

ILLINOIS POLLUTION CONTROL BOARD  
July 25, 1991

MODINE MANUFACTURING CORP., )  
 )  
 Petitioner, ) PCB 88-25  
 ) (Variance)  
 v. )  
 )  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondent. )

ROY M. HARSCH AND GARDNER, CARTON & DOUGLAS APPEARED ON BEHALF OF PETITIONER;

KATHLEEN C. BASSI APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (J. Anderson):

This matter comes before the Board on the Petition for Variance filed by Modine Manufacturing Corp. on January 25, 1988. By Order of February 4, 1988, the Board requested additional information. Modine filed an amended petition for variance on March, 17, 1988, and an open waiver of the deadline for Board decision on April 8, 1988. Modine filed a second amended petition for variance on May 10, 1988. The Agency filed its first recommendation on August 5, 1988. Modine filed a response on October 11, 1988. Modine filed exhibits inadvertently omitted from its response on October 26, 1988. On May 24, 1989, the Agency filed an addendum to its recommendation, and Modine filed its third amended petition for variance.

The Board received three letters of objection to the variance on February 17, 1988, March 2, 1988, and March 11, 1988. The public hearing occurred on May 25, 1989, and members of the public attended and participated. Modine filed a supplement to the record on July 17, 1989, with a letter disclosing events subsequent to the public hearing and its post-hearing brief on July 21, 1989. The Agency filed its post-hearing brief on August 21, 1989. Modine filed a reply brief on September 21, 1989.

On July 3, 1990, the Board ordered briefing on questions arising through its decision in R87-36, a related proceeding on a petition by Modine for site-specific rulemaking. On August 9, 1990, Modine filed its fourth amended petition for variance in response to the Board order. The Agency filed its amended recommendation on September 12, 1990, suggesting that the Board grant the petition in part and deny it in part.

FACTS AND ISSUES

Modine operates a plant that employs 269 workers at

Ringwood, Illinois. The "McHenry" plant uses two processes, the older "Alfuse" process and the newer "Nocolok" process, to produce various types of heat exchange condensers and evaporators for various customers. The Alfuse process produces process wastewater and non-contact cooling water. Process wastewaters arise from a wet scrubber, water quenches, a slurry wash, and test tanks, with the scrubber producing most of the process wastewater. The Nocolok process produces only non-contact cooling water. All plant service water originates from an on-site well. About 3500 gallons per day (gpd) of wastewater originate from plant sanitary facilities. The Alfuse and Nocolok processes produce about 81,000 gpd of non-contact cooling water. The total discharge from all sources combined total about 300,000 gpd.

In the wastewater treatment system, the process wastewaters are combined and treated with lime in the first of three treatment lagoons for neutralization and removal of fluoride, zinc, and aluminum. The sanitary wastewater is first treated in an extended aeration system, then discharged into this first lagoon. The non-contact cooling waters also enter this lagoon system. The first lagoon removes suspended solids and deoxygenating wastes. Flow from the first lagoon discharges to the second lagoon, then the third, in series, before discharge to a chlorine contact tank. The mean hydraulic retention time of the lagoon system is 15 to 20 days. The treated effluent enters an unnamed tributary of Dutch Creek about two miles upstream of the confluence, and Dutch Creek drains into the Fox River about two miles farther downstream.

The Board has granted Modine relief from the generally-applicable limitations and standards in prior proceedings. On May 29, 1984, in PCB 82-111, the Board granted Modine variance relief from the ammonia nitrogen, un-ionized ammonia, biochemical oxygen demand, and total suspended solids standards and limitations for the period from May 29, 1984 until March 1, 1985. See Modine Manufacturing Co. v. EPA, No. PCB 82-111, 59 PCB 185, 215 (May 29, 1984). On December 22, 1987, in PCB 85-154, the Board granted another variance for these parameters for the period from October 16, 1985 through December 31, 1987. See Modine Manufacturing Co. v. EPA, No. PCB 85-154, 84 PCB 735, 740-41 (Dec. 22, 1987). In R87-36, effective May 31, 1990, the Board adopted site-specific rules relating to Modine's fluoride, biochemical oxygen demand, and total suspended solids discharges. See In re Site-Specific Limitation for the Modine Manufacturing Co. Facility, Ringwood, Illinois, No. R87-36, 111 PCB 461, 482-23 (May 24, 1990).

