ILLINOIS POLLUTION CONTROL BOARD
December 19, 1991

DMI, INC.,	)	
	)	
Petitioner,	)	
	)	PCB 90-227
v.	)	(Variance)
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

STEPHEN F. HEDINGER, MOHAN, ALEWELT, PRILLAMAN AND ADAMI APPEARED FOR THE PETITIONER.

RENEE A. STADEL APPEARED FOR THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

On December 5, 1990, DMI, Inc. ("DMI") filed a petition for variance from 35 Ill. Adm. Code 215.204(j), the volatile organic material emissions limits, for its facility located in rural Woodford County. On February 4, 1991, in response to a Board Order, DMI filed an amended petition for variance and on February 28, 1991, DMI filed an open waiver at the Board's request. On February 7, 1991, the Board accepted the amended petition. DMI is requesting that if a variance is granted, the Board grant the relief, retroactively, from September 1, 1990 until such time as site-specific relief is granted or until one year after site-specific relief is denied. On February 4, 1991, the Board received a Petition for Site-Specific Rulemaking and on July 11, 1991, the Board proceeded to First Notice in that rulemaking. (See In the Matter of Petition of DMI, Inc. for Site-Specific Air Regulation: 35 Ill. Adm. Code 215.215, R91-9). The Board notes that DMI has incorporated the record from the rulemaking proceeding into this proceeding.

On March 11, 1991, the Board received the Illinois Environmental Protection Agency's ("Agency") recommendation. The Agency recommended that the variance be granted with certain modifications. In addition, the Agency specifically objected to DMI's request for retroactive relief.

Hearing was held on August 27, 1991 in Eureka, Woodford County, Illinois. In addition to the DMI and Agency representatives, the Department of Energy and Natural Resources participated in the hearing. No members of the public were present. Post hearing briefs were filed by DMI and the Agency on October 16, 1991 and October 29, 1991, respectively. DMI also filed a Motion for Leave to File a Reply Instanter and the Reply on November 4, 1991. That Motion is hereby granted.

Based on the record before it, the Board finds that DMI has presented adequate proof that immediate compliance with Section 215.204(j)(3) would result in the imposition of an arbitrary or unreasonable hardship. Accordingly, the variance will be granted retroactively from September 15, 1990, subject to the conditions in the attached Order.

BACKGROUND

DMI manufactures farm implements at its rural Woodford County plant. DMI is employee-owned and currently employs 289 people. DMI asserts that it is Woodford County's largest employer. (Am. Pet. 8). As part of the manufacturing process, DMI paints its machinery in two separate permitted processes, the paint room and the paint deck. (Am. Pet. 3-4).[1] This petition only concerns the operation of the paint deck, which results in the emission of volatile organic material (VOM).[2] (Am. Pet. 4). DMI has been subject to a previous variance on this operation, which expired in 1989. (See DMI, Inc. v. Illinois Environmental Protection Agency, PCB 88-132, 96 PCB 185.) DMI sought compliance with 35 Ill. Adm. Code 215.204(j), by shifting to a water-based dip system, installing a bake oven and expanding its spray booths. (Am. Pet. 4). This process allowed DMI to comply with the regulations. (Am. Pet. 4). However, DMI discovered that the water-based paint did not properly bind to the equipment and the paint supplier was unable to ameliorate the paint problem. (Am. Pet 4).

DMI filed a petition for a provisional variance with the Agency on September 17, 1990. The Agency denied the Provisional Variance on September 26, 1990 as being outside the scope of relief provided by a provisional variance. (Am. Pet. Exh. 5, p. 5). Therefore, DMI sought variance relief with the filing of this variance petition. (Am. Pet. 4-5).

PAST EFFORTS

DMI began its search for compliant paint in 1984, but DMI was unable to find "any system that even appeared to be acceptable until 1989". (Am. Pet. 11). In order to use the water-based compliant paint DMI installed a system at a cost in

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[1] The Amended Petition will be cited as "Am. Pet."; the transcript of the hearing will be cited as "Tr."; Petitioner's Brief is cited as "Pet. Br." and the Agency's Brief is cited as "Ag. Br.".

