

ILLINOIS POLLUTION CONTROL BOARD
November 19, 1987

RIVERSIDE COATINGS, INC.)
)
 Petitioner,)
)
 v.) PCB 87-94
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

JEFFREY C. FORT AND BRADLEY R. O'BRIEN [MARTIN, CRAIG, CHESTER AND SONNENSCHNEIN] APPEARED ON BEHALF OF PETITIONER, and

PAUL JAGIELLO APPEARED ON BEHALF OF RESPONDENT.

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

Procedural History

This matter comes before the Board on the petition for variance filed by Riverside Coatings, Inc. (Riverside Coatings) on July 2, 1987 as amended July 9, August 3 and August 11, 1987. The subject matter of the petition relates to Riverside's status in the Board's RCRA (35 Ill. Adm. Code Part 700 et seq.) program for the issuance of permits to facilities which treat, store, or dispose of hazardous waste. Riverside Coatings petitioned the Board to hold that:

(a) its Part A permit is issued, or (b) in the alternative, that it be granted a variance from the requirement that it file a Part A permit application within the time period specified in 35 Ill. Adm. Code Section 703.150 and that its Part A permit application be deemed filed with the Agency.

As this petition requests a variance from the RCRA rules, the proceeding was conducted pursuant to the RCRA-specific notice and comment procedures of 35 Ill. Adm. Code 104.142 as well as the general variance procedures of the remainder of Part 104. Written public comments objecting to the grant of variance were filed on July 21 and 28; these comments reflect the views of 44 residents of the City of Geneva.

On August 11, 1987, the Illinois Environmental Protection Agency (Agency) filed its Recommendation that variance should be granted from 35 Ill. Adm. Code 703.155(d) (rather than Section 703.150 as suggested by Riverside Coatings) provided that Riverside Coatings demonstrates that it is in compliance with the requirements of 35 Ill. Adm. Code Part 725, Subpart G (Closure and Post Closure) and Subpart H (Financial Requirements). The Agency also noted that 35 Ill. Adm. Code 104.182(d) requires that a Recommendation that variance be granted must contain a draft permit. The Agency believes that this is inapplicable under these circumstances, as the Part A permit application attached to Petitioner's Amended Petition for RCRA Variance as Attachment B (Pet. Ex. 1, Attachment B) would be the relevant permit in this proceeding. The Agency stated that it did not suggest attachment of conditions to the Part A permit itself, as the Agency's position is that Petitioner must demonstrate its compliance with 35 Ill. Adm. Code 725 Subparts G and H prior to the granting of the variance requested.

Hearing was held on September 15, 1987, at which some members of the public were present, including some persons who had filed written objections. The 45 day period for written comments concerning the Agency Recommendation expired on September 28, 1987. The only comment was that filed by Riverside Coatings, which was accompanied by a motion for expedited decision. The Board has prioritized this decision in response to Riverside's motion.

The Riverside Coatings Operation

Riverside Coatings, Inc., is a small five employee company located approximately thirty-five miles west of Chicago in Geneva, Illinois. Geneva has a population of approximately 9,000 persons.

Riverside Coatings operates a "recycling process" for off-site paint overspray and flushed solvents.* Flushed solvents are materials used to clean out the paint lines for each color change. Overspray is the spray that is sprayed past parts that are to be coated. There are two types of paint overspray. The two oversprays are conventional baked enamel and high-solid baked enamel.

Conventional baked enamel is typically collected by an off-site operator in drums from waterwash spray booths and sent to Riverside Coatings for recycling. After it is received by Riverside Coatings, vacuum distillation is used to distill off

* In using the term "recycling" the Board does not intend to imply that it is holding that this is a recycling process pursuant to 35 Ill. Adm. Code 720.131(b).

water and solvents. The remaining solid material is then blended with color pastes and solvents in order to bring it back to the specified color and viscosity. The recycled material is then shipped back to the customer. Riverside Coatings asserts that there is no loss of reclaimed solvents or paint which would ordinarily become hazardous waste for landfilling or incineration. In addition, the distillation unit is self-contained and completely enclosed and Riverside Coatings asserts that it discharges no pollutants to the air or water.

High solid baked enamel is an expensive material that is advantageous to use since it remains wet. Since it remains wet, the overspray can be easily collected in baffles and backboards where it is collected by troughs or drums for shipping. After the high-solid baked enamel is received by Riverside Coatings it is put into mixing kettles, combined with solvent for viscosity and blended for color. Distillation is not necessary. The recycled material is then returned to the customer. Riverside Coatings asserts that there is no loss of reclaimed solvents or paint which would become hazardous wastes and would be either landfilled or incinerated.

