

ILLINOIS POLLUTION CONTROL BOARD
December 5, 1996

HARRIS MARCUS GROUP, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 95-156
)	(Variance - Air)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

JEFFREY C. FORT, JACQUELINE M. VIDMAR AND CYNTHIA A. FAUR OF
SONNENSCHNEIN, NATH & ROSENTHAL, APPEARED ON BEHALF OF PETITIONER;

BONNIE R. SAWYER APPEARED ON BEHALF OF RESPONDENT.

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

This case arises out of the petition of Harris Marcus Group, Inc. (HMG). HMG is a manufacturer of home accessories and furniture that uses a variety of coatings on wood, metal and other substrates. In the petition, HMG seeks a variance from certain air pollution control regulations that limit the amount of volatile organic material (VOM) that may be contained in coatings applied to wood, metal and other materials. The Illinois Environmental Protection Agency (Agency) opposes the variance.

For the reasons stated below, the Board makes the following findings of fact and conclusions of law. First, the Board finds that the rules regarding HMG's metal coating operations were stayed as to HMG during this proceeding pursuant to Section 38(b) of the Environmental Protection Act (Act) (415 ILCS 5/38(b) (1994).) Second, the Board finds that HMG's metal coating operations are subject to the rules on metal furniture coatings (35 Ill. Adm. Code 218.204(g)) rather than the rules on miscellaneous metal parts and products (35 Ill. Adm. Code 218.204(j).) Third, the Board denies HMG a prospective variance from the metal furniture coating rules. Fourth, the Board does not find that the wood furniture coating rules were stayed as to HMG during this proceeding. Finally, the Board grants HMG a retroactive variance from the rules that apply to HMG's wood furniture coating operations. (35 Ill. Adm. Code 218.204(l).)

BACKGROUND

Procedural Background

The Act charges the Board with the responsibility of granting variance from Board regulations whenever it is found that compliance with the regulations would impose an arbitrary or unreasonable hardship upon the petitioner. (415 ILCS 5/35(a).) The Agency is required to appear in hearings on variance petitions. (415 ILCS 5/4(f).) The Agency is also charged, among other matters, with the responsibility of investigating each variance petition and making a recommendation to the Board as to the disposition of the petition. (415 ILCS 5/37(a).)

On May 26, 1995, Harris Marcus Group, Inc. (HMG) filed a petition (Pet.) seeking a variance from certain air pollution control regulations, including the restrictions on VOM content in wood furniture coatings (35 Ill. Adm. Code 218.204(l)) and miscellaneous metal parts and products (35 Ill. Adm. Code 218.204(j)). While HMG contends that its metal coating operations are subject to the rules on miscellaneous parts and products, HMG also sought a variance from the rules applicable to metal furniture coatings (35 Ill. Adm. Code 218.204(g)) in the event that the Board were to decide that those rules apply. The Agency filed a recommendation (Rec.) on June 27, 1995, recommending that the variance be denied.

A hearing (Tr.) was held before Board Hearing Officer June Edverson on March 15, 1996. No members of the public were present at the hearing. HMG filed post-hearing briefs on April 4, 1996, and April 16, 1996. The Agency filed its post-hearing brief on April 11, 1996.

On August 14, 1996, HMG filed a "Motion to Supplement the Record" which the Board construed as an amended petition (Am. Pet.). The amended petition sought a different variance from that sought in the original petition. The Agency filed an amended recommendation (Am. Rec.) on September 17, 1996, again recommending that the variance be denied. On September 24, 1996, HMG filed a response to the Agency's recommendation.

Factual Background

HMG is a manufacturer of home accessories such as portable residential lighting, wood furniture and designer style accent pieces, including statuary pottery, baubles and frameless designer mirrors. (Tr. at 15.) The company was originally founded in 1971 and since 1981 has operated a facility located at 3757 South Ashland, Chicago, Illinois. (Pet. at 3; Tr. at 17.) The facility is located in two connected buildings on approximately three acres of land. (Tr. at 17.) HMG employs five hundred and fifty people. (Id.)