[2] DMI uses the terms "Volatile Organic Material (VOM)" and Volatile Organic Compound (VOC)" interchangeably throughout. (Pet. Br. 2). The Board will use the term "VOM".

excess of $225,000. (Am. Pet. 12). Use of the compliant paint, however, resulted in several problems which resulted in DMI receiving customer complaints and a "loss of market share and customer goodwill". (Am. Pet. 13 and 26). Therefore, DMI continued to search for a compliant paint that would alleviate the problems resulting from the use of the water-based compliant paint. However, in September 1990, DMI's paint supplier informed DMI that the supplier had exhausted its efforts to solve the problems and the supplier was unable to develop a compliant paint. (Am. Pet. 13).

In addition to DMI's current supplier, DMI contacted other paint suppliers in an attempt to locate a compliant paint. Mr. Robert McClure, plant engineer, testified on behalf of DMI at hearing. Mr. McClure stated that DMI had ongoing contact with two paint suppliers and had contacted a total of five suppliers including the current supplier in an attempt to find a compliant paint. (Tr. 35-36). However, at this time DMI has been unable to find a paint that will meet the needs of DMI and meet the standards of 35 Ill. Adm. Code 214.204(j).

COMPLIANCE PLAN

DMI has set forth two methods to achieve compliance. DMI's preferred method is to be granted a site-specific rule change. As noted earlier, DMI filed its petition for site-specific rulemaking on February 4, 1991. (See In the Matter of Petition of DMI, Inc. for Site-Specific Air Regulation: 35 Ill. Adm. Code 215.215, R91-9). The site-specific rule would raise the allowed emissions for the DMI plant until the year 2000 and require DMI to continue to investigate compliant paints. The Board has not ruled on the site-specific petition at this time.

The second method that DMI has set forth for compliance, if the site-specific relief is not granted, involves the installation of an afterburner to reduce emissions. Installation of the afterburner would cost around $300,000 and the yearly cost of running the afterburner would exceed $35,000 according to DMI. (Am. Pet. 16).

The Agency is in support of the Board's granting site specific relief. (See P.C. 5, p. 6). However, if site specific relief were not granted, the Agency believes that the afterburner system would allow compliance. The Agency specifically states in its recommendation that "[e]ven though the site specific relief may be a viable alternative, the Agency believes that the afterburner system would allow DMI to achieve compliance." (Ag. Rec. 8). Thus, the Agency indicates that compliance could be achieved under either method proposed by DMI.

CONSISTENCY WITH FEDERAL LAW

Both the Agency and DMI agree that the granting of this variance would be consistent with Federal Law. DMI is located in an ozone attainment area and the additional VOM emissions would be within federal guidelines. (Am. Pet. 30). The Agency states that it does not believe the variance will need to be submitted to the United States Environmental Protection Agency (USEPA) as a revision to the State Implementation Plan (SIP). However, the Agency further states that it "believes that if the Board grants DMI a variance as requested, its order should be approvable as a SIP revision". (Ag. Rec. 5).

AGENCY RECOMMENDATION

The Agency recommends that the variance be granted with the following conditions:

a) Petitioner's relief should be limited to the paint in the dip tank on the paint deck. This relief should be limited to its requested limit of 4.2 lb/gallon prior to solvent addition and limiting solvent addition 61 lb/day on a 30 day average.

b) Relief is unnecessary and unwarranted for the spray coat paint which is presently limited to 3.5 lb/gallon in 35 Ill. Adm. Code 215.204(j)(3) and its operating permit.

c) Relief should only be granted prospectively.

