ILLINOIS POLLUTION CONTROL BOARD
July 23, 1998

IN THE MATTER OF:	)	
	)	
PETITION OF THE LOUIS BERKMAN	)	AS 97-5
COMPANY, d/b/a THE SWENSON	)	(Adjusted Standard - Air)
SPREADER COMPANY, FOR AN	)	
ADJUSTED STANDARD FROM 35 ILL.	)	
ADM. CODE PART 215, SUBPART F	)	

ORDER OF THE BOARD (by K.M. Hennessey):

This adjusted standard comes before the Board on the Illinois Environmental Protection Agency's (Agency) motion to reconsider the Board's order of May 7, 1998. In that order, the Board granted petitioner Louis Berkman Company, d/b/a Swenson Spreader Company (Swenson), an adjusted standard from a regulation that limits the amount of volatile organic material (VOM) that may be contained in coatings applied to Swenson's products. In the motion to reconsider, the Agency notes that Swenson now has filed an application to construct and operate a powder coating system. The Agency argues that the application renders the adjusted standard unnecessary. The Board continues to find the adjusted standard necessary, however, and therefore denies the motion to reconsider.

BACKGROUND

Swenson manufactures snow and ice control equipment at a plant in Lindenwood, Ogle County, Illinois. Swenson applies coatings to its products. In this proceeding, Swenson sought an adjusted standard from a regulation that limits the amount of VOM that may be contained in its coatings. Specifically, Swenson sought an adjusted standard from Section 215.204(j)(2), 35 Ill. Adm. Code 215.204(j)(2), which requires manufacturers that apply air-dried coatings to miscellaneous metal parts and products (referred to in this opinion as "sources") to use coatings that contain no more than 3.5 pounds of VOM per gallon (VOM lb./gal.).

The Board may grant an adjusted standard when it determines, among other things, that "factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner . . . ." 415 ILCS 5/28.1(c)(1) (1996). One of the factors that the Board is to consider when adopting a general regulation is the technical feasibility and economic reasonableness of the regulation. See 415 ILCS 5/27(a) (1996).

In an order dated December 4, 1997, the Board considered whether factors relating to Swenson were substantially and significantly different from those that the Board relied upon when adopting Section 215.204(j)(2). Initially, the Board found that coatings that comply with Section 215.204(j)(2) are not available for some of Swenson's customer orders. See Petition

of The Louis Berkman Company, d/b/a The Swenson Spreader Company, for an Adjusted Standard from 35 Ill. Adm. Code 215, Subpart F (December 4, 1997), AS 97-5, slip op. at 6.

Next, the Board considered whether Swenson could comply with various regulatory alternatives to Section 215.204(j)(2). The Board found that Swenson could not economically comply with 35 Ill. Adm. Code 215.205(b), which exempts sources from Section 215.204(j)(2) if they use an afterburner that destroys at least 81% of the VOMs that the source emits. Swenson (December 4, 1997), AS 97-5, slip op. at 10. In addition, the Board found that Swenson could not economically use powder coatings to comply with 35 Ill. Adm. Code 215.206(a)(1), which exempts sources from Section 215.204(j)(2) if they limit VOM emissions to 25 tons/year or less in the absence of air pollution control equipment.

The Board concluded that the unavailability of paints that meet both the requirements of Swenson's customers and Section 215.204(j)(2), together with the economic unreasonableness of other regulatory alternatives, were substantially and significantly different factors. The Board also concluded that Swenson met the remaining requirements for an adjusted standard and therefore held that it would grant Swenson an adjusted standard, subject to certain conditions, including a compliance plan. The Board then ordered Swenson to submit a proposed compliance plan, which the parties fully briefed. On May 7, 1997, the Board entered an order granting Swenson an adjusted standard subject to certain conditions.

The Agency filed a motion to reconsider (motion, cited as "Mtn. at __") on June 12, 1998. Swenson filed a response to motion for reconsideration (response, cited as "Resp. at __") on June 29, 1998.

DISCUSSION

A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law[,] or errors in the court's previous application of existing law." Citizens Against Regional Landfill v. The County Board of Whiteside County (March 11, 1993), PCB 92-156, slip op. at 2, citing Korugluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992). The Agency states that it brings this motion to present new evidence that was not available to the Board at the time of the hearing in this matter. Mtn. at 1. The Agency also argues that the conditions of the adjusted standard now require Swenson to withdraw the adjusted standard. Finally, the Agency argues that Swenson has elected not to accept the adjusted standard and that Swenson must therefore comply with Section 215.204(j)(2). The Board considers these arguments in turn.

The New Evidence

The new evidence upon which the Agency relies is an application to construct and operate a powder coating system (application) that Swenson filed with the Agency on May 14, 1998. See Mtn. Exh. 1. The Agency argues that the application is new evidence that Swenson can technically and economically use a powder coating system to comply with 35 Ill.

Adm. Code 215.204(j)(2) (or more precisely, comply with the exemption to that regulation that Section 215.206(a) grants to sources that limit their VOM emissions to 25 tons/year or less).

