

ILLINOIS POLLUTION CONTROL BOARD  
February 6, 1997

W.R. MEADOWS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 97-58
	)	(Variance - Air)
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by M. McFawn):

This matter is before the Board on a motion to dismiss filed by respondent Illinois Environmental Protection Agency (Agency) on December 27, 1996. The Agency requests that the Board dismiss the variance petition filed by petitioner W.R. Meadows, Inc. (Meadows), on the grounds that Meadows is actually seeking a variance not from limitations required to be imposed by Board regulations, but only from limitations imposed by permit conditions, and that the Board has no authority to grant such relief. Meadows filed its response to the motion to dismiss on January 21, 1997. The Board will grant the Agency's motion to dismiss because variance relief is not available from permit conditions, and we find that Meadows is seeking a variance from limitations imposed only as permit conditions.

Meadows filed its original petition for variance on August 25, 1996. On October 17, 1996, the Board found the petition deficient, and directed Meadows to file an amended petition. Meadows filed an amended petition on November 18, 1996. On December 5, 1996, the Board accepted this matter for hearing, but directed Meadows to submit supplemental information concerning estimated emissions. In response, Meadows submitted supplemental information on December 20, 1996. Subsequently, the Agency filed its motion to dismiss on December 27, 1996, and Meadows filed its response thereto on January 21, 1997, along with a motion to file instanter.

Initially, we grant Meadows' motion for leave to file its response to the motion to dismiss instanter. In support of its request for leave to file, Meadows asserts that it did not receive a copy of the motion to dismiss until January 10, 1997, after contacting the Agency's attorney by telephone. Meadows also asserts that the Agency does not object to the grant of the motion to file instanter. We will therefore consider Meadows response to the motion to dismiss.

## VARIANCE REQUESTED

In its amended petition, Meadows requests a variance from the requirements of Section 9(b) of the Act, which provides:

No person shall:

- b. Construct, install, or operate any equipment, facility, vehicle, vessel, or aircraft capable of causing or contributing to air pollution or designed to prevent air pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit.

(415 ILCS 5/9(b).)

Additionally, Meadows seeks a variance from the requirements of the Board's regulations at 35 Ill. Adm. Code 218.114 and 203.203. The Board's regulation at 35 Ill. Adm. Code 218.114 provides:

No person shall violate any terms or conditions of a permit reflecting the requirements of this Part, operate any source except in compliance with its permit, or violate any other applicable requirements.

(35 Ill. Adm. Code 218.114.)

The Board's regulation at 35 Ill. Adm. Code 203.203 provides, in relevant part:

- d) No permittee shall violate any condition contained in a construction permit issued for a new major stationary source or major modification which is subject to this Part.

(35 Ill. Adm. Code 203.203.)

Meadows is requesting a variance for its facility located in Hampshire, Kane County, Illinois, which is in the Chicago severe nonattainment area for ozone. At this facility, Meadows manufactures asphalt-saturated fiber expansion joint material for use in the construction industry. Specifically, Meadows seeks relief from the requirements of Section 9(b) of the Environmental Protection Act (Act) (415 ILCS 5/9(b)) and the regulations at 35 Ill. Adm. Code 218.114 and 203.203, which prohibit persons from operating in violation of conditions imposed by an air permit. (Am. Pet. at 1.) Meadows also seeks the variance so that it may contest the Agency's application of Section 203.206(e) to its facility. (Am. Pet. at 2.)

Meadows requests this variance in order to deviate from the conditions in its current Construction Permit. (Am. Pet. at 1; see Am. Pet. Exhibit. A.) The relevant conditions (Nos. 2(a) and (b)) impose monthly and yearly restrictions on the quantities of materials that Meadows can use in its asphalt-saturated fiber expansion joint material production operation, and are intended to limit Meadows' emission of volatile organic material (VOM) to 4 tons per

month and 20.5 tons per year. These emission restrictions allow Meadows to maintain its status as a “smaller source” for VOM emissions, pursuant to the regulations at 35 Ill. Adm. Code 201.180 - 201.187, and ensure that Meadows is not subjected to the requirements imposed on “major sources,” set forth at 35 Ill. Adm. Code Part 203. The material usage restrictions and VOM emission limitations established in Meadows’ permit are consistent with the limited manufacturing operations originally planned for the facility. (Am. Pet. at 8.)

Meadows seeks this variance so that it may increase its VOM emissions enough to produce 525 pallets of asphalt-saturated fiber expansion joint material per month, as calculated on an annual basis.<sup>1</sup> (See Am. Pet. at 2, as amended by Meadows’ December 20, 1996 “Response to Board’s Request for Supplemental Information,” at 1.) Meadows states that the variance is necessary due to a catastrophic fire which occurred at the facility of its primary fiberboard expansion joint material supplier, Celotex. (Am. Pet. at 8.)

### THE MOTION TO DISMISS

In its motion to dismiss, the Agency asserts that the statutory and regulatory provisions from which Meadows seeks variance (Section 9(b) of the Act and Sections 218.114 and 202.203) impose no requirements or limitations on Meadows’ facility, and that Meadows is actually only seeking a variance from the requirements imposed by special conditions 2(a) and (b) in its current air permit. These limitations were based on Meadow’s proposed production plans, and not upon a numerical emissions limit contained in a Board regulation. Furthermore, the Agency points out that Meadows admits that increased emissions would not violate any applicable regulations, but only violate its current permit limitations. (Motion to Dismiss at 2.)

