

1 **POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 CADMAN MATERIALS, INC., a
4 Washington corporation,

5 Appellant,

6 v.

7 PUGET SOUND CLEAN AIR AGENCY,

8 Respondent,

9 And,

10 CITY OF KENMORE,

11 Respondent-Intervenor.

PCHB No. 22-089

ORDER DENYING STAY

12 **I. INTRODUCTION**

13 Appellant Cadman Materials, Inc. (Cadman) filed an appeal with the Pollution Control
14 Hearings Board (Board) on November 22, 2022, challenging the Puget Sound Clean Air Agency's
15 (PSCAA) Order of Approval for Notice of Construction No. 11861, issued on October 26, 2022.

16 On December 13, 2022, the City of Kenmore (Kenmore) filed a Petition to Intervene. The
17 Board granted the petition with the conditions that Kenmore would not raise additional legal issues
18 and would operate within the timelines of the case. On December 15, 2022, Cadman filed a Motion
19 for Stay of Certain Conditions in Agency Order of Approval (Motion) seeking a stay of the
20 effectiveness of Conditions 22, 23, and 26-28 in the Order of Approval (Approval). PSCAA and
21 Kenmore opposed the Motion.

1 Because Cadman has not met its burden to show a likelihood of success on the merits or
2 irreparable harm, the Board denies the Motion.

3 The Board deciding this matter was comprised of Neil L. Wise, Presiding, Board Chair
4 Carolina Sun-Widrow, and Board Member Michelle Gonzalez. Attorneys Nancy Bainbridge
5 Rogers and Maxwell C. Burke represented Cadman. Attorneys Jennifer A. Dold and Christopher
6 Bellovary represented PSCAA. Attorney Curtis J. Chambers represented Respondent-Intervenor
7 Kenmore.

8 The Board reviewed the following materials in deliberating on the Motion for Stay:

- 9 1. Notice of Appeal (*Cadman Appeal*), with attached Exs. A and B;
- 10 2. Appellant's Motion for Stay of Certain Conditions in Agency Order of Approval (*Cadman*
11 *Motion*);
- 12 3. Declaration of Dave Warner in Support of Appellant's Motion for Stay (*Warner Decl.*);
- 13 4. Respondent Puget Sound Clean Air Agency's Opposition to Appellant Cadman Material
14 Inc.'s Motion for Stay of Certain Conditions in Agency Order of Approval (*PSCAA*
15 *Response*);
- 16 5. Declaration of John Dawson in Support of Respondent Puget Sound Clean Air Agency's
17 Opposition to Appellant's Motion to Stay (*Dawson Decl.*), with attached Exhibits 1-14;
- 18 6. Second Corrective Declaration of John Dawson in Support of Respondent Puget Sound
19 Clean Air Agency's Opposition to Appellant's Motion to Stay (*Second Dawson Decl.*),
20 with attached Exhibit 16;

- 1 7. Respondent Puget Sound Clean Air Agency's Submittal in Support of Second Corrective
2 Declaration of John Dawson (*PSCAA Submittal*);
- 3 8. Declaration of Steven Van Slyke in Support of Respondent Puget Sound Clean Air
4 Agency's Opposition to Appellant's Motion to Stay (*Van Slyke Decl.*), with attached
5 Exhibits A-C;
- 6 9. City of Kenmore's Opposition to Cadman's Motion for Stay of Certain Conditions in
7 Agency Order of Approval (*Kenmore Response*);
- 8 10. Declaration of Bridgit Baker in Support of City of Kenmore's Opposition to Cadman's
9 Motion for Stay of Certain Conditions in Agency Order of Approval (*Baker Decl.*), with
10 attached Exhibits A-C;
- 11 11. Appellant's Reply in Support of Motion for Stay of Certain Conditions in Agency Order
12 of Approval (*Cadman Reply*);
- 13 12. Second Declaration of Dave Warner in Support of Appellant's Motion for Stay (*2nd*
14 *Warner Decl.*); and,
- 15 13. The Board's file in this matter.