* * *

d) The Variance should expire upon granting of site specific relief or January 1, 1993, whichever comes first.

e) DMI should also be required to continue the testing of potential compliant dip tank coatings. DMI should test coatings at the rate of two per year.

f) DMI should also be required to submit quarterly reports detailing the progress made in achieving complete compliance with 35 Ill. Adm. Code 215.204(j)(3). (Ag. Rec. 8-9).

DMI agrees with the conditions except the condition with regard to prospective relief (condition c). DMI "emphatically does not acquiesce in" prospective relief and has specifically requested retroactive relief. (Pet. Br. 6).

HARDSHIP AND ENVIRONMENTAL IMPACT

DMI asserts that immediate compliance with Section 215.204(j) would pose an arbitrary and unreasonable hardship upon DMI because the water-based painting system, although compliant with the VOM emission levels, is inadequate to meet DMI's reasonable quality standards and DMI's customers' expectations. (Am. Pet. 26).

The Agency, in noting that DMI has already expended $225,000 in the installation of its paint system in trying to achieve compliance, states that: "DMI is also a small business relative to its competitors who have obtained similar site specific relief. The Agency agrees that the environmental impacts are minimal. Therefore, the Agency agrees that an arbitrary and unreasonable hardship is present." (Ag. Rec. 7).

DISCUSSION

As noted above, the Agency recommends that the variance be granted to DMI, prospectively; DMI requests a variance retroactively. Thus, the sole issue in contention is whether or not DMI should receive a retroactive variance.

Before addressing the specific arguments, the Board will first discuss the issue of retroactive variances. The Board notes that as a general rule, in the absence of unusual or extraordinary circumstances, the Board renders variances as effective on the date of the Board order in which they issue. (LCN Closers, Inc. v. EPA, PCB 89-27, 101 PCB 283, 286 (July 27, 1989); Borden Chemical Co. v. EPA, PCB 82-82, 67 PCB 3,6 (Dec. 5, 1985); City of Farmington v. EPA, PCB 84-166, 63 PCB 97, 98 (Feb. 20, 1985); Hansen-Sterling Drum Co. v. EPA, PCB 83-240, 62 PCB 387, 389 (Jan. 24, 19856); Village of Sauget v. EPA, PCB 83-146, 55 PCB 255, 258 (Dec. 15, 1983); Olin Corp. v. EPA, PCB 83-102, 53 PCB 289, 291 (Aug. 30, 1983).)

> A variance is not retroactive as a matter of law, and the Board does not grant variance retroactivity unless retroactive relief is specially justified.
>
> Deere & Co. v. EPA, PCB 88-22, 92 PCB 91-94 (Sept. 8, 1988) (citations omitted).

Absent a waiver of the statutory due date, Section 38(a) of the Environmental Protection Act requires the Board to render a decision on a variance within 120 days of the filing of a petition. (See Ill. Rev. Stat. 1989 ch. 111 1/2, par. 1038(a) (amended from 90 days by P.A. 84-1320, effective Sept. 4, 1986)). For this reason, a petitioner that wishes a variance to commence by a certain date must file its petition at least 120 days prior to the desired inception date. (See EPA v. Citizens Utilities

Co. of Illinois, PCB 79-142, 56 PCB 1, 4 (Jan. 12, 1984)). (Enforcement action in which inception date of variance was at issue).

The rationale behind this general rule is twofold, and the Board has set it forth in prior opinions. First,

> To grant retroactive relief as requested would encourage other companies to file in an untimely manner.
>
> DMI, Inc. v. EPA, PCB 88-132, 96 PCB 185, 187 (Feb. 23, 1987).

Further,

> The Board is inclined not to grant retroactive relief, absent a showing of unavoidable circumstances, because the failure to request relief in a timely manner is a self-imposed hardship.
>
> American National Can Co. v. EPA, PCB 88-203, 102 PCB 215, 218 (Aug. 31, 1989).

However, the Board has granted variances with "retroactive" inception dates under certain circumstances. The nature of the circumstances has dictated the inception date in each case.