The flushed solvents that are recycled by Riverside Coatings contain 35-60% solid paint. After it is received by Riverside Coatings, the flushed solvent is processed through vacuum distillation. Solvent remaining after the distillation process is sent back to the customer. The remaining solid portion is blended with virgin materials to meet color and viscosity specifications and is returned to the customer. Riverside Coatings asserts that there are no still bottoms for disposal, nor is there any pollutant discharged into either the air or water.

The recycling facility currently owned and operated by Riverside Coatings, Inc., was owned and operated by Riverside Laboratories from 1956 to 1986. The recycling operations performed by Riverside Laboratories were similar to Riverside Coatings, Inc.'s, current operations, including the recycling of paint overspray and flushed solvents.

Riverside Coatings is located in the same building as is Riverside Laboratories, which conducts a paper saturating business. Riverside Coatings occupies about one-quarter of the building's floor space, and its operations are separated from those of Riverside Laboratories by a cinder block wall and fire door.

Permit History

In late 1985, the Agency advised Riverside Laboratories that the Agency believed that certain aspects of the paint recycling operation were regulated as a hazardous waste activity. It

appears that Riverside Laboratories disagreed, but that Riverside Laboratories did file a Part A permit application with the Illinois Environmental Protection Agency on February 20, 1986. (Pet. Ex. 1, Attachment A) While the Agency reviewed the application, at no time did the Agency advise Riverside Laboratories that the Part A application was not timely. Thus, pursuant to 35 Ill. Adm. Code Section 703.153, Riverside Laboratories gained interim status for its recycling facility.

As aforementioned, in April, 1986, Riverside Coatings, Inc., purchased its present facility from Riverside Laboratories. Riverside Coatings asserts that the only change resulting from the purchase was a change in ownership, with no material change in the recycling operations. Riverside Coatings asserts that the permit application filed on February 20, 1986 by Riverside Laboratories accurately portrays the current operations of the Riverside Coatings, Inc., facility.

35 Ill. Adm. Code 703.155(d) "Changes During Interim Status" provides that:

Changes in the ownership or operational control of a facility may be made if the new owner or operator submits a revised Part A permit application no later than 90 days prior to the scheduled change. When a transfer of ownership or operational control of a facility occurs, the old owner or operator shall comply with the requirements of 35 Ill. Adm. Code 725, Subpart H (financial requirements), until the new owner or operator has demonstrated to the Agency that it is complying with that Subpart. All other interim status duties are transferred effective immediately upon the date of the change of ownership or operational control of the facility. Upon demonstration to the Agency by the new owner or operator of compliance with the Subpart, the Agency shall notify the old owner or operator in writing that it no longer needs to comply with that Part as of the date of demonstration.

Riverside Coatings did not file a Part A application 90 days prior to the ownership change, and Riverside Laboratories has not maintained the financial assurance on behalf of Riverside Coatings. Riverside Coatings did file a Part A permit application on June 24, 1987. However, Riverside Coatings has not, as yet obtained insurance to meet the financial requirements of Section 725, Subpart H.

The Record Developed At Hearing

At hearing, Riverside Coatings presented as witnesses its president, Tom Fallon, and its environmental consultant, Vic Cravillo. Mr. Fallon discussed the operations of Riverside Coatings, the circumstances of his purchase of the company, and his attempts to secure environmental impairment insurance to comply with Subpart H requirements, Mr. Cravillo discussed the various documents which he had prepared on behalf of Riverside Coatings for submittal to the Agency, including its waste characteristic in-flow plan, inspection plan, contingency plan and emergency procedures, their manifest/recordkeeping, operation log, personnel training, and closure plan. The Agency reiterated its position that variance should be granted from what it characterized as "merely paperwork requirements" in light of the Riverside Coatings application for liability insurance and submittal of information to demonstrate compliance with other applicable regulations. Geneva residents John Brayton, Curtis Kenyon, and Donald Slavecek also appeared to ask questions and to present their concerns.

