

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
OF THE STATE OF DELAWARE

IN THE MATTER OF:

FREE FLOW PACKAGING CORPORATION

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) Appeal No. 93-16  
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FINAL ORDER

The Environmental Appeals Board ("Board") held a hearing on this appeal on March 22, 1994. The Board members present were Clifton H. Hubbard, Jr., Chairman, Joan Donoho, Diana A. Jones and Robert I. Samuel. Steven C. Blackmore, Deputy Attorney General, advised the Board. Free Flow Packaging Corporation ("Free Flow") was represented by David S. Swayze, Esquire and Richard A. Forsten, Esquire. Kevin P. Maloney, Deputy Attorney General, represented the Secretary of the Department of Natural Resources and Environmental Control ("DNREC"). For the following reasons, the Board unanimously affirms the decision of the Secretary.

SUMMARY OF THE EVIDENCE

Free Flow manufactures loose-fill polystyrene packaging material in its facility in Newark, Delaware. During the manufacturing process, Free Flow adds to this product a blowing agent which is categorized as a volatile organic compound ("VOC"). A large portion of this compound is emitted from the packaging product during the manufacturing and cooling process. Emissions of VOCs are subject to DNREC's air pollution control regulations and permitting process. Free Flow appealed to the

Board after DNREC refused to approve a requested amendment to its air pollution discharge permit, No. APC-88/0279-Construction/Operation, as amended ("Permit").

Free Flow initially sought to amend condition 3 in its Permit to show that 75% of the VOC's were retained in their product and therefore not emitted. Free Flow then indicated that it would accept a retention credit of 50%. Free Flow also sought to eliminate Permit condition 7 which restricts its operating hours. Free Flow contends that it is being treated unfairly since its major Delaware competitor, Norel Corporation, has a 50% VOC retention credit in its permit, APC-87/0269 ("Norel Permit"). Therefore, Free Flow sought to receive an identical 50% retention credit. DNREC argued that the scientific data does not support Free Flow's Permit application and that Free Flow should not be entitled to benefit from an earlier DNREC mistake on the Norel Permit.

#### FINDINGS OF FACT

1. At the time that its Permit was issued, Free Flow accepted certain conditions (including condition No. 7) to restrict total VOC emissions below 100 tons annually so that Free Flow would not be classified as a "major source" and subject to the restrictions which such classification entails. See June 16, 1993 letter from N. Lee Randolph to Ronald Clazie (Chronology No. 2).

2. The VOCs which Free Flow uses as blowing agents are isobutane and isopentane. These gases are injected into liquid

polystyrene which, after foaming and cooling, is then chopped into pieces. These pieces are then re-heated to expand them to produce higher quality packaging material. The VOCs are continuously emitted during the manufacturing and cooling process and for sometime thereafter.

3. Free Flow's Permit provides a 15% retention credit for the VOCs. See Condition 3. Thus, for every 100 tons of VOCs injected into the product it is assumed that 15 tons are retained and 85 tons emitted.

4. A competitor of Free Flow, Norel Corporation, also produces loose-fill polystyrene packaging material in Delaware. Free Flow contends that Norel's Permit has a retention credit of 50%, although the test data submitted with Norel's Permit indicated that only 5% of the VOCs were actually retained in the product after approximately 20 to 50 days. See Norel's Permit at p. 4. Norel is limited in its Permit to 46.8 tons of pentane (VOC) emissions per year. Condition No. 1.

5. DNREC conceded that it erred by assuming Norel's product retained 50% of the added VOCs, however DNREC has not yet revised Norel's Permit to reflect the evidence that a greater percentage of the VOCs are emitted. DNREC contended that neither Free Flow nor Norel were entitled to a permit with a 50% retention credit.

6. Free Flow conducted tests at the conclusion of its manufacturing process which showed that approximately 73% of the VOCs were retained. DNREC wanted to evaluate test data which analyzed longer periods of time, to determine where the rate of

emissions leveled off, however Free Flow initially refused to provide this data since it did not believe it was responsible for such emissions. Ronald Clazie, Free Flow's Vice-President of Engineering, testified that the point where emissions leveled off occurs after approximately 4 months; Free Flow's product retains approximately 10-15% of the VOCs at that time. The 1991 test data indicates that only approximately 16% of the VOCs were retained after one week. See data from Chronology No. 3. After a review of the old and new test data, DNREC refused to alter Free Flow's 15% retention credit.