The nature of the relief sought in this proceeding and the Agency's recommendation have changed throughout the course of this proceeding. Initially, Modine sought the following with regard to ammonia-nitrogen, un-ionized ammonia, biochemical

oxygen demand, and total suspended solids:

a new variance, or a determination that the rules in question separately and in combination are unreasonable, arbitrary and capricious as specifically applied to its McHenry Plant . . . .

Petition for Variance at 2.

The Agency Recommendation challenged Modine's assertions as to the treatability of its wastewater and impact on the receiving stream. The Agency Recommendation highlighted many perceived informational deficiencies in the petition and criticized the petition as deficient for lacking a compliance plan. The Agency asserted that Modine sought a permanent variance contrary to law and recommended denial of the requested variance.<sup>1</sup> The first and second amended petitions for variance added further information and arguments to the record. The Third Amended Variance Petition added further arguments as to the originally-requested pollutants, but further added variance requests as to fluoride and barium discharges. See Third Amended Variance Petition at 5-6.

When Modine filed its fourth amended petition, dated August 9, 1990, it sought relief more limited in many ways from the original petition, although it added a request as to zinc. By this last filing, Modine added definite variance expiration dates for each pollutant, and it dropped its request as to barium. Modine's fourth amended petition retained the prior requests for relief as to ammonia nitrogen, un-ionized ammonia, biochemical oxygen demand, total suspended solids, and fluoride. Similarly, the Agency's amended recommendation of September 12, 1990 no longer urged a blanket denial of variance relief. In the intervening time from January 25, 1988 until August 9, 1990, Modine has effected changes to its wastewater treatment system, completed October 1, 1990, and the Board granted a site-specific rule for Modine's fluoride, biochemical oxygen demand, and total suspended solids discharges in R87-36, effective May 31, 1990. See 14 Ill. Reg. 9437 & 9460 (June 15, 1990). In R87-36, the Board also determined that no relief was necessary as to barium pursuant to the background pollutant exception of 35 Ill. Adm. Code 304.103. See In re Site-Specific Limitation for the Modine Manufacturing Co., supra, at 482-23.

As of this time, the relative positions of the parties are summarized point-by-point as follows:

<sup>1</sup> This reflects the Agency's position as late as the public hearing held May 25, 1989, see Tr. 28-31, and when it filed its post-hearing brief on August 21, 1989. See Post-Hearing Brief at 3-8.

Ammonia Nitrogen (NH<sub>3</sub>-N) (Sections 302.212, 304.105 & 304.301)

Modine: For the period from December 31, 1987<sup>2</sup> through October 1, 1990:

3.2 mg/l (monthly average)	May through September
4.4 mg/l (monthly average)	October through April
4.4 mg/l (daily maximum)	May through September
4.4 mg/l (daily maximum)	October through April

Agency: For the period from the date of the Board Order until October 1, 1990:

Grant requested limits.