HMG is a custom, made-to-order operation with approximately 15,000 active items. (Tr. at 18; Pet. at 3.) The facility has the capability to produce an additional 10,000 end items and over 100,000 parts. (Tr. at 18.) Since HMG is a "custom made job shop," average production runs of 12 to 26 pieces are typical. (Tr. at 18; Pet. at 3.) Several hundred types of

coatings in varying quantities may be used in the HMG facility in a given year. (Tr. at 20; Pet. at 4.) For example, in 1993, HMG used over 40 different coatings on its wood furniture products and 140 different coatings on its metal products. (Pet. at 5.)

HMG services a wide variety of contract, wholesale and retail customers. (Tr. at 17; Pet. at 3.) HMG's products are retailed through department stores, furniture stores, lighting specialty shops, wholesale clubs, and gift shops. (Id.) Contract customers include the United States government and hotel and motel chains. (Tr. at 17-18.) Shipments of products must be completed within 20 days after receipt of the customer's order. (Tr. at 23.) Meeting this schedule is complicated by the large number of raw materials used by HMG. (Id.)

Most lamp parts have a decorative finishing step or brass plating and in the departments the decorative finishes change every three months so the company can offer new goods to the marketplace. (Pet. at 3.) In addition, HMG's made-to-order operation often requires the manual application of multiple coatings. (Tr. at 20.)

HMG provided testimony regarding its emissions at the hearing in this case and in In the Matter of 15% ROP Plan Control Measures for VOM Emissions - Part IV, (April 20, 1995) R94-21 (R94-21 proceeding). HMG's testimony in the R94-21 proceeding has been incorporated into the record for this case. In that proceeding, HMG testified that in 1994, it emitted an estimated total of 54 tons per year (TPY) of volatile organic compounds from its facility: 32 tons from wood furniture coating operations, 15 tons from metal coating operations, and 8 tons from coatings applied to other substrates. (Testimony of Gordon Nelson on behalf of Harris Marcus Group in R94-21 proceedings at 4). In this case, HMG presented revised estimates of its 1994 emissions. HMG now estimates that its 1994 emissions were 12.27 TPY from wood coatings and 13.89 TPY from metal coatings. (Pet. Ex. 12.) HMG's estimate of emissions from coatings applied to other substrates remained at 8 TPY. (Tr. 153-154.)

Requested Variance

HMG is requesting a variance from the requirements for control of VOM emissions from its wood furniture coating, miscellaneous metal coating and metal furniture coating operations. (35 Ill. Adm. Code 218.204(l), (j) and (g).) Those provisions were amended by the Board on April 20, 1995 in the R94-21 proceedings. (These amendments shall be referred to as the R94-21 amendments). The R94-21 amendments became effective on May 9, 1995, with the provisions for VOM emissions control becoming applicable on March 15, 1996. In the R94-21 proceeding, the Board included several measures for reduction of VOM in various coating categories, including metal furniture coatings and miscellaneous metal parts and products coatings. The R94-21 amendments also tightened the applicability levels (from 100 tons per year to 25 tons per year) for wood furniture coating operations.

Section 218.204(l) sets forth the emission limitations for wood furniture coatings listed below. Compliance with limits marked with an asterisk (*) was required on and after March 15, 1996.

		kg/l	lb/gal
1)	Clear topcoat	0.67 0.67*	(5.6) (5.6)*
2)	Opaque stain	0.56 0.56*	(4.7) (4.7)*
3)	Pigmented coat	0.60 0.60*	(5.0) (5.0)*
4)	Repair coat	0.67 0.67*	(5.6) (5.6)*
5)	Sealer	0.67 0.67*	(5.6) (5.6)*
6)	Semi-transparent stain	0.79 0.79*	(6.6) (6.6)*
7)	Wash coat	0.73 0.73*	(6.1) (6.1)*

