

FILED

DEC 3 2007

BEFORE THE HEARING BOARD
OF THE
BAY AREA AIR QUALITY MANAGEMENT DISTRICT
STATE OF CALIFORNIA

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

In the Matter of the Application of)
)
5 **CONAGRA FOODS, INC.**) No. 3542
)
6 For a Variance from Regulation 2, Rule 1,) ORDER DENYING VARIANCE
7 Sections 301 and 302, and Authority to)
8 Construct Condition 23050, Part 3)
_____)

9
10 The above-entitled matter is an Application for Variance ("Application") from the
11 provisions of Regulation 2, Rule 1, Sections 301 and 302 of the Rules and Regulations of the Bay
12 Area Air Quality Management District (the "District"), and from the provisions of Condition
13 23050, Part 3, of the Authority to Construct under which ConAgra Foods, Inc., operates a
14 vegetable drying facility (the "ATC") located at 1280 Pacheco Pass Highway, in Gilroy,
15 California. The Application for Variance was filed on October 12, 2007, and requested relief for
16 the period from October 24, 2007, through November 30, 2007.

17 Robert F. Lawrence, Orrick, Herrington & Sutcliffe LLP, appeared on behalf of ConAgra
18 Foods, Inc., ("Applicant"). Marian Balster and Terry Young of ConAgra Foods also appeared on
19 behalf of Applicant.

20 Todd Gonsalves, Assistant Counsel, appeared for the Air Pollution Control Officer
21 ("APCO").

22 The Clerk of the Hearing Board provided notice of this hearing on the Application for
23 Variance in accordance with the requirements of the California Health and Safety Code. The
24 Hearing Board heard the request for variance on November 1, 2007.

25 The Hearing Board provided the public an opportunity to testify at the hearing as required
26 by the California Health and Safety Code, but no one did so. The Hearing Board heard evidence,

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1 testimony and argument from Applicant and the APCO. The APCO opposed the granting of the
2 variance.

3 The Hearing Board declared the hearing closed after receiving evidence, testimony and
4 argument, and took the matter under submission for decision. After consideration of the evidence,
5 the Hearing Board voted to deny the request for variance, as set forth in more detail below:

6 BACKGROUND

7 Applicant operates a vegetable drying facility located at 1280 Pacheco Pass Highway in
8 Gilroy, California (the "Facility").

9 The Facility is equipped with four multi-stage vegetable dryers designated, respectively, as
10 Sources 17, 18, 19, and 20 in Applicant's ATC (collectively, the "Dryers"). Sources 17, 18, and 19
11 are each powered by heaters that have a maximum heat input of 24 MM BTU/hr. Source 20 is
12 powered by heaters that have a maximum heat input of 17 MM BTU/hr. Air contaminants emitted by
13 the Dryers include nitrogen oxides (NOx) and carbon monoxide (CO).

14 Regulation 2, Rule 1, Section 301 of the District Rules and Regulations requires any person
15 who puts in place, builds, erects, installs, modifies, modernizes, alters or replaces any article,
16 machine, equipment or other contrivance, the use of which may cause, reduce or control the
17 emission of air contaminants, to first secure written authorization from the APCO in the form of an
18 authority to construct.

19 Regulation 2, Rule 1, Section 302 of the District Rules and Regulations requires that any
20 person who would operate a source of air contaminants that is the jurisdiction of the District to first
21 secure written authorization from the APCO in the form of a permit to operate.

22 Condition 23050, Part 3, of the ATC limits the combined total natural gas usage at the Dryers
23 to no more than 393,000 MMBTU (3,930,000 therms) in any consecutive twelve month period.

24 The Dryers were constructed in the 1950's or 1960's. The Facility operated until the year
25 2001, when the Facility was closed and the District operating permit lapsed.

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1 In 2005, Applicant applied to the District for permits to reopen the facility and to operate the
2 Dryers with the existing burners. Applicant intended to use the Dryers to dry onions. Because the
3 Facility had closed in 2001 and the operating permit lapsed, the old Dryers were considered new
4 sources, and were subject to the Best Available Control Technology (BACT) provisions of
5 Regulation 2, Rule 2, of the District Rules and Regulations, which required Applicant to retrofit the
6 Dryers with BACT, if cost-effective to do so.

7 The APCO determined that, under Regulation 2, Rule 2, of the District Rules and Regulations,
8 Low NOx burners were BACT to limit emissions from the Dryers.

9 Applicant disagreed that Low NOx burners were BACT. Applicant claimed that the use of
10 Low NOx burners in onion dryers would turn the onions pink, a phenomenon Applicant referred to as
11 "pinkening". In its permit application, Applicant requested that the Facility be allowed a natural gas
12 throughput limit sufficient to operate the Dryers twenty-four hours a day for about 230 days per year.

13 In order to allow the Facility to operate without installing Low NOx burners, the APCO
14 imposed Condition 23050, Part 3, of the ATC, referenced above (the "Therm Limit"). The Therm
15 Limit allows natural gas usage sufficient to operate the Dryers twenty-four hours a day for about 184
16 days in any consecutive twelve-month period. As a result, the number of days Applicant could
17 operate the Dryers and the Dryers' emissions were limited such that Low NOx burners would not be
18 cost effective as BACT. Thus, the Therm Limit allowed Applicant to avoid BACT.