The Board has made the variance retroactive to the date on which we would have rendered a decision--i.e., 120 days from the date the petition was filed--where there was a delay of the proceeding through no fault of the petitioner. Allied Signal, Inc. v. EPA, PCB 88-172, 105 PCB 7, 12 (Nov. 2, 1989) (procedural delay); Morton Chemical Div. v. EPA, PCB 88-102, 96 PCB 169, 181 (Feb. 23, 1989) (confusion over interpretation of federal regulations, the Agency changed its view during the course of the proceeding, and the petitioner sought compliance during the pendency); Union Oil Co. of California, PCB 84-66, 63 PCB 75, 79 (Feb. 20, 1985) (delay was beyond the control of the petitioner). We have used a shorter period than the statutory time for decision to back-date a variance where we have otherwise viewed the petition as timely filed prior to the date on which the petitioner required the relief. Monsanto Co. v. EPA, PCB 88-206(B), 98 PCB 267, 273 (Apr. 27, 1989) (filed 92 days before compliance deadline). However, this type of "backdating" is entirely consistent with the Board's repeatedly-enunciated disinclination to grant retroactive variances. In these cases, the Board did little more than confer an inception date of the latest date on which the Act would have required a Board decision, were it not for a waiver of that deadline. Under certain circumstances, such as those in the instant case, there is a legitimate interest on the part of the Board and all parties

that the petitioner grant a waiver of the 120-day period, and this merely serves to avoid penalizing a petitioner for having submitted such a waiver.

The Board has applied an inception date earlier than the 120 days where there are unavoidable, special, or extraordinary circumstances. American National Can Co. 102 PCB 218 (11 days after filing, where petitioner diligently sought compliance and there was no reason to anticipate the need for a variance until it was too late to timely file); Minnesota Mining and Manufacturing Co. v. EPA, PCB 89-58, 102 PCB 223, 226 (Aug. 31, 1989) (day after filing, where petitioner learned of error that resulted in non-compliance only shortly before filing); Fedders-USA, 98 PCB 19 (date of filing, where extended proceeding for prior variance ended only a short time before filing); Pines Trailer Co. v. EPA, PCB 88-10, 90 PCB 485, 488 (June 30, 1988); Bloomington/Normal Sanitary District v. EPA, PCB 87-207, 87 PCB 21, 22 (Mar. 10, 1988) (nine days after filing, where there were unexpected construction delays and the petitioner made a good faith effort at compliance); Classic Finishing Co. v. EPA, PCB 84-174(b), 70 PCB 229, 233 (June 20, 1986) (date of filing first amended petition, where there was a change in company ownership, an ongoing compliance effort that resulted in updating of the petition and eventual compliance before the date of the Board decision, and due to nature of the materials involved and the technology-forcing nature of the underlying regulations); Chicago Rotoprint Co. v. EPA, PCB 84-151, 63 PCB 91 (Feb. 20, 1985) (35 days after filing, where need for variance was not known earlier). The Board has also occasionally applied an effective date that ante-dates the filing of the petition under the extreme of such circumstances. Deere & Co., 92 PCB 94 (Sept. 8, 1988) (20 days prior to filing, where petitioner diligently sought relief and good faith efforts appeared to have resulted in compliance prior to the Board decision); Midwest Solvents Co. of Illinois v. EPA, PCB 84-5, 57 PCB 369, 371 (Apr. 5, 1991) (nine days before filing, where the petitioner was diligent in seeking relief and the delay in filing arose through procedural confusion over the extension of a prior provisional variance).

Other cases underscore the fact that the timeliness of filing is a primary factor in consideration of the "special circumstances." First, there are those in which the Board routinely refused to apply a retroactive inception date where either the petitioner filed late without explanation, or where delay resulted through some fault of the petitioner. (LCN Closers, Inc., 101 PCB 286; DMI, Inc., 96 PCB 187; Borden Chemical Co., 67 PCB 6; City of Farmington, 63 PCB 98; Hansen-Sterling Drug Co., 62 PCB 389; Village of Sauget, 55 PCB 258; Olin Corp., 53 PCB 291). Second is the existence of other factors relating to the petitioner's diligence and efforts at compliance:

> A principal consideration in the granting of retroactive relief is a showing that the petitioner has diligently sought relief and has made good faith efforts at achieving compliance.
>
> Deere & Co. v. EPA, PCB 88-22, 92 PCB 91, 94 (Sept. 8, 1989) (citations omitted).