As noted above, HMG contends that its metal coating operations are subject to the rules on miscellaneous metal parts and products. The emission limitations for those items are set forth in Section 218.204(j) and are as follows:

		kg/l	lb/gal
1)	Clear coating	0.52 0.52*	(4.3) (4.3)*
2)	Extreme performance coating		
	A) Air dried	0.42 0.42*	(3.5) (3.5)*
	B) Baked	0.42 0.40*	(3.5) (3.3)*

* * *

4)	All other coatings		
	A)	Air Dried	0.42 (3.5)
			0.40* (3.3)*
	B)	Baked	0.36 (3.0)
			0.34* (2.8)*

* * *

As noted above, however, HMG also sought a variance from the rules applicable to metal furniture coatings in the event that the Board determines that those rules apply to HMG's metal coating operations. The emission limitations for metal furniture coating in Section 218.201(g) are as follows:

1)	Air dried	0.36 (3.0)
		0.34* (2.8)*
2)	Baked	0.36 (3.0)

Section 218.208(a) exempts a source from the emission limitations in both 218.204(j) and 218.204(g) if the combined emissions from all lines at the source subject to the same subsection never exceed 6.8 kg/day (15 lbs./day) before the application of capture systems and control devices.

In its original petition for variance filed on May 26, 1995, HMG requested a variance from 35 Ill. Adm. Code 218.204(l) and (g) or (j) relating to volatile organic materials emission limitations from May 26, 1995 up to and including May 26, 2000. HMG proposed that it would comply with the following interim limits (in pounds of VOM per gallon) during the variance term:

Wood Furniture:	Clear Topcoat	6.7
	Semi-transparent Stains	7.0
	Opaque Stains	6.8
	Sealer	6.3
Metal Coating:	Clear Coating	7.0
	All other coatings:	
	Air dried	7.1
	Baked	7.4

After a hearing was held in this matter in March, 1996 and post-hearing briefs were filed, HMG filed an amended petition stating that it had achieved success in reformulating coatings and that its need for variance relief had been significantly altered. HMG reports that as of August 12, 1996, it is using coatings in its wood furniture coating operations which meet

the VOM-content requirements of Section 218.204. (Am. Pet. at 3.) Therefore, HMG now seeks a variance from March 15, 1996 to August 12, 1996 to cover the time period that HMG was implementing its compliance plan. (Am. Pet. at 4.) In the alternative, HMG contends that the Board could find that a variance for its wood furniture coating operations is not necessary in this instance since the wood furniture regulations were stayed as to HMG while the variance petition was pending. (Am. Pet. at 4.)

The amended petition also reports that HMG experienced success with the use of low-VOM clear coatings in its metal coating operations. (Am. Pet. at 4.) HMG has found success in hand-spraying a clear coat with a VOM content of 2.8 lbs./gal. (Am. Pet. at 5.) HMG maintains that this low-VOM coating complies with the requirements applicable to emission requirements for miscellaneous metal coating operations in 218.204(j), to which HMG contends it is subject. (Am. Pet. at 6.)

HMG acknowledges that if the Board finds that its operations are instead subject to the rules on metal furniture coatings, HMG's coatings do not meet the 2.3 lbs./gal. limit imposed by those rules. HMG contends, however, that even if it uses a 2.8 lbs./gal. coating, its VOM emissions are less than 15 lbs./day and HMG is therefore exempt from the metal furniture coating rules under 218.208(a). (Am. Pet. at 6.) Thus, HMG contends that it now meets the metal furniture coating limits as well. However, if the Board finds that HMG is subject to the metal furniture coating rules, HMG still requests a short variance to enable it to resolve recordkeeping and permitting issues. (Am. Pet. at 6.) The term of the variance that HMG requests is from March 15, 1996 until the earlier of August 12, 1997, or 35 days after the Agency issues a permit for its metal coating operations.