16 Based upon the evidence submitted and the written materials filed, the Board enters the
17 following decision:

18 **II. BACKGROUND**

19 Cadman has owned and operated an asphalt plant at 6431 NE 175th Street in Kenmore,
20 Washington since July 2017. *Warner Decl.* ¶ 4. Numerous residential and commercial buildings
21 are located near the plant, which is situated in the northwest corner of a business complex and east

1 of Kenmore’s waterfront commercial development area. The Burke-Gilman Trail is approximately
2 70 feet north of the plant. The asphalt plant has been operating in that location for approximately
3 50 years. *Dawson Decl.* ¶ 14; *Warner Decl.*, ¶ 4.

4 The plant produces sand, gravel, concrete, asphalt, and building materials and supplies
5 these products to customers throughout the Pacific Northwest. *Dawson Decl.*, ¶ 3. The plant
6 includes a drum dryer, natural gas fired burner, a baghouse, asphalt cement tanks, pugmill/weigh
7 hopper, a conveyer, and truck loading area. The plant has no storage capacity for asphalt, and any
8 asphalt produced must be hauled offsite. Excess asphalt is transported to a recycle facility in
9 Woodinville. *Id.*, ¶ 5.

10 Asphalt is rarely used in winter because of low temperatures and there are few customers
11 for asphalt during this season. If Cadman produced asphalt at maximum capacity during winter,
12 most of the product could not be sold or stored and would have to be recycled. *Id.*, ¶ 9.

13 There is a potential for odor from the plant dryer, the asphalt cement storage tanks, and
14 ducting from the truck loading area, conveyer, and two asphaltic concrete storage silos. *Dawson*
15 *Decl.*, ¶ 13. *PSCAA* has received odor complaints regarding the Kenmore facility from
16 approximately 2006 through 2022. *PSCAA* has issued notices of civil penalties to the Kenmore
17 facility in 2011, 2016, 2020, and 2022. *Van Slyke Decl.*, ¶¶ 16-17. Cadman implements odor
18 control procedures and processes at the Kenmore plant, per recommendations from *PSCAA*.
19 *Second Warner Decl.*, ¶ 6.

20 In March 2019, *PSCAA* issued Notice of Violation No. 3-009870 to Cadman. The Notice
21 required Cadman to apply for a notice of construction for various portions of equipment replaced

1 at the asphalt plant during maintenance upgrades. *Warner Decl.*, ¶ 6; *Van Slyke Decl., Ex. C*
2 (*NOV 3-009870*). On July 1, 2019, Cadman applied for a notice of construction. *Dawson Decl.*, ¶
3 9. PSCAA issued the Order of Approval (Approval) on October 26, 2022, approving the Notice
4 of Construction for the asphalt plant and imposing various conditions. *Cadman Appeal, Ex. A*
5 (*Order of Approval No. 11861*).

6 On December 15, 2022, Cadman filed the Motion, seeking a stay of Conditions 22, 23, and
7 26-28.

8 **Condition 22**

9 This condition provides, in pertinent part, that Cadman shall test emissions for compliance
10 with the Approval’s emission limits within 90 days after issuance of the Approval. Subsequently,
11 Cadman shall conduct emissions tests at least once every 36 months. Also, Cadman shall test
12 emissions for compliance with opacity limits at least once every 12 months. The owner shall
13 submit a compliance test plan at least 21 days prior to each compliance test. *Warner Decl.*, ¶ 8;
14 *Cadman Appeal, Ex. A, p. 3*. Cadman submitted a test plan to PSCAA after business hours on
15 December 30, 2022. The plan identifies January 24, 2023, as the initial test date. The plan states
16 that the facility “will be tested when operating at or near the maximum hourly production rate of
17 asphaltic concrete achieved in the three years prior to the test.” *PSCAA Submittal, Ex. 16. (Cadman*

1 *Test Plan*), p. 11. The plan does not contain any explanation why the plant should not operate at
2 maximum capacity during the test. *PSCAA Submittal, Ex. 16, pp. 1-2.*

3 **Condition 23:**

4 This condition requires that, during the emissions testing, the owner shall produce asphaltic
5 concrete at or near the maximum hourly production rate achieved in the three years prior to the
6 test. The condition also provides that if the maximum production rate cannot be
7 achieved, Cadman shall explain in the test plan why the test conditions should be considered
8 representative of normal operation. *Warner Decl.*, ¶ 8; *Cadman Appeal, Ex. A, p. 3.*

9 **Condition 26:**

10 If PSCAA communicates to Cadman that it has detected a specified level of odor
11 attributable to Cadman's drum dryer, baghouse, asphalt cement tanks, Cadman must comply with
12 Condition 27. *Cadman Appeal, Ex. A, p. 4.*

13 **Condition 27:**

14 If required by Condition 26, Cadman must immediately implement an odor response
15 program, including an investigation, corrective action, and a report. *Id.*, pp. 4-5.