Now to the specific arguments in this case, DMI requested that the variance be retroactive to September 1, 1990. However, DMI stated that the September 1 date was chosen for convenience and "[i]n fact, relief was not necessary until September 15, 1990" (the date that DMI began using the noncompliant paint). (Pet. Br. 12). DMI stated that it "recognizes that retroactive relief is somewhat of an extraordinary remedy, granted only in the face of unusual or extraordinary circumstances". (Pet. Br. 12). DMI maintains that such extraordinary or unusual circumstances are present in this case due to

> DMI's unflagging good faith efforts to achieve compliance, the expense and inconvenience to which DMI has already submitted itself in its efforts to achieve compliance, the utter lack of any harm to the environment from DMI's actions, and the emergency nature of DMI's request for relief. (Pet. Br. 12).

DMI stated that after its paint supplier notified DMI that a compliant paint could not be found to meet the needs of DMI, DMI, on September 5, 1990, "contacted the Agency to see if it had any suggestions or ideas, to which the Agency responded negatively". (Pet. Br. 15). DMI then informed the Agency that it had no choice but to cease using the water-based paint and return to the high-volatility paint. DMI began using the high-volatility paint on September 15, 1990. (Pet. Br. 15-16).

In further support of DMI's request for retroactive relief, DMI stated that "September in particular, and the early autumn season in general are critical times in the farm implement market." (Pet. Br. 16). DMI president, William Schmidtgall, testified that 87 percent of DMI's product will have been shipped to dealers while only 32 percent will have been sold to end users during this time. (Pet. Br. 16, Tr. 21-22). Thus, DMI maintains that had it not demonstrated to its dealers by late fall, 1990 that it had resolved the paint quality issue DMI expected to receive substantially fewer early orders. (Pet. Br. 16-17).

The Agency argues that no "extraordinary or unusual" circumstances exist which would warrant the granting of retroactive relief. (Ag. Br. 2). The Agency maintains that DMI "should have known to request an extension of its variance or to

timely file another variance based on its past experience". (Ag. Br. 12). In support of its position the Agency points to testimony by DMI president, William Schmidtgall, who stated that DMI received complaints in early 1990 from dealers concerning the paint quality. (Ag. Br. 3). The Agency goes on to state that:

> DMI's variance did not expire until July 1, 1989 or when a compliant paint was found. DMI certainly could have filed for an extension of its variance by April 1, 1990, some 120 days prior to the end of its variance. Even when complaints continued, DMI seemed to hope that the problems would go away and did not come to the realization that it could not be solved until September 1990 when the fall sale season was beginning. DMI then after months of acknowledgment of the problem abruptly switched back to high volatile coatings prior to seeking relief. (Ag. Br. 3).

CONCLUSION

The Board finds that denial of a retroactive variance would impose an arbitrary or unreasonable hardship. The Board is not persuaded by the Agency's argument that DMI "should have known, based on past experience" that a retroactive variance was necessary. In fact, DMI had a reasonable expectation that the compliant paint would be acceptable. Mr. Schmidtgall testified that "our preliminary tests indicated to us that it [the compliant paint] did give us the quality expectations that our customers had and that matches the market position that DMI takes within a very competitive environment". (Tr. 16). Further DMI's paint supplier did not inform DMI that the supplier could not meet DMI's needs until September of 1990. DMI could have reasonably expected that the supplier could provide a paint until that time.