Statutory And Regulatory Framework

As noted above, the Act charges the Board with the responsibility of granting variance from Board regulations whenever it is found that compliance with the regulations would impose an arbitrary or unreasonable hardship upon the petitioner. (415 ILCS 5/35(a).) In determining whether a variance is to be granted, the Act requires the Board to decide if a petitioner has presented adequate proof that immediate compliance with the Board regulations at issue would impose an arbitrary or unreasonable hardship. (*Id.*) Furthermore, the petitioner bears the burden of proving that its claimed hardship outweighs the public interest in attaining compliance with regulations designed to protect the public. (Willowbrook Motel v. Pollution Control Board, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1977).)

In addition, a variance, by its very nature, is a temporary reprieve from compliance with the Board's regulations, and compliance is to be sought regardless of the hardship which eventual compliance presents an individual polluter. (Monsanto Co. v. Pollution Control Board, 67 Ill. 2d 276, 287, 367, N.E.2d 684, 688 (1977).) Accordingly, a variance petitioner is required, as a condition to grant of variance, to commit to a plan which is reasonably calculated to achieve compliance within the term of the variance, unless certain special circumstances exist.

DISCUSSIONMetal Coating Operations

As discussed above, HMG seeks a variance from the rules applicable to its metal coating operations from March 15, 1996 until the earlier of August 12, 1997 or 35 days after the Agency issues a permit for its metal coating operations. Thus, the relief that HMG seeks has both a retroactive and a prospective component. The Board shall discuss these components in turn.

Request for Retroactive Relief from the Metal Coating Rules. HMG requests a variance that is retroactive to the extent that it seeks a variance from March 15, 1996 to the date of this order. The Board finds, however, that HMG is entitled to a stay for the period of this proceeding with respect to its metal coating operations and thus no retroactive variance is necessary. Section 38(b) of the Act provides as follows:

If any person files a petition for a variance from a rule or regulation within 20 days after the effective date of such rule or regulation, the operation of such rule or regulation shall be stayed as to such person pending the disposition of the petition.

The same stay provision is also found in the Board's regulations at 35 Ill. Adm. Code 104.102.

The parties disagree as to whether HMG is subject to the VOM emission limits for miscellaneous metal parts and product coatings (218.204(j)) or to those for metal furniture coatings (218.204(g)). The amendments adopted in R94-21 lowered the VOM emission limits for both categories, however, effective March 15, 1996. HMG filed for a variance from those rules on May 26, 1995, well before the effective date of those amendments. Therefore, the Board finds that those rules were stayed from March 15, 1996 to the date of this order.

HMG's Need for Prospective Relief from the Metal Coating Rules. HMG originally sought a variance from certain rules applicable to its metal coating operations on the grounds that compliant coatings were not available. In its amended petition, HMG states that it is now using coatings with a lower VOM content. HMG also states that its emissions are now within the exemption to those rules -- *i.e.*, HMG emits less than 15 lbs./day before the application of capture systems and control devices. (35 Ill. Adm. Code 218.208(a).)

HMG also contends that its need for a prospective variance turns on whether the Board determines that its metal coating operations are subject to the rules applicable to metal furniture coatings (218.204(g)) or miscellaneous metal parts and products (MMPP) coatings (218.204(j)). If, as HMG contends, its operations are subject to the MMPP coating rules, no variance is necessary, because the coatings that HMG now uses meet the limitations set forth in those rules. (Am. Pet. at 5.)

Accordingly, the Board must first decide whether HMG is subject to the limits for MMPP or metal furniture. As noted above, the metals that HMG coats are used in lamps and residential lighting fixtures. (Pet. at 5.) In Frederick Cooper Lamps, Inc., v. IEPA, PCB 96-158 (August 15, 1996), the Board held that residential lighting fixtures constitute lamps and as such are “metal furniture” and are subject to the limitations for metal furniture coating set forth at 35 Ill Adm. Code 218.204(g). The Board finds no reason to rule otherwise in this case. Accordingly, the limitations in 218.204(g) apply to HMG’s metal coating operations.

