#### ORDER

The Board hereby grants Fedders-USA a variance from 35 Ill. Adm. Code 215.204(h) from April 1, 1986 to and including September 30, 1989, subject to the following conditions:

1. Fedders will limit its VOM emissions from flowcoating operations during the variance period to 6.75 lbs. VOM per gallon exclusive of solvent used to clean the flowcoaters;
2. Fedders will install a new electrodeposition paint system and achieve full compliance with 35 Ill. Adm. Code 215.204(h) by September 30, 1989;
3. Fedders will submit to the Agency two compliance reports: one by June 15, 1989 and one within 30 days of achieving final compliance;
4. Within 45 days after the date of this Opinion and Order, Fedders shall execute and send to:

Illinois Environmental Protection Agency  
 Attention: Bill Ingersoll  
 Enforcement Programs  
 2200 Churchill Road  
 Springfield, IL 62794-9276

a certificate of acceptance of this variance by which it agrees to be bound by the terms and conditions contained herein. This variance will be void if Fedders fails to execute and forward the certificate within the 45-day period. The 45-day period shall be in abeyance for any period during which the matter is appealed. The form of the certification shall be as follows:

CERTIFICATION

I, (We) \_\_\_\_\_, having read the Opinion and Order of the Illinois Pollution Control Board in PCB 86-47, dated April 6, 1989, understand and accept the said Opinion and Order, realizing that such acceptance renders all terms and conditions thereto binding and enforceable.

\_\_\_\_\_  
 Petitioner

\_\_\_\_\_  
 Authorized Agent

\_\_\_\_\_  
 Title

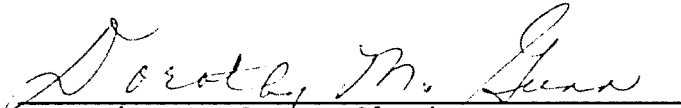
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 Date

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985, ch. 111-1/2, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

Board Member J. Anderson concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 6<sup>th</sup> day of April, 1989, by a vote of 7-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board