19 On May 10, 2006, the APCO issued the ATC with the Therm Limit. At the time the APCO
20 issued the ATC, Applicant was then aware that the Therm Limit would allow the Dryers to operate
21 only 184 days per year, and not the 230 days per year Applicant requested. In addition, in January
22 and February 2007, during its planning cycle for the Facility's summer 2007 drying season, Applicant
23 projected that the Facility would likely need to operate the Dryers in excess of 184 days to complete
24 the 2007 summer drying season.

1 Applicant operated the Dryers for the duration of the summer 2006 drying season and
2 remained within the Therm Limit. As of November 1, 2007, the date of the hearing on the
3 Application, Applicant was on the cusp of exceeding the Therm Limit.

4 District rules and regulations afford remedies to the holder of a District permit who disagrees
5 with, or wishes to change, an operating condition imposed in the District permit. The permit holder
6 may appeal from the APCO's permitting decision or submit an application to modify the permit.

7 In the time between the issuance of the ATC on May 10, 2006, and filing the Application on
8 October 22, 2007, Applicant neither appealed any conditions in the ATC, nor did Applicant apply for
9 any change in any of the conditions in the ATC, nor did Applicant provide the APCO with sufficient
10 empirical evidence to support Applicant's claim that Low NOx burners would result in pinking.

11 DISCUSSION

12 The Hearing Board may grant a variance upon finding that the criteria set forth in Health and
13 Safety Code § 42352 are met. The burden is on Applicant to establish the basis for making each of
14 the Findings. In this matter, Applicant has not provided sufficient evidence to demonstrate that due
15 to circumstances beyond the reasonable control of Applicant, requiring immediate compliance with
16 the Therm Limit would have resulted in an arbitrary taking of property or the practical closing and
17 elimination of a lawful business, as required by Health and Safety Code Section 42352(a)(2).

18 The Application arises out of Applicant's disagreement with a BACT determination of the
19 APCO. The BACT determination in question formed the basis for the Therm Limit the APCO
20 imposed in the ATC.

21 The onus was on Applicant to pursue remedies to change Therm Limit or the BACT
22 determination on which it was based. Such remedies include the filing of a permit appeal before this
23 Board or submitting to the APCO an application to modify the ATC to change the Therm Limit or to
24 reevaluate the underlying BACT determination. In the course of informal discussion regarding the
25 ATC, Applicant did not provide the APCO with sufficient evidence that the APCO's BACT
26 determination was incorrect.

1 Applicant had adequate opportunity between May 10, 2006, when the ATC issued, and
2 October 22, 2007, when it filed the Application, to seek to have the Therm Limit changed. At the
3 time the ATC issued, Applicant knew the Therm Limit would have the effect of preventing Applicant
4 from operating the Dryers for a long drying season. In addition, Applicant forecasted in its planning
5 cycle of January/February 2007, that the Therm Limit would likely not allow the Facility to operate
6 for the duration of the summer 2007 drying season.

7 Applicant had, and did not pursue, remedies at its disposal to address its disagreement with
8 the permitting decisions the APCO made in connection with issuing the ATC and to avoid
9 noncompliance with the Therm Limit. Accordingly, Applicant has not shown that, due to
10 circumstances beyond Applicant's reasonable control, requiring compliance with the Therm Limit
11 would be unreasonable or would result in an arbitrary taking.

12 SPECIFIC FINDINGS

13 The Hearing Board finds pursuant to Health and Safety Code section 42352 that:

14 1. Applicant failed to show that, due to conditions beyond the reasonable control of
15 Applicant, requiring compliance with Regulation 2, Rule 1, Sections 301 and 302 of the Rules and
16 Regulations of the Bay Area Air Quality Management District and with the provisions of Condition
17 23050, Part 3, of the Authority to Construct under which Applicant operates the Facility would result
18 in an arbitrary and unreasonable taking of property or the practical closing of a lawful business.
19 Applicant failed to pursue the remedies at its disposal to address its disagreement with the permitting
20 decisions the APCO made in connection with issuing the ATC and to avoid noncompliance with the
21 Therm Limit.

22 THEREFORE, THE HEARING BOARD ORDERS:

23 A variance from Regulation 2, Rule 1, Sections 301 and 302 of the Bay Area Air Quality
24 Management District Rules and Regulations and from the provisions of Condition 23050, Part 3,
25 of the Authority to Construct under which Applicant operates the Facility is hereby denied.

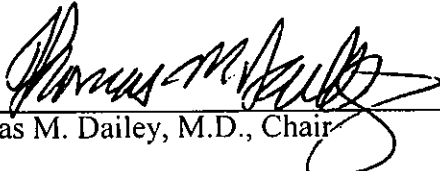
26 Moved by: Terry A. Trumbull, Esq.

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Seconded by: Rolf Lindenhayn, Esq.

AYES: Christian Colline, P.E., Rolf Lindenhayn, Esq., Julio Magalhães, Ph.D.,
Terry A. Trumbull, Esq., and Thomas M. Dailey, M.D.

NOES: None



Thomas M. Dailey, M.D., Chair

11-28-07
Date