Request for Variance from Metal Furniture Coating Rules. HMG states that it also complies with the metal furniture coating rules because it falls within the exemption for sources emitting less than 15 lbs./day of VOM. Under those rules, however, HMG states that it needs a variance from March 15, 1996 to the earlier of August 12, 1997 or 35 days after the Agency issues a permit for metal coating operations. (Am. Pet. at 6.) HMG argues that this variance is necessary to allow it to resolve recordkeeping and permitting issues. (Id.)

As an initial matter, the Board finds that HMG has not specified what these “permitting issues” are with respect to the metal furniture coating rules, nor how such issues have imposed an arbitrary or unreasonable hardship on HMG. The Board notes that the exemption upon which HMG seeks to rely, 218.208(a), is based on actual emissions, not permitted emissions. Thus, permitting issues cannot serve as a basis for the issuance of a variance.

Similarly, the Board cannot find that recordkeeping requirements impose any unreasonable or arbitrary hardship on HMG. While HMG presented some testimony that recording and calculating its emissions on a daily basis has been a difficult undertaking (Tr. 50-54; 131-134), it presented no evidence that it has not been able to meet the recordkeeping requirements of 218.204. HMG has not presented evidence that those requirements have otherwise imposed an unreasonable or arbitrary hardship upon HMG. Accordingly, the Board denies HMG’s request for a prospective variance from 218.204(g).

Wood Furniture Coating Operations

In its amended petition, HMG seeks a retroactive variance from March 15, 1996 to August 12, 1996, the date on which it asserts that it came into compliance with the VOM emissions limits in 218.204(l). HMG also suggests that the Board could find that these rules were stayed as to HMG during the pendency of this variance proceeding. The Board addresses the stay issue first.

Availability of Stay of Wood Furniture Coating Rules. If HMG first became subject to the emissions limits in 218.204(l) as a result of the lowered threshold for those rules imposed in the R94-21 amendments, those rules would be stayed during this proceeding under Section 38(b) of the Act. The parties disagree significantly, however, as to whether these limits applied to HMG even before the threshold was lowered. If the R94-21 amendments imposed no new limits on HMG, no stay would be available.

Prior to the adoption of the R94-21 amendments, the limitations in 218.204(l) applied to wood furniture coating lines “if the source contains process emission units, not regulated by [various other subparts of Part 218, including the subpart regulating metal furniture coatings] . . . which as a group” have maximum theoretical emissions (MTE) of 100 tons per year (TPY) or more. (35 Ill. Adm. Code 218.208(b)(1).) The amendments adopted in R94-21 retained the same emissions limits in 218.204(l), but lowered the threshold for application of those rules to 25 TPY potential to emit (PTE). (35 Ill. Adm. Code 218.208(b)(2).) The lowered threshold became effective on March 15, 1996. (*Id.*) The parties agree that during the period for which a variance is sought, HMG’s PTE was over 25 TPY. The parties do not agree on whether HMG’s MTE was 100 TPY or more before the R94-21 amendments became effective.

MTE is defined in part as “the quantity of volatile organic material emissions that theoretically could be emitted by a stationary source based on the design capacity of the source and 8760 hours per year.” (35 Ill. Adm. Code 211. 3690.) HMG submitted testimony and exhibits showing that its MTE from wood furniture coatings were 71.1 TPY in 1994, and on that basis argues that it was not subject to 218.204(l) before the new threshold applied. (Tr. 126-145, 167-173; Pet. Ex. 3, 10.) In its calculations, HMG included only potential emissions from coatings applied directly to wood furniture, and assumed that its wood furniture coating operations constituted a separate source.¹ (*Id.*) The record does not clearly indicate whether HMG included emissions from all process emission units associated with its wood furniture coating operations. HMG’s witness testified that data on its 1995 emissions was not yet available. (Tr. 145-146.) HMG presented no evidence on its wood furniture MTE for 1993 or 1995.

