

**POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON**

CADMAN MATERIALS, INC., a  
Washington corporation,

Appellant,

v.

PUGET SOUND CLEAN AIR AGENCY,

Respondent,

And,

CITY OF KENMORE,

Respondent-Intervenor.

PCHB No. 22-089

PREHEARING ORDER

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

On December 13, 2022, the City of Kenmore (Kenmore) filed a Petition to Intervene. A prehearing conference was held on December 14, 2022. Board Member Neil L. Wise presided for the Board. The Presiding Officer granted the motion to intervene, with the conditions that Kenmore would not raise additional legal issues and would operate within the timelines of the case.

Cadman also indicated it would be filing a stay motion on December 15, 2023.

1 At the prehearing conference, Attorneys Nancy Bainbridge Rogers and Maxwell C.  
2 Burke appeared on behalf of Cadman. Attorneys Jennifer A. Dold and Christopher Bellovary  
3 appeared on behalf of PSCAA. Attorney Curtis J. Chambers represented Respondent-Intervenor  
4 Kenmore. Based on the conference, the Board enters the following Prehearing Order:

5 **I. HEARING**

6 The hearing in this matter is set for **November 27-December 1, 2023**, commencing at  
7 **9:00 a.m.** The format and location of the hearing will be determined at a later date. Parties shall  
8 be prepared to proceed to hearing on those dates.

9 A final prehearing conference will be held on **November 13, 2023, at 10:00 a.m.** to  
10 discuss logistics for the hearing. Information on how to participate in the prehearing conference  
11 will be sent to the parties before the conference.

12 **II. MEDIATION AND SETTLEMENT**

13 The parties are encouraged to undertake settlement efforts, including use of the  
14 Environmental and Land Use Hearings Office's no-cost mediation services. The parties shall  
15 confer regarding settlement and mediation, and shall notify the Board jointly by **May 15, 2023**,  
16 of their conference, the status of settlement discussions, and whether they agree to mediate this  
17 matter.

18 The parties may also request mediation services at any time by contacting the  
19 Environmental and Land Use Hearings Office.  
20  
21

1 **III. ISSUES**

2 The parties submitted and agreed to the following legal issues which will govern the case:

- 3 1. Has Appellant met its burden of proof to demonstrate that Notice of Construction  
4 (“NOC”) Order of Approval No. 11816 (October 26, 2022) is not lawful and  
5 proper pursuant to Ch. 70A.15 of RCW and the Agency’s implementing  
6 regulations?  
7
- 8 2. When an Appellant challenges only select conditions in a NOC Order of Approval,  
9 does the Pollution Control Hearings Board have authority to invalidate those select  
10 conditions when the conditions are legally necessary to implement the Agency’s  
11 BACT determination(s) and/or other regulatory requirements?  
12
- 13 3. Is Appellant precluded from challenging the inclusion of certain equipment and/or  
14 activities in NOC Order of Approval No. 11816 (October 26, 2022) where it failed  
15 to appeal the corrective action order in Notice of Violation No. 3-009870 (March  
16 6, 2019)?  
17
- 18 4. Did the Agency err when making some of the Notice of Construction subject to  
19 “new source” standards and review, when Cadman’s parts replacement provided  
20 only functionally equivalent parts, and no increase to emissions?  
21
5. Did the Agency err in classifying upgrades of the condensing filters on the asphalt  
cement tanks as “replacement or substantial alteration of an emission control  
technology” instead of “routine maintenance, repair or similar parts replacement,”  
under WAC 173-400-114(1)?
6. Did the Agency violate RCW 70A.15.1005 by requiring Cadman to test emissions  
at the Facility every 36 months, while similar facilities are required to test only  
every five years?
7. Is the requirement that Cadman conduct emissions tests by producing asphalt at or  
near the maximum hourly production rate achieved in the prior three years  
“reasonably necessary” under RCW 70A.15.2210(3)?
8. Did the Agency exceed its authority under RCW 70A.15.1030(2) and Agency  
Regulation I, Section 9.11 by imposing odor monitoring and control conditions  
that are beyond that regulatory authority, including failing to require an affidavit

1 from an odor complainant that an alleged odor unreasonably interferes with the  
2 person's enjoyment of property?

3 9. Did the Agency violate RCW 70A.15.1005 by imposing certain conditions  
4 regarding odor when such conditions are not imposed on similar facilities?

5 10. Did the Agency err in deeming the odor conditions to be control technology, and  
6 in deeming the odor conditions "best available control technology," under RCW  
7 70A.15.1030(6)?

8 11. Did the Agency consider and balance the costs of the odor conditions as required  
9 by RCW 70A.15.1005 and RCW 70A.15.1030(6)?

10 12. Are the odor conditions "reasonably necessary" under RCW 70A.15.2210(3)?

11 13. Was Cadman obligated to suggest alternative language or conditions to ensure that  
12 the equipment and processes under review are not causing odor impacts?

#### 13 **IV. MOTIONS**

##### 14 1. Stay Motion

15 Cadman seeks a stay of certain permit conditions pending resolution of this proceeding.

16 The parties agreed to the following briefing schedule:

17 **Cadman Motion for Stay: December 15, 2022.**

18 **Response: January 3, 2023**

19 **Reply: January 10, 2023.**

20 2. Dispositive Motions: Motions on any issue that would be dispositive of all, or part of  
21 the case shall be filed and served by **August 28, 2023**. Opposing parties shall have **14 days from  
the date received for response**, and the moving party will have **10 days from receipt of the**

1 **response for reply.** Absent an order granting a motion to exceed page limitation, dispositive  
2 motions and responses shall not exceed 25 pages, and replies shall not exceed 10 pages.