7. Free Flow's requested 50% retention credit was not supported by the testimony and test data which indicated that an average of 33% of the VOCs were retained after the conclusion of the manufacturing and cooling process. DNREC's refusal to provide Free Flow with a 50% retention credit was justified based upon the evidence before DNREC and the evidence before the Board.

#### CONCLUSIONS OF LAW

Free Flow wants DNREC to measure VOC emissions for permitting purposes at the earliest conclusion of the manufacturing process. Free Flow also argues that it should not be responsible for additional emissions since it tries to ship the majority of its products within 48 hours. DNREC seeks to measure emissions over a longer period of time since the test data shows that the VOCs continue to escape. The Board finds DNREC's approach to be reasonable since VOCs continue to be released during manufacturing, cooling, storage, shipping and use

by ultimate consumers. While many of Free Flow's customers receive the product outside of Delaware, it is not unfair to Free Flow to have Delaware (the state of manufacture) measure and regulate VOC emissions which are commenced by a Delaware manufacturing process, especially since the majority of the emissions occur within one week of manufacture. An alternative system which focuses on regulating the customers (or final users) of the product, and those who open the sealed shipping containers and release VOCs, may produce an unreasonable administrative burden. Thus, the Board finds DNREC's permitting process to be reasonable here. Free Flow's argument is unreasonable since it attempts to ignore the continuing emissions.

Free Flow also argues that it was placed at a competitive disadvantage since Norel received a more favorable permit. Norel's Permit assumed a 50% retention credit. However, there is no indication that Free Flow is assessed a higher fee based upon its lower retention credit. Rather, Free Flow seeks to decrease the retention level to prevent it from exceeding the 100 ton federal threshold for "major sources," which must install costly and technologically advanced emissions control equipment. Free Flow's facility is located in New Castle County, a non-attainment area under federal ozone standards, which necessitates stringent regulatory standards.

Free Flow's argument that DNREC and Norel have placed it in a competitive disadvantage is misplaced. Free Flow filed this appeal since it is nearing the 100 ton major source threshold.

Norel's Permit limits its emissions to 46.8 tons annually, with an assumed retention of 50%. Even assuming that DNREC revised Norel's retention to 15%, and authorized annual emissions up to 79.6 tons, the amount of emissions from Norel's facility would not exceed the major source threshold. Thus, the evidence revealed that Free Flow's competitive disadvantage stemmed from the 100 ton threshold as opposed to differences in Permit emission retention.

DNREC acknowledged that it erred when it accepted Norel's 50% retention credit and, in light of the increased understanding of the test data and manufacturing process, it would not authorize such a credit in a permit today. However, DNREC has not corrected Norel's Permit although it now acknowledges its errors and anticipates an adjustment. As shown above, DNREC's delays in revising Norel's Permit do not lead to a reversal here. Specifically, the Board rejects Free Flow's argument that DNREC acted arbitrarily or inflicted substantial injustice. However, DNREC should strive to regulate in an even-handed manner and correct its mistakes as quickly as possible. If it has not developed a procedure to amend conditions in permits such as Norel's it should do so promptly.

While Free Flow's contentions were not supported by the evidence, its argument has also been rejected since it would set a harmful precedent. To allow Free Flow to benefit from the mistake in Norel's Permit would result in an increase in VOC pollution emissions. DNREC should not be required to repeat its

mistake on a larger scale. Simply put, two wrongs do not make a right. Free Flow has not convinced that Board that it is entitled to an amendment of its Permit. In appeals to the Board, the appellant has the burden of proof to show that DNREC's decision was not supported by the evidence. 7 Del. C. § 6008(b). Free Flow did not satisfy its burden here.

CONCLUSION

For the foregoing reasons, the Board unanimously affirms  
DNREC's denial of Free Flow's Permit amendment request.

Clifton H. Hubbard, Jr. 5/14/94  
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Chairman

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Joan Donoho

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Robert I. Samuel

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Diana A. Jones

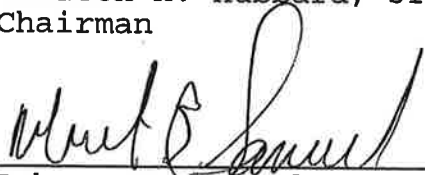
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DATE: May 14, 1994

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