Un-ionized Ammonia (Section 302.212(b))

Modine: For the period from December 31, 1987<sup>3</sup> through October 1, 1990:

0.08 mg/l

Agency: For the period from the date of the Board Order until

<sup>2</sup> In the January 25, 1988 petition for variance, Modine sought an extension of the prior variance of PCB 85-154, a new variance, or a declaration that the standards for ammonia-nitrogen, un-ionized ammonia, biochemical oxygen demand, and total suspended solids did not apply to its discharges because they were "unreasonable, arbitrary and capricious as specifically applied" to its discharges. Petition for Variance at 2. The fourth amended petition clearly requested an inception date of December 31, 1987, the day the PCB 85-154 variance expired, for fluoride, biochemical oxygen demand, and total suspended solids. It requested a variance "until October 1, 1990" for ammonia-nitrogen, un-ionized ammonia, and zinc. See Fourth Amended Petition at 6. The Agency interpreted the requests as to ammonia-nitrogen and un-ionized ammonia as for the period beginning December 31, 1987, yet stated that Modine was unclear as to the requested inception as to zinc. See Agency's Amended Recommendation at 2. The Board reads the requests as to ammonia-nitrogen and un-ionized ammonia as for the period beginning December 31, 1987, consistent with the Agency's interpretation. However, the Board fails to see how the Agency interpreted this same passage as unclear as to zinc. Therefore, the Board interprets the requested inception date for zinc as December 31, 1987 for the sake of the following discussion.

<sup>3</sup> See supra note 2.

October 1, 1990:

Grant requested limits.

Difference between the parties: The inception date, i.e., the period from December 31, 1987 until the date of the Board Order.

Biochemical Oxygen Demand (BOD<sub>5</sub>) (Section 304.120(c))

Modine: For the period from December 31, 1987<sup>4</sup> through May 31, 1990<sup>5</sup>:

25 mg/l (monthly average)	May through September
35 mg/l (monthly average)	October through April

60 mg/l (daily maximum)	May through September
70 mg/l (daily maximum)	October through April

Agency: For the period from the date of the Board Order until May 31, 1990:

Grant requested limits, but retroactive relief is unwarranted.

Difference between the parties: The retroactive inception date, i.e., the period from December 31, 1987 until the date of the Board Order.

Total Suspended Solids (TSS) (Section 304.120(c))

Modine: For the period from December 31, 1987<sup>6</sup> through May 31, 1990<sup>7</sup>:

12 mg/l (monthly average)

30 mg/l (daily maximum)

Agency: For the period from the date of the Board Order until May 31, 1990:

<sup>4</sup> See supra note 2.

<sup>5</sup> The effective date of the relief granted in the site-specific rulemaking in R87-36.

<sup>6</sup> See supra note 2.

<sup>7</sup> See supra note 5.

Grant requested limits, but retroactive relief is unwarranted.

Difference between the parties: The retroactive inception date, i.e., the period from December 31, 1987 until the date of the Board Order.

Fluoride (Sections 302.208 & 304.105)

Modine: For the period from December 31, 1987<sup>8</sup> until May 31, 1990<sup>9</sup>:

4.0 mg/l (monthly average)

5.6 mg/l (daily maximum)

Agency: For the period from the date of the Board Order until May 31, 1990:

Grant requested limits, but retroactive relief is unwarranted.

Difference between the parties: The retroactive inception date, i.e., the period from December 31, 1987 until the date of the Board Order.

Zinc (Section 304.124)

Modine: For the period from December 31, 1987<sup>10</sup> until October 1, 1990:

No limitation stated

Agency: Deny the requested variance because Modine has proven no hardship and proposed no limitation.

Difference between the parties: Any grant of relief.

DISCUSSION

The Board made specific findings in the site-specific rulemaking, R87-36:

[T]here is no alternative treatment method for Modine which is simultaneously technically feasible and

<sup>8</sup> See supra note 2.

<sup>9</sup> See supra note 5.

<sup>10</sup> See supra note 2.

economically reasonable. . . . [A]t least as regards the parameters at issue, [Modine's effluent] is not a limiting factor in the quality of the receiving waterway.

In re Site-Specific Limitation for the Modine Manufacturing Co., supra, at 478.

Subsequent to that Opinion and Order of May 24, 1990 relating to biochemical oxygen demand, total suspended solids, and fluoride, the Agency recommends that the Board grant the requested variances for all parameters except zinc. See Agency's Amended Recommendation at 4-5. Therefore, since the initial filing of this proceeding, the issues in this proceeding have reduced to two: (1) the propriety of retroactive relief, and (2) whether relief is warranted as to zinc. The Board now addresses these issues in turn.