16 **Condition 28:**

17 Cadman shall monitor for detectable odors from the drum dryer, baghouse, or asphalt
18 cement tanks weekly during dryer operations. No odor monitoring is required during weeks the
19 dryer does not operate. Locations to be monitored are specified in the condition. If unacceptable
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1 levels of odors are detected, Cadman shall immediately initiate corrective action. *Second Warner*
2 *Decl.*, ¶ 4; *Cadman Appeal, Ex. A*, p. 5.

3 III. ANALYSIS

4 A. MOTION TO STAY STANDARD

5 The Board is authorized to stay the effectiveness of an order until a decision is rendered on
6 the merits. RCW 43.21B.320(3); WAC 371-08-415. To obtain a Stay under these provisions,
7 Cadman must make a prima facie case for issuance of the stay by showing either: (1) a likelihood
8 of success on the merits of the appeal, or (2) irreparable harm. WAC 371-08-415(4). If Cadman
9 can make a prima facie case, the Board is required to grant the stay unless PSCAA or Kenmore
10 shows either: (1) a substantial probability of success on the merits, or (2) a likelihood of success
11 on the merits accompanied with an overriding public interest which justifies denial of the stay. *Id.*

12 A stay is akin to a preliminary injunction and is not an adjudication on the merits, but rather
13 a device for preserving the status quo and preventing irreparable loss of rights before the judgment.
14 *Coal. to Protect Puget Sound Habitat v. Dep't of Ecology*, PCHB No. 14-047, p. 6 (June 23, 2014).
15 An injunction is an extraordinary equitable remedy designed to prevent serious harm. *Kucera v.*
16 *Dep't. of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000).

17 When a stay is requested, Cadman must show that the status quo must be maintained until
18 a decision is made upon the merits. Evaluation of the likely outcome on the merits is based on a
19 sliding scale that balances the comparative injuries that the parties and non-parties may suffer if a
20 stay is granted or denied. *Airport Cmty. Coal. v. Ecology*, PCHB No. 01-160, p. 2 (June 23, 2014).
21 Evaluating relative harm is consistent with the analogous inquiry undertaken when a litigant seeks

1 a preliminary injunction. *Ardagh Glass, Inc. v. Puget Sound Clean Air Agency*, PCHB No. 15-120,
2 p. 7 (April 27, 2016). A reviewing body is not to adjudicate the ultimate rights in the case when
3 considering a request for a preliminary injunction. *Kucera*, 140 Wn.2d at 216-17.

4 **B. BOARD'S ANALYSIS**

5 The Board applied the stay standard to the permit conditions subject to the stay request
6 (Conditions 22, 23, and 26-28) and determined whether Cadman is likely to prevail on the merits
7 of the challenge to the conditions or will suffer irreparable harm if those conditions are not stayed.

8 In the Motion, Cadman argues it is likely to prevail in its appeal of the Approval's odor
9 conditions (26-28). *Cadman Motion*, pp. 6-8. In addition, Cadman contends that the testing
10 conditions (22-23) are unreasonable and will cause irreparable harm.¹ *Id.*, pp. 8-9. PSCAA takes
11 the opposite position and argues that the Board cannot stay selected permit conditions without
12 suspending the entire permit. *PSCAA Response*, p. 11; *Van Slyke Decl.*, ¶ 10. The Board disagrees
13 with the proposition that the Approval will fail if any of the conditions are stayed. In *Cedar Grove*
14 *Composting, Inc. v. Puget Sound Clean Air Agency*, PCHB Nos. 11-011 & 11-012 (June 3, 2011)
15 (*Cedar Grove*), the Board selectively stayed certain permit conditions and left others in force.

16 **1. Likelihood of Prevailing on the Merits**

17 Cadman argues that PSCAA can only regulate odors through Regulation I, Section 9.11,
18 the agency's nuisance regulation. In *Cedar Grove*, the Board granted a stay of odor conditions.