The Agency claims that HMG’s MTE in 1994 was 168 TPY. The Agency calculated a higher MTE for HMG in part because it assumed that HMG’s wood furniture coating operations were not a separate source. (Tr. 201-212.) The Agency’s witness also appeared to have relied on different assumptions than did HMG regarding HMG’s design capacity and emissions units, although the record is not entirely clear on this point. (Tr. 203-204, 210-211.) The Agency also relied on information from one or more HMG permit applications, which the Agency did not introduce as exhibits. The Agency did not present testimony on HMG’s MTE for 1993 or 1995.

The Agency also argues that HMG was subject to the restrictions in 35 Ill. Adm. Part 215 prior to August 16, 1991. Part 215, which was superseded in Cook County in 1991, contains limitations on emissions from wood furniture coating operations that are identical to those contained in 218.204(l). The Agency claims that HMG was subject to these restrictions prior to August 16, 1991, and that the R94-21 amendments therefore imposed no new

¹ Petitioner’s expert witness, William O’Shea, testified that actual emissions from coatings applied to all other substrates in 1994 were 8 TPY. (Tr. 153-54.) It is not clear what additional MTE would result if emissions from these coatings were included.

requirements on HMG. The record contains very little evidence, however, on HMG's operations and emissions prior to August 16, 1991.

Because of the incomplete record on this issue, as noted above, the Board finds the evidence inconclusive as to whether HMG's MTE was 100 TPY or greater before the new threshold became effective. The Board notes that such questions, including the issue of whether HMG's wood furniture coating operations constitute a separate source, are typically decided in an enforcement proceeding. The Board will not decide this issue in a variance proceeding on an incomplete record. Accordingly, the Board must consider whether HMG is entitled to a retroactive variance from March 12, 1996 to August 12, 1996.

Retroactive Variance from Wood Furniture Coating Rules. As noted above, in order to obtain a variance, HMG must show that the relevant regulation imposed upon it an arbitrary and unreasonable hardship, and that the hardship outweighs the environmental impact of the variance. Furthermore, HMG must demonstrate that it had an appropriate compliance plan. In addition, to obtain retroactive relief, HMG must show that it has diligently sought relief and has made good faith efforts at achieving compliance. (General Motors Corp. v. IEPA, (June 4, 1992), PCB 88-193 at 5-6.)

Hardship. In its petition, HMG argued that coatings that comply with the limitations in 218.204(l) were not available. HMG also argued that its actual emissions from its wood furniture coating operations are already less than 25 TPY, a level of emissions which would exempt it from the requirements in 218.204(l) if HMG also had a federally enforceable operating permit that limited its emissions to less than 25 TPY. At the time that HMG filed for a variance, however, HMG did not have a federally enforceable permit. In addition, HMG claimed that it was unable to find coatings that met the VOM limitations in 218.204(l). Accordingly, HMG was not in compliance with 218.204(l) at the time it filed its original petition. In its original petition, HMG contended that it was arbitrary and unreasonable to require HMG to comply with the rules while HMG sought a permit.

In its amended petition, HMG states that as of August 12, 1996, it is using coatings that meet the VOM limitations in 218.204(l). Therefore, HMG asserts that it is in compliance with 218.204(l) and no longer needs a federally enforceable permit to achieve compliance. HMG now seeks only a retroactive variance from March 15, 1996 to August 12, 1996, to cover the period during which it was implementing its compliance plan.

In support of its claim that compliant coatings were not available for its wood furniture coating operations, HMG submitted testimony that compliant coatings were not available because of the number of different coatings it uses and the requirements of its production processes. (Tr. 42-43, 47-48.) HMG also submitted evidence that the cost of add-on controls was unreasonable. Petitioner's expert, William O'Shea, estimated the capital costs of add-on controls for wood furniture coatings to range from \$850,000 through \$1.4 million and the annual costs to range from \$340,000 to \$790,000. (Pet. Ex. 14, Table 3; Tr. 159-60.) HMG also submitted evidence that the cost per ton of VOM controlled would range from \$34,100 to \$79,700. (Pet. Ex. 14, Table 4.) This is significantly higher than the estimates submitted by the Agency during the R94-21 proceedings; in those proceedings, the Agency estimated a

control cost per ton of VOM (from all operations subject to the rules amended in R94-21, including both wood and metal coating) to range from \$3,450 to \$12,570. (15% ROP Plan Control Measures for VOM Emissions - Part IV, R94-21 (April 20, 1995), p. 4.)