Retroactive Variance Relief

Modine filed its petition for site-specific rulemaking, in R87-36, on October 16, 1987--76 days before the December 31, 1987 expiration of the variance in PCB 85-154. Modine filed the initial petition in the instant proceeding, requesting variance relief as to ammonia-nitrogen, un-ionized ammonia, biochemical oxygen demand, fluoride, and total suspended solids, on January 25, 1988, 25 days after the expiration of the prior variance. Modine first requested relief as to zinc on August 9, 1990. Fluoride and zinc were not the subject of PCB 85-154. See Modine Manufacturing Co. v. EPA, No. PCB 85-154, 84 PCB at 740-41.

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, No. PCB 89-27, 101 PCB 283, 286 (July 27, 1989); Borden Chemical Co. v. EPA, No. PCB 82-82, 67 PCB 3,6 (Dec. 5, 1985); City of Farmington v. EPA, No. PCB 84-166, 63 PCB 97, 98 (Feb. 20, 1985); Hansen-Sterling Drum Co. v. EPA, No. PCB 83-240, 62 PCB 387, 389 (Jan. 24, 1985); Village of Sauget v. EPA, No. PCB 83-146, 55 PCB 255, 258 (Dec. 15, 1983); Olin Corp. v. EPA, No. 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, No. 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. 111½, 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, No. PCB 79-142, 56 PCB 1, 4 (Jan. 12, 1984) (Enforcement action in which inception date of variance was at issue). This is apparently the position the Agency desires the Board to take, since the Agency requests that the Board make any variance effective on the date of the Board Order.<sup>11</sup>

As we stated in Fedders-USA v. EPA, No. PCB 86-47, 98 PCB 15, 19 (Apr. 6, 1989):

[The Board] will not . . . 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).

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, No. 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, No. 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,

<sup>11</sup> Of course, this would result in dismissal of this proceeding because the requested termination dates are past.



Inc. v. EPA, No. PCB 88-172, 105 PCB 7, 12 (Nov. 2, 1989) (procedural delay); Morton Chemical Div. v. EPA, No. 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, No. 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, No. 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 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 earlier inception date than the 120 days where there are unavoidable, special, or extraordinary circumstances. American National Can Co. 102 PCB at 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, No. 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 at 19 (date of filing, where extended proceeding for prior variance ended only a short time before filing); Pines Trailer Co. v. EPA, No. PCB 88-10, 90 PCB 485, 488 (June 30, 1988); Bloomington/Normal Sanitary District v. EPA, No. 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, No. 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 updatings 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 regulation); Chicago Rotoprint Co. v. EPA, No. 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 at 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, No. 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 at 286; DMI, Inc., 96 PCB at 187; Borden Chemical Co., 67 PCB at 6; City of Farmington, 63 PCB at 98; Hansen-Sterling Drug Co., 62 PCB at 389; Village of Sauget, 55 PCB at 258; Olin Corp., 53 PCB at 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, No. PCB 88-22, 92 PCB 91, 94 (Sept. 8, 1988) (citations omitted).

The Board has located only one case in which it granted retroactive variance relief without some recitation of unavoidable, special, or extraordinary circumstances that indicate timeliness of the filing for relief. That was the variance granted Modine immediately prior to this requested variance, and in that proceeding the Agency recommended that the variance commence on the date of filing of the petition. See Modine Manufacturing Co., 84 PCB at 739-40. In that predecessor to this present proceeding, the Board stated:

The Board finds this matter to be a difficult call. The long time that this matter has been extant, both in its present and previous incarnations, compounded by the repeated delays in bringing this matter to resolution, suggest that some of the hardship asserted by Modine is self-imposed. Moreover, the Board is displeased with a request for a variance which has a term, but for a few days, which is after the fact. While the Board allows that there may be circumstances where the latter condition might validly arise, it also believes that after-the-fact grants of variance are generally inconsistent with the intent of variance relief as enunciated by the Environmental Protection Act. At the minimum, it is not the intent

of a variance to legitimize past failure to comply with rules and regulations.