Mr. Fallon explained that he had been a sales agent for various companies, including Riverside Laboratories, for about 20 years, and that when the recycling operation now known as Riverside Coatings became available, he bought it. In his direct testimony Mr. Fallon stated that Riverside Coatings did not file a Part A application because he believed that Riverside Laboratories Part A Permit transferred automatically to his new company. On cross-examination, Mr. Fallon acknowledged that he did not check with anyone to verify his assumption that Riverside Laboratories was in compliance with all rules. Mr. Fallon also stated that, as a recycler, he did not believe he was subject to the RCRA requirements as his operations met some, but not all, of the criteria of 35 Ill. Adm. Code 720.131(b). That section establishes procedures by which the Board may determine that a material is not a "solid waste" for RCRA purposes; the Board will not detail Riverside Coatings' arguments concerning this section, as the section by its terms requires that all, not just some, of the criteria be met.

As to Riverside's operations, Mr. Fallon supplemented the petition by stating that Riverside Coatings limits the amount of material it has on its premises for storage pending processing to 50 drums, and that any one drum is typically on its premises for no more than two weeks. The drums are stored on a concrete pad in an enclosed loading dock which is locked at night. The storage area is equipped with a sprinkler system.

As to financial requirements, Mr. Fallon testified that his company is in compliance with the closure assurance requirements, as the company has established a trust containing \$1,813, the estimated costs for removal and disposal of any wastes on site

and for decontamination of the area. Riverside Coatings does not presently have the required environmental impairment insurance to cover sudden occurrences but Mr. Fallon explained that his efforts this year to obtain such insurance had been fruitless until recently. As of April, the two insurance brokers whom he had contacted could not locate a company who would provide coverage (Pet. Exh. 4). In September, however, Riverside Coatings located an insurer, the American Insurance Group (AIG), which does provide coverage "although it is very expensive". Based on Mr. Fallon's description of his operations, AIG "did not foresee any difficulty" with Riverside's obtaining coverage. However, AIG's final decision is contingent on its analysis of an environmental risk assessment to be performed by an engineering firm approved by AIG. Mr. Fallon anticipates a decision by AIG in approximately three months. (R. 25-26, Pet. Exh. 5).

Mr. Fallon introduced into the record a March 2, 1987 memorandum from USEPA headquarters to the regional offices. The memorandum provides guidance concerning facilities which are seeking Part B RCRA permits and which could not comply with liability coverage requirements due to the "constrained insurance market". USEPA stated its belief that it would be appropriate to allow facilities who were otherwise in compliance with all applicable regulations an "additional few months" to obtain insurance coverage. Six months was suggested as sufficient extra time, although facility-specific adjustments could be made. USEPA suggested that permits should be denied for failure to obtain insurance only at the end of the additional extension of time. (Pet. Exh. 6)

John Brayton expressed concerns shared by 27 other citizens who reside near Riverside Coatings' facility. One concern, which was also articulated by Curtis Kenyon, was about odors and fumes. However, these witnesses were not aware that Riverside Coatings is an operation independent of Riverside Laboratories, and were not able to state which operation was the source of the odors.

Mr. Brayton, who is a member of the Geneva Fire Department, also expressed concerns arising from his experience and belief as to the hazardous nature of the solvents and other materials processed by Riverside Coatings. Mr. Brayton felt that Riverside's security system is defective, noting that there is no security officer on the grounds and that trucks containing drums of chemicals have been left parked outside the facility. Although admitting that he had not had an opportunity to review Riverside Coatings' contingency plan, Mr. Brayton felt that due to the explosive nature of the chemicals on the grounds, that Riverside should have a vapor detection system in its facility, since an explosion "would take out the sprinkler system and everything else with it". Mr. Brayton concluded that, while he would "not like to see the facility shut down, that he was very

concerned about the lack of liability insurance to clean up and pay for medical expenses in the event of any accidents." Mr. Brayton was also generally critical about the lack of communication by the facility with the community about the nature of the chemicals and the operation. These concerns were reiterated by Donald Slavecek.

The Board's Determination

This situation poses a very close judgment call for the Board. The RCRA Part A and Part B permit system was structured to allow continued operation of facilities in existence at the time the rules came into effect. While the rules clearly contemplate a purchase situation of the sort presented here, they require timely notice and filings. Riverside Coatings' explanation of its failure to comply is very thin.

The Board acknowledges the general validity of Riverside Coating's arguments that there has been some confusion over the scope of the facilities covered by the RCRA rules. However, such arguments are not relevant to this case. Mr. Fallon testified that he merely assumed that in purchasing the facility that all permits were transferred to him, and apparently made no investigation of what requirements applied to his facility. Accordingly, Mr. Fallon could hardly have been confused about legal arguments concerning whether his facility was the type that needed a RCRA permit. His hardship, then, is largely self-imposed.