In addition, the Agency misstated the position DMI was in with regard to the previous variance. DMI could not have filed for an extension of the previous variance because that variance had expired by its terms no later than July 1989. In addition, DMI's requested relief and its compliance alternatives are significantly different in the instant case than in the previous variance. Therefore, filing a new variance petition was DMI's only recourse.

As previously discussed, this is DMI's second variance request. The Board granted DMI a variance in 1989, and granted relief retroactively to 120 days from the filing of the petition for variance. Since the granting of that variance, DMI did achieve compliance. When use of the compliant paint was no longer satisfactory to DMI's customers, it continued to search for a compliant paint until DMI's paint supplier indicated that it was not possible to find a paint which would meet DMI's needs.

DMI then sought relief first in the form of a provisional variance, which the Agency denied, and then with a variance petition before the Board.

The Board also notes that DMI also states that the variance would "pose no adverse environmental impacts". (Pet. Br. 10). The Agency does not agree that there would be "no adverse" impacts; however, the Agency does state that the granting of the variance would result in "minimal environmental impacts". (Ag. Br. 2). DMI points out in its petition that DMI is located in rural Woodford County which is an attainment area for ozone. (Pet. 18). In addition, the Agency indicates that DMI is located "in a long-standing attainment area" and that the variance would be "approvable" as a SIP revision. (Ag. Rec. 5). Thus, the granting of this variance should not affect the Federal approval of the SIP.

The Board finds that relief is unnecessary and unwarranted for the spray coat paint which is presently limited to 3.5 lb/gallon in 35 Ill. Adm. Code 215.204(j)(3) and its operating permit.

The Board is concerned with the granting of retroactive variances and does not generally grant such a variance. (See Modine Manufacturing Corp. v. IEPA, PCB 88-25, July 25, 1991). However, under certain circumstances, such as those in the instant case where, DMI has diligently sought relief and after having made a good faith effort to maintain compliance and could not have reasonably anticipated earlier that variance would be needed, the Board has granted retroactive relief. Therefore, the Board will grant DMI retroactive relief to September 15, 1990.

This Opinion constitutes the Board's finding of fact and conclusions of law in this matter.

ORDER

1. Petitioner DMI, Inc., is hereby granted variance from 35 Ill. Adm. Code 215.204(j) for its facility located on Route 150 in Woodford County, Illinois, subject to the following conditions:

   a) Relief is limited to the paint in the dip tank on the paint deck. Such paint is further limited to a VOM content not to exceed 4.2 lb/gallon prior to solvent addition and solvent addition is limited to 61 lb/day on a 30 day average.

   b) Variance begins retroactively on September 15, 1990.

c) Variance expires upon granting of site specific relief or January 1, 1993, whichever comes first.

d) DMI shall continue the testing of potential compliant dip tank coatings. DMI shall test coatings at the rate of no less than two per year.

e) DMI shall submit quarterly reports detailing the progress made in achieving complete compliance with 35 Ill. Adm. Code 215.204(j)(3). The reports shall be submitted to:

Regional Manager
Division of Air Pollution Control
Illinois Environmental Protection Agency
5415 North University
Peoria, Illinois 61614

2. Within forty-five days of the date of this Order, Petitioner shall execute and forward to Renee Stadel, Division of Legal Counsel, Illinois Environmental Protection Agency, P.O. Box 19276, 2200 Churchill Road, Springfield, Illinois 62794-9276, a Certificate of Acceptance and agreement to be bound to all terms and conditions of the granted variance. The 45-day period shall be held in abeyance during any period that this matter is appealed. Failure to execute and forward the Certificate within 45-days renders this variance void and of no force and effect as a shield against enforcement of rules from which this variance is granted. The form of Certificate is as follows:

CERTIFICATION

I (We), _____, hereby accept and agree to be bound by all terms and conditions of the Order of the Pollution Control Board in PCB 90-227, December 19, 1991.

_____
Petitioner

_____
By: Authorized Agent

_____
Title

_____
Date

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989, 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.

J.D. Dumelle concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 19th day of December, 1991 by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board