In considering the entirety of this matter, the Board finds that in such a close decision the recommendation of the Agency to grant the requested variance carries special weight.

Modine Manufacturing Co., 84 PCB at 739-40 (retroactive to date of filing).

The present variance proceeding is essentially an extension of the prior Modine Manufacturing Co. proceeding quoted above, with some minor differences. Again the Agency recommends a grant of variance, but it expressly recommends that the variance take effect on the date of this Order. In addition to the parameters involved in the prior proceeding, fluoride and zinc are involved here. Here, Modine has achieved compliance prior to the date of this order, in major part as a result of the R87-36 site-specific rulemaking. Through the string of variance proceedings and two site-specific rulemakings,<sup>12</sup> Modine has sought relief; and through the R87-36 site-specific rule and various plant and process changes, Modine has already achieved compliance.

However, Modine nowhere recites any special circumstances that would justify full retroactive relief, and Modine nowhere explains its delay in filing this present proceeding to the extent it requests an extension of variance. The filing of R87-36 prior to the termination of the PCB 85-154 variance is insufficient because it is unrealistic to expect any site-specific rule to issue within 76 days. A recitation of arbitrary and unreasonable hardship is necessary to any grant of a variance. Therefore, an arbitrary and unreasonable hardship cannot also constitute a "special circumstance" that would justify retroactive relief. Otherwise, all variances would simply apply retroactively upon request.

For the foregoing reasons, the Board has two options:

1. Grant relief retroactive to 120 days after the date Modine filed the petition for variance; or

<sup>12</sup> See In re Site-Specific Limitation for the Modine Manufacturing Co., No. R87-37, Modine Manufacturing Co. v. EPA, No. PCB 85-154, 84 PCB 735 (Dec. 22, 1987); Modine Manufacturing Co. v. EPA, No. PCB 82-111, 58 PCB 207 (May 29, 1984); Modine Manufacturing Co. v. EPA, No. PCB 79-112, 47 PCB 519 (Aug. 18, 1982) (dismissed); In re Modine Manufacturing Co. Petition to Amend Chapter 3 Regulations, No. R79-8, 46 PCB 247 (Apr. 29, 1982) (dismissed); Modine Manufacturing Co. v. EPA, No. PCB 74-14, 14 PCB 169 (Oct. 17, 1974) (Order on rehearing).

2. Deny relief by dismissing this proceeding because the requested termination dates are already past.

The Board favors the first option. However, Modine filed the initial petition on January 25, 1988, and it subsequently amended the petition four times--the final time on August 9, 1990. The filing of an amended petition restarts the time-clock for the purposes of Section 38(a). See City of South Beloit, No. PCB 86-113, 76 PCB 368 (Mar. 19, 1987); Mobil Oil Co. v. EPA, No. PCB 84-37, 60 PCB 41 (Sept. 6, 1984). This means that the choice of inception dates could range from May 24, 1988 to December 6, 1990.

In considering which date to use as an inception date for the grant of variance in this proceeding, the Board again considers the history of this proceeding. The Board notes that since the filing of the initial petition, Modine has revised its plant operations and pursued R87-36 to achieve compliance. Modine did not wait until Board resolution of this matter to take actions directed towards compliance. Further, Modine continued to revise its request and plant actions until the Agency finally agreed to recommend a grant of variance. As stated by Modine in its pleadings:

Modine has filed its variance request . . . so that Modine could come into full compliance with the Board's regulations. The length of time it has taken Modine to reach this point is not the result of misuse, but has resulted from Modine's continuing efforts to find a compliance alternative.

Modine's Reply Brief at 2 (filed September 1, 1989).

