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**HEARING BOARD
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT**

**MARY ROMAIDIS
CLERK
HEARING BOARD
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT**

BEFORE THE HEARING BOARD

OF THE BAY AREA AIR QUALITY MANAGEMENT DISTRICT

In the Matter of the Appeal of)	
)	
NEW UNITED MOTOR MANUFACTURING, INC.)	DOCKET NO: 3441
)	
From the denial of Application No. 7151)	ORDER DENYING APPEAL
)	
)	

The above-captioned matter came on regularly for hearing on December 11, 2003, with all parties present or represented by counsel, regarding an Appeal from the Bay Area Air Quality Management District's ("District" or "Air District") denial of Application 7151 by Appellant New United Motor Manufacturing, Inc. ("NUMMI").

Michael Steel, Esq., Pillsbury Winthrop LLP, appeared as counsel for NUMMI.

Alexander Crockett, Esq., appeared as counsel for Respondent, the Air Pollution Control Officer ("APCO") of the Air District.

The Clerk of the Hearing Board provided notice of the hearing on the Appeal, and a hearing in this matter was conducted in accordance with the applicable requirements of the California Health & Safety Code.

The Hearing Board considered the administrative record of proceedings before the APCO, as provided by the respective parties, in the form of exhibits to their written submittals.

THE HEARING BOARD STATES as the reasons for its decision and FINDS as to those matters before it for adjudication as follows:

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1 **BACKGROUND**

2 This Appeal concerns an automobile bumper coating operation at NUMMI's manufacturing
3 plant located in Fremont, California. The facility is subject to District regulatory jurisdiction, and has
4 been assigned Facility No. 1438. The District has authorized NUMMI to operate the bumper coating
5 line pursuant to a Permit to Operate.

6 NUMMI's bumper coating process involves, among other things, applying primer coatings and
7 then topcoat coatings to the bumpers. The coatings are applied in a spray booth, and the coated bumpers
8 are then cured in a curing oven. This Appeal concerns the bumper line primer spray booth and curing
9 oven.

10 The coatings contain Volatile Organic Compounds ("VOCs"), which are released from both the
11 spray booth and the curing oven during the coating operation. NUMMI's current permit, which was
12 issued in 1993 when the bumper line was first constructed, requires that the VOC emissions from the
13 spray booth and oven be abated by the use of a device known as a thermal oxidizer.

14 This permit condition was imposed pursuant to the District's "Best Available Control
15 Technology" ("BACT") requirement. Under the BACT requirement, as set forth in District
16 Regulation 2-2-301, all sources that will emit more than 10 pounds per day of VOCs must use the Best
17 Available Control Technology, as defined in District Regulation 2-2-206, to abate their emissions. The
18 permit also has various other conditions that have the effect of limiting emissions, such as restrictions
19 on the amount of coatings that can be used per year.

20 The maximum VOC emissions that could legally be emitted by NUMMI's bumper prime coating
21 operation under the current permit conditions is 56.6 tons per year. This limit is not specified as a
22 permit condition; rather, it is the maximum emissions that could result from NUMMI's current operating
23 restrictions contained in its permit.

24 NUMMI applied to modify its permit condition requiring the use of the thermal oxidizer on
25 March 6, 2003. NUMMI sought in its application to remove the requirement to use the thermal oxidizer
26 if it uses water-borne coatings with a VOC content of less than 1.7 pounds per gallon. As NUMMI
27 explained, "[t]he proposed modifications would allow NUMMI to use this material [water-borne primer]
28 or another with similar VOC characteristics without being required to abate the potential emissions

1 using the existing thermal oxidizer.” The parties agree that under the modified permit that NUMMI
2 proposed, maximum VOC emissions from the bumper prime coating operation would be reduced from
3 56.6 tons per year to 52.4 tons per year.

4 The APCO determined that the thermal oxidizer requirement could be removed only if
5 NUMMI’s proposed replacement permit condition satisfied the Best Available Control Technology
6 standard. The APCO thus undertook a BACT analysis and determined that BACT requires the use of
7 the thermal oxidizer, even with low-VOC water-borne coatings, and found that continued use of the
8 thermal oxidizer will reduce VOC emissions from 52.4 tons to 15.9 tons per year, a reduction of an
9 additional 36.5 tons.

10 For the curing oven, the APCO’s conclusion was based on his determination that use of the
11 thermal oxidizer is “achieved in practice” – that is, that thermal oxidizers are used with water-borne
12 coatings at other similar curing ovens. A control device or technique that has been successfully utilized
13 elsewhere on similar processes falls within the definition of BACT set forth in District Regulation
14 2-2-206.1.