Given these facts, the Agency asserts that the Board may not grant the variance requested because the Act does not confer authority on the Board to grant a variance from a permit or permit condition; rather, the Board can only grant a variance from a rule, regulation, requirement, or order of the Board. (Motion to Dismiss at 3, citing Landfill Inc. v. Pollution Control Board, 74 Ill.App.2d 541, 387 N.E.2d 258 (1979).) Lastly, the Agency asserts that Meadows’ proper recourse would be to seek a permit modification from the Agency, and should the Agency deny the requested permit modification, Meadows could then appeal that determination to the Board.

In its response to the motion to dismiss, Meadows contends that a variance proceeding is the proper proceeding in which to seek the requested relief. Meadows, citing East Moline v. Pollution Control Board, 188 Ill. App. 3d 349, 544 N.E.2d 82 (3d Dist. 1989), asserts that the proper procedure, when challenging an application of a rule to a particular facility, through a permit or otherwise, is to petition for variance. Meadows also argues that the Agency has applied Section 202.206(e) to its facility, and that such application is erroneous, and that it is therefore seeking relief from application of this rule to its facility, and the permit conditions

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<sup>1</sup> It is unclear what production rate is permissible under Meadows’ permit; however, the permitted rate is established by the material usage restrictions from which Meadows is seeking relief.

imposed upon Meadows as a result thereof. Finally, Meadows asserts that a permit modification cannot provide it with the relief it seeks. Meadows asserts that its previous request for a provisional variance was denied because of the Agency's erroneous interpretation of 35 Ill. Adm. Code 203.206 as requiring inclusion of fugitive emissions in determining Meadows' source status for purposes of permitting. (Response to the Motion to Dismiss at 4.)

#### ANALYSIS

The Agency is correct in that the Board does not grant variance relief from permit conditions. Pursuant to Section 35 of Act, the Board has authority to grant a variance where a petitioner has presented adequate proof that immediate compliance with the Board regulation at issue would pose an arbitrary or unreasonable hardship. (415 ILCS 5/35(a) (1994).) Furthermore, the Board has long held that it is without authority to grant variances from permit conditions. In Illinois Power Company v. Illinois Environmental Protection Agency, PCB 84-75, *slip op.* at 1 (July 19, 1984) the Board, citing Landfill, Inc. v. PCB 74 Ill.2d 541, 387 N.E. 2d 541, 387 N. E. 2d 258 (1978) stated:

The Board notes that it is without power to grant variances from permit conditions in that so doing would improperly infringe upon the permitting authority of the Illinois Environmental Protection Agency.

In City of Mount Olive v. Illinois Environmental Protection Agency, PCB 85-24 *slip op.* at 1 (March 7, 1985), the Board stated:

The Board does not have the power to grant variance from permit conditions; it can only grant variance from Board regulations which [underlie] those conditions, thereby allowing the Illinois Environmental Protection Agency to modify the permit.

Meadows' reliance on East Moline v. Pollution Control Board, 544 N.E.2d 82, 135 Ill.Dec. 725 (Ill. App. 3d Dist. 1989) in support of its position that a petition for variance is the proper procedure to challenge the application of a rule to a particular facility, through a permit or otherwise, is erroneous. Its interpretation does not take into account the entirety of the court's holding in East Moline. In East Moline, the court stated, "The statutory mechanism for obtaining relief from compliance with a regulation *on the basis of an arbitrary or unreasonable hardship* is to petition for a variance under Section 35 of the Act." (*Id.*, 135 Ill.Dec. 727 (emphasis added).) However, the appropriate mechanism for challenging the imposition of permit conditions *which are not necessary to avoid a violation of the Act or Board regulations* is a permit appeal pursuant to Section 40 of the Act. (415 ILCS 5/40; see e.g. East Moline at 135 Ill.Dec. 727.)

Because the Board cannot grant variance from permit conditions, we must determine whether Meadows is in fact seeking variance relief from limitations imposed solely by permit conditions. Meadows states that it is requesting the variance in order to "allow Meadows to deviate from the conditions of its current Construction Permit." (Am. Pet. at 1.) Furthermore, Meadows admits that, "The VOM emissions associated with increased production are not in excess of any applicable regulations. The VOM content of the asphalt is

in compliance with 35 Ill. Adm. Code 218.920-218.928 [Subpart PP: Miscellaneous Fabricated Product Manufacturing Processes].” (Am. Pet. at 9.) These statements make clear that the limitations from which Meadows seeks relief are contained solely in permit conditions which the Agency based on Meadow’s own proposed production schedule. They are not numerical VOM emissions limitations specifically set out in the Act or Board regulations. Meadows asserts that it is seeking not only a variance from permit conditions, but also relief from the requirements of Section 9(b) of the Act, and the regulations at 35 Ill. Adm. Code 218.114 and 203.203. However, these statutory and regulatory provisions do not impose separate limitations on Meadows, but merely require compliance with the permit conditions imposed by the Agency. Allowing variance relief from these provisions would be tantamount to allowing a variance from the permit conditions themselves.

We note that Meadows also argues that the Board does have authority to review the permit conditions at issue, asserting that the conditions are based on the Agency’s application of 35 Ill. Adm. Code 203.206(e) to Meadows’ facility, which would require Meadows to include its fugitive emissions when determining whether its facility is a major source. However, nothing in the record evidences that the Agency has applied this regulation to the Meadows facility. While Meadows is concerned that the Agency will apply 35 Ill. Adm. Code 203.206(e) and find it to be a major source based upon the proposed increase in its emissions, Meadows has not yet applied for a revision to its permit to allow such increased emissions.

This opinion constitutes the Board’s findings of fact and conclusions of law in this matter.

#### ORDER

For all the reasons stated in the foregoing opinion, the Board grants the Agency’s motion to dismiss W.R. Meadows’ petition for variance. This docket is closed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (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 opinion and order was adopted on the \_\_\_\_ day of \_\_\_\_\_, 1997, by a vote of \_\_\_\_\_.

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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board