On the other hand, the materials reclamation service provided by Riverside Coatings, if performed in accordance with applicable regulations, is an environmentally beneficial one. Moreover, the Board acknowledges that this situation is somewhat analogous to one in which a very small business is purchased by an employee of that business. In such cases, while the purchaser may have the experience to continue operating the business as was done previously, the purchaser may lack experience overall, such as experience in business management, including investigation of all regulatory requirements.

It is clear in this case that since belatedly entering into the RCRA compliance process in conjunction with the filing of this variance petition, that Riverside Coatings has made considerable progress in areas which can generally be characterized as risk assessment and management. As a result of the filing of the petition, Riverside Coatings' operations and risk management plans are receiving scrutiny by the Agency earlier than might be expected given the sheer volume of Part B permit applications with which the Agency must deal. The Board places weight on the fact that the Agency continues to recommend grant of variance from the Part A application filing deadline, based on its assessment that there should be no adverse

environmental impact as long as Riverside Coatings demonstrates compliance with all other applicable regulations.

Concerning the liability insurance issue, Riverside Coatings has adequately made its case that the required insurance was not obtained earlier this year because this type of coverage was simply not being provided by insurance carriers. As this circumstance was beyond Riverside Coatings' control, the alleged hardship in this respect is not entirely self-imposed.

Finally, while denial of variance would not inevitably lead to the shutting down of this facility (although an enforcement action certainly could be brought seeking this result), Riverside Coatings could be liable for substantial monetary penalties for operation of its facility without a RCRA permit. It is questionable whether such liability would aid in enforcement of the Act, since, as aforesaid, the Board gives weight to the fact that Riverside Coatings has already provided most of the required Part A information, that environmental impairment insurance coverage has recently been difficult to obtain, and that Riverside Coatings would appear to have a reasonable likelihood of receiving such insurance in the near future.

The Board finds that, based on all of the facts presented here, that denial of variance would impose an arbitrary or unreasonable hardship. The Board will grant variance from 35 Ill. Adm. Code 703.155(d) until February 19, 1988, by which time Riverside Coatings will be required to file proof of insurance with the Agency.

In so finding, the Board does not discount the concerns expressed by Riverside Coatings' neighbors. As to the odor complaints, the Board notes that this variance insulates Riverside Coatings from enforcement only against a charge that it is operating without a permit. Enforcement for violations of other regulations is still possible.

As to Mr. Brayton's concern about the absence of a vapor detection system in the Riverside Coatings facility, this record is insufficiently detailed to allow the Board to draw any conclusions about the matter. The Board trusts that the Agency will consider the matter as a part of its permitting oversight of this facility.

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

ORDER

- 1) Riverside Coatings, Inc. is hereby granted variance from 35 Ill. Adm. Code 703.155(d), subject to the following conditions:

- a) This variance will terminate on February 19, 1988 or upon Riverside Coatings' submittal to the Agency of proof that its facility complies with all requirements of 35 Ill. Adm. Code, Subpart H (Financial Requirements) particularly as it relates to environmental impairment insurance, whichever first occurs.
 - b) During the term of this variance, Riverside Coatings shall provide the Agency with any additional information specified by the Agency in writing as necessary to demonstrate compliance with 35 Ill. Adm. Code Part 725, Subpart G (Closure and Post Closure).
 - c) Riverside Coatings shall operate its facility in accordance with the methods and procedures outlined in its Part A application and in documents submitted in support thereof. Riverside Coatings shall take such additional measures as are necessary to prevent emissions of nuisance odors from its facility.
- 2) Within 45 days of the date of this Order, Petitioner shall execute and forward to Paul Jagiello, Enforcement Programs, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62794-9276, a Certification of Acceptance and Agreement to be bound to all terms and conditions of this variance. The 45-day period shall be held in abeyance during any period that this matter is being 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 variance was granted. The form of said Certification shall be as follows:

CERTIFICATION

I, (We), _____, having read the Order of the Illinois Pollution Control Board, in PCB 87-94, dated November 19, 1987, understand and accept the said Order, realizing that such acceptance renders all terms and conditions thereto binding and enforceable.

Petitioner

By: Authorized Agent

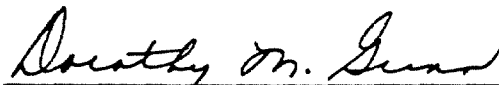
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- 3) Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985 ch. 111 1/2 par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

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 November, 1987, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board