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21 ¹ Cadman's Motion is inconsistent on which Conditions the stay request covers. On page 1 of the Motion, Cadman requests that Conditions 22, 23, and 26-28 be stayed. On page 9 of the Motion, Cadman refers to Conditions 13, 22, 23 and 26-28. Cadman later clarified that it was not seeking a stay of Condition 13. *Cadman Reply*, p. 14.

1 Cadman contends that *Cedar Grove* is directly on point. Therefore, Cadman argues it is likely to
2 prevail on the merits regarding Conditions 26-28. *Cadman Motion*, pp. 6-8.

3 PSCAA responds that Cadman must meet technology standards such as Best Available
4 Control Technology and Reasonably Available Control Technology, and general emission
5 standards, as well as the nuisance requirements. *PSCAA Response*, pp. 25-27. PSCAA notes that
6 it has required other facilities to check for odors at the property line and/or to find and fix problems
7 at a facility based on detected odors. *Dawson Decl.*, ¶ 18. Further, PSCAA argues that
8 *Cedar Grove* is distinguishable because it is an old case, with a specific set of facts, and PSCAA
9 had imposed similar conditions on other facilities. *PSCAA Response*, pp. 22-25.

10 In its response, PSCAA also argues that Cadman has not met its burden of showing that a
11 stay would preserve the status quo, which places Cadman's request outside of the Board's authority
12 to issue a stay. PSCAA bases this contention on the Board's ruling in *Sammamish Plateau Water*
13 *and Sewer Dist. v. Dep't of Ecology*, PCHB No. 07-024 (January 14, 2008). *PSCAA Response*,
14 pp. 20-22. In the *Sammamish* case, the Board stated the basic principle that a stay is a device for
15 preserving the status quo. The Board then held that the relief requested was outside the Board's
16 stay authority, as it included the imposition of additional monitoring requirements, which went
17 beyond the basic principle. *Sammamish*, PCHB No. 07-024, p.19. The Board disagrees with
18 PSCAA's reading of the *Sammamish* case to interpret status quo as a threshold jurisdictional
19 inquiry.

1 To analyze the balance of harms, the Board compares the history of odor complaints² and
2 enforcement actions against the minimal harm to Cadman (as explained in the Board’s irreparable
3 harm discussion below). The Board concludes the balance of harms weighs in favor of PSCAA
4 and therefore a stronger showing of likelihood of success by Cadman is required.

5 The Board agrees with PSCAA that *Cedar Grove* is distinguishable. First, while both cases
6 involve odor control conditions, the types of emitting facilities are completely different; a
7 composting facility versus an asphalt plant. Second, in *Cedar Grove* the Board concluded that
8 Cedar Grove had raised serious questions regarding whether PSCAA could enforce the nuisance
9 regulation in the absence of third party complaints. *Cedar Grove*, PCHB Nos. 11-011 & 11-012,
10 *p. 12*. In the instant case, there is evidence of third-party complaints. *Van Slyke Decl.*, ¶ 16;
11 *Baker Decl., Exs. B-C*. Third, the scope and intensity of monitoring was more burdensome in
12 *Cedar Grove*, with on site monitoring at 15 locations required. *Cedar Grove*, PCHB Nos. 11-011
13 & 11-012, *pp. 7-8, 12*.

14 Finally, the Board defers to PSCAA’s specialized knowledge and expertise on complex
15 and scientific or technical judgments such as emissions conditions. *Advocates for a Cleaner*
16 *Tacoma, v. Puget Sound Clean Air Agency*, PCHB No. 19-087c, p.26 (SEPA Issues) (Nov. 19,
17 2021).

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² See *Van Slyke Decl.* ¶¶ 16-17.

1 The Board concludes that although both parties have made good arguments, Cadman has
2 not shown a prima facie case of likelihood of success in its appeal of Approval Conditions 22-23,
3 and 26-28.

4 **2. Irreparable Harm**

5 The Approval requires the emissions testing be conducted within 90 days of the issuance
6 of the Approval, or January 24, 2023. *Cadman Appeal, Ex. A, p. 3 (Condition 22)*. Cadman rarely
7 produces asphalt in the winter since there is no market for the product during that time. If the plant
8 had to produce asphalt at the maximum production capacity for the emissions testing, the majority
9 of the product would have to be hauled offsite and recycled. This would result in significant
10 expenditures of time and money for little return. Therefore, Cadman contends that Conditions 22
11 and 23 (testing conditions) are unreasonable and will cause irreparable harm to Cadman, based
12 primarily on economic losses. *Warner Decl., ¶ 9*.