For the foregoing reasons, the Board finds that the amended petitions filed throughout this proceeding have served a useful purpose. The Board will not penalize Modine for filing the amended petitions that served this purpose of ending the controversy in this proceeding. The Board further observes that Modine has used the time during the pendency of this proceeding to seek relief and to achieve compliance. These "special circumstances" would justify the Board using the date of filing of the initial petition to determine the inception date for the variance.

As noted earlier in this Opinion and Order, the initial petition for variance included requests for relief as to ammonia-nitrogen, un-ionized ammonia, biochemical oxygen demand, and total suspended solids. The third amendment of May 24, 1989 added fluoride, and the fourth amendment of August 9, 1990 added zinc. Therefore, as to ammonia-nitrogen, un-ionized ammonia, biochemical oxygen demand, and total suspended solids, the Board

will grant the variance retroactive to 120 days after the filing of the initial petition--i.e., to May 24, 1988. As to fluoride, the Board will grant the variance retroactive to 120 days after the filing of the third amended petition--i.e., to September 21, 1989. For the reasons stated below, the Board will deny relief as to zinc.<sup>13</sup>

### Zinc Variance Relief

In the fourth amended petition for variance, Modine asserts that it had eight zinc exceedances during the period of January, 1984 through July, 1990. Modine states that it believes these the result of the location of its sampler, which tends to collect unrepresentative samples for zinc. Modine intended to relocate this sampler by October 1, 1990. It did not believe that its effluent had an adverse impact on the receiving stream. Modine requested the variance to allow it to construct a new sampling point. Fourth Amended Variance Petition at 5-6.

The zinc issue first appeared in the August 9, 1990 Fourth Amended Variance Petition. No request as to zinc appears in any of the prior petitions. See generally Petition for Variance (filed Jan. 25, 1988); Amended Petition for Variance (filed Mar. 17, 1988); Second Amended Petition for Variance (filed May 10, 1988); Third Amended Variance Petition (filed May 24, 1989). Modine did not make one at hearing. See generally Transcript of Hearing (held May 25, 1989). Further, Modine made no assertions as to zinc in its post-hearing filings. See generally Modine's Post Hearing Comment (filed June 2, 1989); Modine's Post Hearing Brief (filed July 21, 1989); Modine's Reply Brief (filed Sept. 1, 1989). In fact, the only factual basis given in support of the requested relief is contained in the request in the Fourth Amended Variance Petition. See Fourth Amended Variance Petition at 5-6.

The Agency requests that the Board deny the requested relief. The Agency concedes that Modine's explanation of the zinc exceedances is probably true, but states that Modine presents the results from no test to prove this theory, and the Agency asserts that there are other alternatives Modine could apply in the interim before the requested October 1, 1990 expiration date. The Agency goes on to assert the following:

[Modine] is undertaking a project that will correct a newly-discovered violation, and . . . the easiest "fix" is to include this new problem in the variance

<sup>13</sup> The Board notes that an independent basis exists for denying relief as to zinc: 120 days after August 9, 1990 is later than the requested termination date of October 1, 1990. Dismissal of the request as moot would be appropriate.

proceeding already underway. However, the Agency and the Board have a responsibility to protect the integrity of the variance system. Variances should not be granted simply because it is expedient and convenient. Modine has demonstrated no hardship regarding other solutions to its zinc problem. Modine has not even proposed a limit for zinc for the duration of the variance.

Agency's Amended Recommendation at 3-4 (filed Sept. 12, 1990; emphasis added).

The Board observes that Modine's August 9, 1990-requested zinc variance would have expired October 1, 1990 if granted. The request apparently was for an inception date of December 31, 1987.<sup>14</sup> Thus, Modine seeks relief for possible past violations as of this date.