The Agency argues that this evidence should be ignored because during the R94-21 proceeding, the Agency identified 14 sources in the Chicago area that were in compliance with the wood furniture coating limitations. (Agency's Post-Hearing Brief at 22-23, citing Tr. 186.) In addition, the Agency argues, HMG had not adequately explored alternatives to the coating limitations, such as cross-line averaging or daily weighted averaging. (Id.)

The Board finds that suitable compliant coatings were not available for HMG's wood furniture coating operations. In addition, the Board finds that that the cost of add-on controls was unreasonable. The Board finds that HMG's operations are not similar to those of the sources in the Chicago area that are in compliance with these rules. The Board also does not find that cross-line averaging or daily weighted averaging was a viable compliance option for HMG. Accordingly, the Board finds that HMG has demonstrated that compliance with the wood furniture coating rules imposed an unreasonable and arbitrary hardship on HMG during the period for which a variance is sought.

Environmental Impact. HMG's expert, Mr. O'Shea, testified that the excess emissions resulting from the variance that HMG sought were 1.27 TPY. (Pet. Ex. 13.) This estimate assumed that HMG's wood furniture coating operations were a separate source, but the additional contribution from other sources that should be included appears to be minimal, because actual emissions from all of its other non-metal coating operations appear to be close to or below the 25 TPY threshold for applicability of the rules. (Tr. 153-54; Pet. Ex. 12.)

The Agency claims that HMG did not submit sufficient evidence that the variance would have a minor environmental impact. The Agency argues that HMG should have submitted a computer model showing the impact of its excess emissions on ambient air quality. (Agency's Post-Hearing Brief at 27-28.)

The Board finds that the environmental impact of the requested variance is minimal. The Board finds that the computer modeling is not required in this case, given the short term for which the variance is requested and the difficulty in developing a model to assess the impact of these excess emissions on ambient air quality. (Nesco Steel Barrel Company v. IEPA, (January 22, 1987), PCB 84-81, slip op. at 4 (the Board "has previously acknowledged the lack of precise understanding of the dynamics of hydrocarbon transport and ozone formation.")) Accordingly, the Board finds that the hardship imposed by compliance outweighed the environmental impact of non-compliance.

Compliance Plan. HMG submitted extensive testimony regarding its efforts to come into compliance with 218.204(l), and has now reported that these efforts have been successful. The Board finds that HMG's compliance plan was adequate.

Consistency with Federal Law. The Board finds no inconsistency between the requested variance and federal law. The Agency originally claimed that the variance sought in the original petition required a revision to the State Implementation Plan (SIP) for Illinois (Rec. at 22), but the Agency did not pursue this claim in its post-hearing briefs or raise it in its amended recommendation. Even if the variance does require a SIP revision, that requirement does not render the variance inconsistent with federal law. (Marathon Oil Company v. IEPA, (November 7, 1996), PCB 96-254, slip op. at 13-14.)

Availability of Retroactive Relief. HMG requests a retroactive variance beginning on March 15, 1996 and ending on August 12, 1996. The Board has determined that in the absence of unusual or extraordinary circumstances, the Board renders variances effective on the date the Board order is issued. (LCN Closers, Inc. v. EPA, (July 27, 1989), PCB 89-27, 101 PCB 283, 286.) The reasoning behind the general rule is to discourage untimely filed petitions for variance, especially when the failure to request relief in a timely manner is a self-imposed hardship. (Fedders-USA v. EPA, (April 6, 1989), PCB 86-47, 98 PCB 15, 19.) However, upon specific justification retroactive variances have been granted. (Deere & Co. v. EPA, (September 8, 1988), PCB 88-22, 92 PCB 91.)

Timeliness of filing is a primary factor in considering “special circumstances.” The Board has 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.) In addition, 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, 92 PCB at 4.)