The Agency argues: "The Board and the Agency must presume that the company is acting rationally and that the act of applying to construct and operate the powder coating system means it has sufficiently researched the feasibility of this system for which a substantial capital expenditure is needed." Mtn. at 3. Implicitly, the Agency argues that Swenson's application is conclusive proof that powder coating is economically reasonable and therefore that an adjusted standard is not appropriate.

In its response, Swenson argues first that it discussed its potential plans to use powder coatings in the adjusted standard proceeding, as well as a related enforcement proceeding, and thus the application should not be considered new evidence. Resp. at 3-4. Swenson notes that the Board's order of December 4, 1997, noted that Swenson "had offered to install a powder coating system as part of settlement discussions in the Agency's enforcement case against Swenson." Resp. at 4, citing Swenson (December 4, 1997), AS 97-5, slip op. at 11.

In addition, Swenson notes that the Board found that the evidence showed that "it will be some time before the [powder coating] system is installed and working smoothly." Resp. at 4, citing Swenson (December 4, 1997), AS 97-5, slip op. at 9. Even after it is installed and working smoothly, Swenson notes that evidence previously submitted shows that a powder coating system can only handle components up to 10 feet long, or approximately 70% of Swenson's production. Resp. at 5. "However, high VOM coatings, which typically constitute small production runs, or are unavailable in powder coating colors, will most likely not be powder coated regardless of their size, owing to the substantial amount of 'down time' associated with color changes given the single booth proposal being considered." Resp. at 5. As a result, Swenson argues that "neither Swenson . . . nor Respondent know whether the installation of a powder coating system will cause the company's VOM emissions to fall below 25 tons annually, the regulatory threshold for the [exemption from the] 3.5 lb./gal. VOM content regulation." Resp. at 5-6.

The Board finds that Swenson's application is not the type of new evidence that justifies reconsideration. As Swenson notes, it has been clear throughout this proceeding that Swenson has contemplated using powder coatings. Furthermore, the Board cannot find that Swenson's application, standing alone, demonstrates that Swenson can economically use powder coatings as an alternative. As Swenson notes, it is not yet clear whether the powder coating system will cause its VOM emissions to fall below 25 tons/year and exempt it from compliance with Section 215.205(j)(2). "[R]econsideration is not warranted unless the newly discovered evidence is of such conclusive or decisive character so as to make it probable that a different judgment would be reached." Patrick Media Group, Inc. v. City of Chicago, 255 Ill. App. 3d 1, 8, 626 N.E.2d 1066, 1071 (1st Dist. 1993). The Board finds that the application does not require a different outcome on Swenson's adjusted standard petition.

Whether Swenson Must Withdraw the Adjusted Standard

The Agency also argues that this evidence shows that Swenson must withdraw its adjusted standard under the following condition:

> Swenson must apply to the Board to withdraw this adjusted standard if its research shows that Swenson can technically and economically use coatings that comply with 35 Ill. Adm. Code 215.204(j)(2) or a powder coating system. Mtn. at 1-2, citing Petition of the Louis Berkman Company, d/b/a The Swenson Spreader Company, for an Adjusted Standard from 35 Ill. Adm. Code 215.Subpart F (May 7, 1998), AS 97-5, slip op. at 11.

The Agency argues: "Swenson's filing of the powder coating application indicates that Swenson can technically and economically use a powder coating system. In light of such determination, Swenson must withdraw the adjusted standard." Mtn. at 2.

Swenson replies that nothing has occurred to change the Board's finding that powder coatings are not economically reasonable. Resp. at 3. Swenson states that it has merely followed Board regulations in submitting the application, and that it has not yet begun to use powder coatings. *Id*. The Board agrees and finds that this condition has not been triggered.

Whether Swenson Must Comply with the Rule of General Applicability

Finally, the Agency notes that the Board's final order provided: "In Citizen Utilities v. PCB, 9 Ill. App. 3d 158, 164, 289 N.E.2d 642, 647 (2d Dist. 1972), the Illinois Appellate Court held that a petitioner who is granted a variance upon conditions retains the option of complying with the rule of general applicability in lieu of the variance. The same logic applies in an adjusted standard proceeding and therefore Swenson has the same option." Swenson (May 7, 1998), AS 97-5, slip op. at 9. The Agency argues that Swenson's application indicates that it has opted to comply with Section 215.204(j)(2) in lieu of the adjusted standard. Mtn. at 3.

Swenson did not address this argument, but the Board does not find that Swenson has repudiated the adjusted standard by filing the application. In fact, Swenson's response indicates that Swenson has accepted the adjusted standard (including its conditions).

CONCLUSION

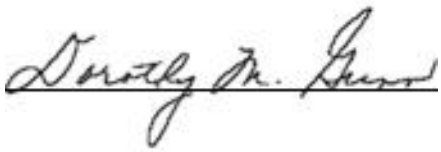
The Board denies the motion to reconsider.

In its response, Swenson requested that the Board specifically provide that the time for appeal of the Board's May 7, 1998 opinion shall not run anew from the date of this order. Swenson notes that 35 Ill. Adm. Code 101.246(c) allows the Board to do so. However, Swenson offers no reason why such an order would be appropriate here, and the Board is not aware of any reason to cut off the Agency's right to appeal. The Board therefore denies Swenson's request.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 23rd day of July 1998 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board