13 PSCAA responds that it routinely requires that emissions testing be conducted soon after
14 an approval is issued and that conducting emissions tests at maximum production rate is common.
15 *Van Slyke Decl., ¶ 11*. PSCAA argues that Cadman could have explained the problem with winter
16 testing under the terms of Condition 23. *PSCAA Response, pp. 14-15*. PSCAA also points out that
17 Cadman's test plan for the January 24, 2023, emissions tests does not include the option to explain
18 why the production rate cannot be achieved during the test. *PSCAA Submittal, p. 2*. PSCAA notes
19 that Cadman has not approached the agency with any alternate proposals, such as a tiered test plan
20 or waiting until a large enough order for asphalt had been received to justify operating at peak
21 capacity. *PSCAA Response, pp. 30-31*.

1 The Board agrees with PSCAA. Condition 23 allows for an explanation if the production
2 rate cannot be achieved. If a winter maximum production test would be wasteful and unnecessarily
3 expensive, Cadman could have explained the facts in its test report and proposed a test during the
4 usual production season. Instead, Cadman asks the Board to modify the conditions to delay the
5 test until spring or summer (i.e., after May 1 and before August 1). *Cadman Reply*, pp. 1-2, 13-14.
6 Finally, Cadman has performed these tests during winter at its Woodinville and Everett facilities.
7 *Van Slyke Decl.*, ¶ 13, Exs. A, B.

8 Under the facts of this case, the Board concludes that Conditions 22 and 23 do not
9 necessarily cause irreparable harm to Cadman.

10 In its Reply, Cadman argues for the first time that Conditions 26-28 are unreasonable and
11 will cause irreparable harm to Cadman. *Cadman Reply*, pp. 6-8. Cadman contends that the odor
12 conditions are not necessary to limit odors at the plant because Cadman already implements odor
13 control technology and processes at the facility. *Id.*, pp. 6-7. Also, to comply with Condition 28,
14 Cadman will have to hire a new employee or outside consultant to conduct the weekly monitoring,
15 which would be very costly. *Id.*, pp. 7-8; *Second Warner Decl.*, ¶ 5. Cadman claims it will be
16 irreparably harmed by being forced to pay for compliance with the odor conditions. *Cadman Reply*,
17 p. 8.

18 The Board does not consider the expenditure of funds irreparable harm under the stay
19 standard. *Clallam Cty. v. Dep't of Ecology*, PCHB No. 19-044, p. 6 (September 17, 2019). The
20 Board concludes that having to pay for a new employee or outside consultant to conduct the weekly
21 monitoring does not constitute irreparable harm. PSCAA estimates that odor monitoring would

1 encompass roughly two miles and take about one hour per week. *PSCAA Response, pp. 16-17.*
2 Further, Condition 26 is limited to odors attributable to the drum dryer, baghouse, and asphalt
3 cement tanks. Condition 28 specifies that no odor monitoring is required when the dryer is not
4 operating. Since there is no market for asphalt in the colder months, it is unlikely the dryer would
5 be operating during those months. Finally, further action by Cadman is only required if
6 unacceptable levels of odors are detected. The Board concludes that compliance with Conditions
7 26-28 will not cause irreparable harm.

8 Because Cadman has failed to show a prima facie case of likelihood of success or
9 irreparable harm as to the issues raised in its motion, the Board does not reach whether PSCAA
10 has shown a substantial likelihood of success or likelihood of success combined with overriding
11 public interest. RCW 43.21B.320(3); WAC 371-08-415(4).

12 When ruling on a request for a stay, the Board is not deciding the merits of the underlying
13 appeal. The Board's denial of the motion for stay is not a statement that it has determined that
14 Cadman may not ultimately succeed in their challenge to the Approval. As the appeal proceeds,
15 the Board will further carefully consider Cadman's arguments, witness testimony and evidence,
16 but at this preliminary stage, Cadman has not met its burden.

17 IV. ORDER

18 Cadman Materials, Inc.'s Motion for Stay of Conditions 22-23 and 26-28 from Order of
19 Approval No. 11861 is **DENIED**.

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21 SO ORDERED this 31st day of March 2023.

POLLUTION CONTROL HEARINGS BOARD

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