In this case, HMG filed its petition for variance from 218.204(l) on May 26, 1995. This was well before March 15, 1996, the effective date of the amended rule that decreased the threshold for those rules. The need for retroactive relief arose as a result of various delays that arose in part out of HMG’s efforts to reach a settlement with the Agency; when those efforts failed, this matter proceeded to hearing. Assuming that HMG was affected by the change in the applicability threshold for the rule, HMG sought relief in a timely manner. Furthermore, the evidence introduced at the hearing demonstrated that HMG made good faith efforts in achieving compliance with the rule.

As noted earlier, the record is inconclusive on HMG’s maximum theoretical emissions prior to the amendments adopted in R94-21, and thus it is not clear whether HMG was in fact affected by the change in the applicability threshold for 218.204(l). Both parties agree, however, that HMG’s emissions exceeded the threshold after the amendments adopted in R94-21 took effect. The testimony of HMG witnesses at this proceeding regarding -- which the hearing officer noted no issues of credibility -- and in the hearings on R94-21 suggests that HMG believed in good faith that it was not subject to the limitations in 218.204(l) prior to the amendments adopted in R94-21. The Board further notes there is little Board precedent on the proper method for calculating MTE. Given these special and unusual factors, as well as the short term for which HMG seeks a retroactive variance, the Board grants HMG a

retroactive variance from the limitations in 218.204(l) from March 15, 1996 to August 12, 1996, subject to the conditions proposed in HMG's amended petition.

CONCLUSION

This opinion constitutes the Board's findings of fact and conclusions of law. First, the Board finds that the rules regarding HMG's metal coating operations were stayed as to HMG during this proceeding pursuant to Section 38(b) of the Environmental Protection Act (Act) (415 ILCS 5/38(b) (1994).) Second, the Board finds that HMG's metal coating operations are subject to the rules on metal furniture coatings (35 Ill. Adm. Code 218.204(g)) rather than the rules on miscellaneous metal parts and products (35 Ill. Adm. Code 218.204(j).) Third, the Board denies HMG a prospective variance from the metal furniture coating rules. Fourth, the Board does not find that the wood furniture coating rules were stayed as to HMG during this proceeding. Finally, the Board grants HMG a retroactive variance from the rules that apply to HMG's wood furniture coating operations. (35 Ill. Adm. Code 218.204(l).)

ORDER

The Board finds that HMG's metal coating operations are subject to the emissions limitations for metal furniture set forth at 35 Ill. Adm. Code 218.204(g). The Board finds that 218.204(g) was stayed as to HMG's metal furniture coating operations from March 15, 1996 to the date of this order. The Board denies HMG's request for a variance from 218.204(g) from the date of this order to the earlier of August 12, 1996 or 35 days after the Agency issues a permit for metal coating operations.

The Board does not find that the wood furniture coating rules were stayed as to HMG during this proceeding. The Board grants HMG a variance from the wood furniture coating emission limitations at 35 Ill. Adm. Code 218.204(l) from March 15, 1996 to August 12, 1996. During the term of this variance, HMG shall have complied with the following interim emissions limits for its wood furniture coatings (in pounds of volatile organic material per gallon):

Clear Topcoat	6.7
Semi-transparent Stains	7.0
Opaque Stains	6.8
Sealer	6.3

IT IS SO ORDERED.

If petitioner chooses to accept this variance subject to the above order, within 45 days of the date of this order, petitioner shall execute and forward to:

Compliance Unit, Bureau of Air

Illinois Environmental Protection Agency
P.O. Box 19276
2200 Churchill Road
Springfield, Illinois 62794-9276

a Certification of Acceptance and Agreement to be bound to all terms and conditions of this variance, and such certification shall be in the form specified by the Board. 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 the rules from which this variance is granted.

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 95-156, December 5, 1996.

Petitioner _____

Authorized Agent _____

Title _____

Date _____

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 order was adopted on the _____ day of _____, 1996, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board