Modine's assertions in favor of a zinc variance are essentially this: we have discovered apparent violations of Section 304.124(a) in our monitoring numbers; we believe that there was no violation, rather there was a problem in the monitoring numbers themselves; and we have a means of complying within 53 days; therefore, give us a variance from this provision. Nowhere does Modine aver that compliance with the zinc standard would impose an arbitrary and unreasonable hardship, and nowhere does Modine cite facts of record that would support such a finding; Modine simply requests the variance.

In light of these facts, the Board must hold that Modine has failed to present adequate proof that immediate compliance would impose an arbitrary and unreasonable hardship for the purposes of Section 35(a). Ill. Rev. Stat. 1989 ch. 111 $\frac{1}{2}$ , par. 1035(a). Modine has therefore failed to justify a grant of variance, and the Board will deny variance relief as to zinc.<sup>15</sup>

#### ORDER

The Board hereby grants a variance to Modine Manufacturing Co. from the following:

<sup>14</sup> See supra note 2.

<sup>15</sup> The Board notes that should an enforcement action arise, Modine has itself observed that proof of an "arbitrary and unreasonable hardship" can stand as a defense to that action. See Amended Petition for Variance at 5; Ill. Rev. Stat. 1989 ch. 111 $\frac{1}{2}$ , par. 1031(c). For the purposes of this proceeding, Modine has failed to submit a record that could justify the finding necessary to result in a variance for zinc.

- A. the ammonia nitrogen (NH<sub>3</sub>-N) standards of 35 Ill. Adm. Code 302.212, 304.105, and 304.301 for the period from May 24, 1988 through October 1, 1990;
- B. the un-ionized Ammonia standard of 35 Ill. Adm. Code 302.212(b) for the period from May 24, 1988 through October 1, 1990;
- C. the biochemical oxygen demand (BOD<sub>5</sub>) standard of 35 Ill. Adm. Code 304.120(c) for the period from May 24, 1988 through May 31, 1990;
- D. the total suspended solids (TSS) standard of 35 Ill. Adm. Code 304.120(c) for the period from May 24, 1988 through May 31, 1990; and
- E. the fluoride standards of 35 Ill. Adm. Code 302.208, and 304.105 for the period from September 21, 1989 until May 31, 1990.

During the term of this variance, Modine Manufacturing Co. shall discharge no effluent that exceeds the following limitations:

4.4 mg/l (NH <sub>3</sub> -N) (daily maximum)	May through September
3.2 mg/l (NH <sub>3</sub> -N) (monthly average)	May through September
4.4 mg/l (NH <sub>3</sub> -N) (daily maximum)	October through April
4.4 mg/l (NH <sub>3</sub> -N) (monthly average)	October through April
0.08 mg/l un-ionized ammonia	
60 mg/l (BOD <sub>5</sub> ) (daily maximum)	May through September
25 mg/l (BOD <sub>5</sub> ) (monthly average)	May through September
70 mg/l (BOD <sub>5</sub> ) (daily maximum)	October through April
35 mg/l (BOD <sub>5</sub> ) (monthly average)	October through April
30 mg/l (TSS) (daily maximum)	
12 mg/l (TSS) (monthly average)	
5.6 mg/l fluoride (daily maximum)	
4.0 mg/l fluoride (monthly average)	

Modine Manufacturing Co. shall execute a Certificate of Acceptance and return an executed copy of that document to the Agency addressed as follows:

Kathleen C. Bassi  
Division of Legal Counsel  
Illinois Environmental Protection Agency  
2200 Churchill Road  
P.O. Box 19276  
Springfield, Illinois 62794-9276

Modine Manufacturing Co. shall return the executed copy to the Agency within 45 days of the date of this Opinion and Order. The Certificate of Acceptance shall take the following form:

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 88-25, dated July 25, 1991.

\_\_\_\_\_  
Petitioner

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

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

APPEAL OF FINAL BOARD ORDERS


Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989 ch. 111½, 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, do hereby certify that the above Opinion and Order was adopted on the 25<sup>th</sup> day of July, 1991, by a vote of 5-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board