15 For the spray booth, the APCO’s conclusion was based on his determination that NUMMI could
16 use the thermal oxidizer to abate VOCs at a cost of \$8,844 per ton abated, well below the District’s cost-
17 effectiveness threshold. A control device that is technologically feasible and cost-effective falls within
18 the definition of BACT set forth in District Regulation 2-2-206.3. The APCO’s determination in this
19 respect was based on data published by the United States Environmental Protection Agency (“EPA”),
20 known as “Con-Co\$t” data.

21 District staff asked NUMMI to submit plant-specific information for the APCO to use in his
22 BACT determination instead of the EPA data. NUMMI did not provide such data. NUMMI provided
23 information relating to “emissions equivalency” requested by the District for its BACT review. In
24 response to the APCO’s request for information to allow him to “re-evaluate” BACT for this
25 application, however, NUMMI also took the position that a re-evaluation of BACT was not authorized
26 by District rules. NUMMI took the position that District rules only authorize application of a new
27 BACT determination when there is an increase in emissions resulting from a modification, as those
28 terms are defined in the District’s rules.

1 The APCO denied NUMMI's application on September 22, 2003. NUMMI timely filed this
2 Appeal on October 24, 2003. The parties agreed to waive their right to a hearing within 30 days in
3 order that they could prepare and submit written briefs. After submission of the briefs, the hearing was
4 held on December 11, 2003.

5 **STANDARD OF REVIEW**

6 Under Section 3.5 of the Hearing Board's Rules, "the Board's role is to determine whether the
7 APCO's interpretation of the applicable legal requirements in its action is fair and reasonable and
8 consistent with other actions of the APCO and whether the APCO followed proper and appropriate
9 procedures and guidelines. . . . Specifically, it is the Board's task to determine whether the agency's
10 interpretation of its duty was reasonable and if its performance of that duty was regularly performed."
11 "[T]he proper scope of the Hearing Board's review is one of deference to the District's determination
12 with the burden on the Appellants to show the District's action . . . was erroneous."

13 **LEGAL ISSUES**

14 1. The threshold issue that this Hearing Board faces is whether the APCO was required to allow
15 NUMMI to amend its permit without assessing whether the proposed amendment complies with the
16 "Best Available Control Technology" standard. Essentially, the NUMMI application was a request to
17 modify a specific condition (No. 10320) of its existing Permit to Operate. In this instance amendment
18 of the condition is no less a discretionary act than was the original imposition of the condition. The
19 Hearing Board does not find that the APCO was required to grant NUMMI's application without a
20 BACT analysis. The Board therefore finds no error in the APCO's decision to subject NUMMI's
21 proposed permit amendment to a BACT review.

22 The parties agreed that:

- 23 • The source of the Best Available Control Technology requirement is Section 2-2-301 of
24 the District's Regulations;
- 25 • District Regulation 2-2-301 requires that any source with the potential to emit 10 pounds
26 or more of VOCs (or certain other pollutants) per highest day "shall apply BACT";

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- 1 • Under the terms of Regulation 2-2-301, this requirement is triggered when a new source
- 2 is constructed that will emit more than 10 pounds per day, or when an existing source
- 3 undergoes a modification that will increase emissions by more than 10 pounds per day;
- 4 • Once the BACT requirement is triggered for a source, the source remains subject to the
- 5 BACT requirement as long as its emissions remain above the 10-pounds-per-day BACT
- 6 threshold.

7 The Hearing Board concluded that the APCO did not err in determining that NUMMI continues to be
8 subject to BACT for its bumper line coating operation in that it was undisputed the operation would
9 continue to emit more than 10 pounds of VOC's per day.

10 2. A secondary issue is whether NUMMI can satisfy BACT by using any device or technique that
11 will limit VOC emissions to less than 56.6 tons per year; or whether NUMMI must demonstrate that the
12 particular device or technique it proposes to use satisfies the BACT requirement. The APCO took the
13 latter position, and we do not find that position to be an unreasonable interpretation of the applicable
14 legal requirements or of the APCO's duty under those requirements. The "Best Available Control
15 Technology" as expressed in NUMMI's current permit conditions is a requirement to use the thermal
16 oxidizer, not a requirement to remain within a 56.6 ton emission limit. The permit does not contain any
17 BACT condition setting forth a 56.6 ton limit, and NUMMI's proposed amendment would not create
18 any such permit condition. Rather, NUMMI proposes to remove the thermal oxidizer requirement, and
19 to replace it with another "control device or technique" – the use of low-VOC coatings. In such a
20 situation, the APCO has no duty to approve the removal of the existing BACT permit condition unless
21 he can determine that the proposed replacement permit condition satisfies the Best Available Control
22 Technology standard set forth in District Regulation 2-2-206, regardless of whether emissions will be
23 more or less than 56.6 tons per year. The APCO, therefore, did not err in conducting and relying upon
24 the results of a BACT review of NUMMI's proposed replacement condition – the use of water-borne
25 coatings without the thermal oxidizer – to answer that question. Refusing to modify the existing
26 condition was within the discretion of the APCO.

27 3. Finally, NUMMI contends that the APCO's treatment of past proposals by NUMMI to remove
28 thermal oxidizer requirements where water-borne coatings were used, and claims that the APCO has

1 acted inconsistently. Specifically, NUMMI points to an application to remove a thermal oxidizer
2 condition from its Instrument Panel spray booth in 1996, and an application to remove a thermal
3 oxidizer condition from its Truck Axle line in 2001. The Hearing Board finds no inconsistency that
4 would require it to overturn the APCO's denial of NUMMI's application here.

5 With respect to the Instrument Panel spray booth, the APCO asked for and received cost-
6 effectiveness information with which to conduct a BACT analysis. This data showed that the thermal
7 oxidizer would not have been cost-effective for the Instrument Panel spray booth. NUMMI did not
8 submit any such information here.

9 With respect to the Truck Axle line, the Hearing Board first notes that NUMMI raised this issue
10 for the first time at the hearing, and thus failed to ensure that the APCO would consider this example in
11 his BACT analysis. But in any event, with the Truck Axle application NUMMI did not seek to replace
12 its thermal oxidizer condition with another specific emission control practice, as it has done here.
13 Rather, it sought to change from BACT expressed as a particular type of control technology to BACT
14 expressed simply as a numeric emission limitation, with which NUMMI can comply in any manner it
15 desires. The District determined that "[b]ecause the sources (S-1061 and S-1062) will exceed 10 pounds
16 per day, BACT review is required," just as it did here. The APCO then approved the application
17 because he determined that the proposed change was consistent with BACT.

18 Thus, in past cases, the APCO has consistently undertaken a BACT review for applications to
19 remove thermal oxidizer conditions in connection with a switch to water-borne coatings, although the
20 final outcome in each case has been different based on the particular facts presented. The Hearing
21 Board does not find that the existence of these two prior examples required the APCO to grant
22 NUMMI's application here without undertaking a BACT review.

23 **FACTUAL ISSUES**

24 Having found no error in the APCO's decision to review NUMMI's proposed substitute
25 condition to see whether it satisfies the BACT standard, the Hearing Board must now consider
26 Appellant's contention that the BACT determination of the APCO was factually erroneous. The
27 Hearing Board concludes that the APCO's determination was reasonable, based on the information that
28 was before him at the time he made it, and, therefore, finds no reason to disturb it.

1 NUMMI raises two points on which it argues that the APCO erred. First, NUMMI disputes
2 whether the use of the thermal oxidizer for the bumper spray booth is cost-effective. Second, NUMMI
3 disputes whether the thermal oxidizer for the spray booth is technologically feasible from an
4 engineering standpoint.

5 Counsel for Appellant acknowledged during oral arguments that NUMMI failed to raise these
6 points to the APCO while he was considering NUMMI's application. Moreover, NUMMI refused a
7 specific request from District staff that it provide cost-effectiveness information for the APCO to use
8 in making his BACT determination. Having failed to take advantage of this invitation to make its
9 factual arguments while the application was under review, NUMMI cannot make them for the first time
10 here. It would be inappropriate for this Hearing Board to hold an evidentiary hearing and independently
11 develop a record that is different from the record that was before the APCO when he made his decision.
12 Additionally, NUMMI can still present this information to the APCO in support of a new application to
13 modify the condition.

14 The Hearing Board, therefore, reviews the APCO's decision on the record that was before him
15 at the time. The only evidence in that record is that using the thermal oxidizer on the spray booth in
16 conjunction with water-borne coatings would be technologically feasible and cost-effective. The
17 APCO relied on "Con-Co\$t" information published by the United States Environmental Protection
18 Agency that indicated that the thermal oxidizer could be used to abate 36.5 tons of VOCs per year at an
19 estimated cost of \$322,788. This works out to be \$8,844 per ton of VOCs abated, which is below the
20 level that the District considers cost-effective. This evidence supports the conclusion that the thermal
21 oxidizer is "Best Available Control Technology" as defined in the District's Regulations.

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1 THEREFORE, THE HEARING BOARD ORDERS:

2 That the Appeal of NUMMI shall be and hereby is DENIED.

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4 Moved by: Allan R. Saxe, Esq.

5 Seconded by: Thomas M. Dailey, M.D.

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7 AYES: Allan R. Saxe, Esq.; Terry A. Trumbull, Esq.; Thomas M. Dailey, M.D.

8 NOES: Christian Colline, P.E.; Julio Magalhães, Ph.D.

9 NON-PARTICIPATING: None.

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Thomas M. Dailey, M.D., Chair

Date

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