3 3. Non-Dispositive Motions: **Responses** to any non-dispositive motion shall be filed and  
4 served **five business days from receipt of the motion** by the non-moving party. The moving  
5 party shall then have **three business days from receipt of the response to file and serve a**  
6 **reply.** For non-dispositive motions, responses, and replies, the pleading and supporting  
7 documents shall be filed with the Presiding Officer. Absent an order granting a motion to exceed  
8 page limitation, non-dispositive motions and responses shall not exceed 15 pages, and replies  
9 shall not exceed five pages.

10 4. Motions in Limine

11 Motions *in limine* shall be filed by **November 13, 2023.**

12 5. Oral Argument Not Required. Motions will be decided based on the written record,  
13 unless oral argument is requested by a party and granted by the Presiding Officer.

14 **V. WITNESSES AND EXHIBITS**

15 The parties submitted preliminary witness and exhibit lists.

16 A. Final Witness List: Final lists of witnesses shall be served on the parties and filed  
17 with the Board by **November 13, 2023.** Any witness listed in final lists may be called by any  
18 party. The party calling a witness has the responsibility to ensure his/her attendance at the  
19 hearing.

20 B. Final Exhibit List and Exhibit Exchange: By **November 6, 2023**, the parties shall  
21 exchange lists of the exhibits intended to be used at the hearing. Parties shall confer and attempt

1 to reach agreement on exhibits' authenticity and admissibility, as well as eliminate duplicate  
2 exhibits. Copies of exhibits shall be provided to the other party (if requested) within two working  
3 days of such a request. Final exhibit lists shall also be filed with the Board and served on the  
4 other parties by **November 13, 2023**. All exhibits must be introduced in connection with a  
5 witness' testimony, unless stipulated to and admitted by the presiding officer. Parties are asked to  
6 submit into evidence only those portions of voluminous documents actually being referred to or  
7 relied upon by a witness.

8 Parties who plan to introduce the testimony of any expert witness at the hearing shall  
9 submit as an exhibit to the Board and all parties a written statement of the qualifications,  
10 experience, and expertise of each such expert witness. WAC 371-08-475(6). Any sensitive  
11 personal information such as the residential address of the expert witness should be redacted.

12 When meeting with the Presiding Officer prior to the commencement of the hearing, each  
13 party shall have available its own electronic exhibits and an index of the exhibits which shall  
14 identify those stipulated to by the parties, and spaces for indicating whether each exhibit was  
15 offered, admitted, or excluded. Each exhibit shall be pre-marked by tab for identification (A-1,  
16 A-2, etc., for appellant; R-1, R-2, etc., for respondent), and so identified on the exhibit lists. All  
17 oversized exhibits shall be marked with the case number. The number given to an exhibit does  
18 not limit the order of its introduction at hearing. Any exhibit listed by one party may be  
19 introduced by another party. **Any paper filings of exhibits shall be three-hole punched and**  
20 **the Board requests that tabbed exhibits be placed in binders if possible. In any event,**

1 voluminous exhibits (over 100 pages) must be placed in binders for the convenience of the  
2 Board.

3 **ELECTRONIC EXHIBITS.** For Zoom hearings, all exhibits must be electronic.  
4 Presentation of the exhibits shall be in the form as outlined on the Electronic Exhibit Guidelines  
5 provided to the parties with this Order. Any party planning to file electronic exhibits will submit  
6 them to the Board by **November 13, 2023.**

## 7 VI. **DISCOVERY**

8 A. Completion of Discovery: The parties shall complete discovery by **August 14, 2023.**  
9 If formal discovery is pursued, parties should pay particular attention to the time requirements of  
10 the superior court civil rules with regard to interrogatories, depositions, etc. Discovery requests  
11 shall be served sufficiently ahead of the discovery deadline so that the opposing party has the  
12 response time allowed by these rules. (For example, responses to interrogatories are typically due  
13 thirty (30) days after service. *See* CR 33.) Depositions, interrogatories, requests for production or  
14 inspection, requests for admission and the responses shall not be filed with the Board. It is the  
15 initiating party's responsibility to maintain the original together with answers to interrogatories  
16 and to make them available for the proceedings, as necessary.

17 B. Discovery Disputes: The parties shall endeavor to resolve any discovery disputes  
18 without involving the Board. If the Board is required to resolve the dispute, discovery motions  
19 and supporting documents must be filed with the Presiding Officer. Any party filing a discovery  
20 motion shall also file a proposed order and shall accompany such filing with an affidavit reciting  
21 efforts to resolve the discovery dispute.

1 **VII. BRIEFS**

2 Prehearing Briefs shall be filed and served no later than **November 20, 2023**. Briefs are  
3 limited to **fifteen (15) pages** absent an order granting a motion to lengthen.

4 **VIII. COMMUNICATION**

5 **COMMUNICATION/CONTACT**: All correspondence and filings with the Board shall  
6 be sent to the attention of the Presiding Officer at [eluh@eluh.wa.gov](mailto:eluh@eluh.wa.gov) with copies sent at the  
7 same time to all other parties. There shall be no *ex parte* contact (contact by one party in the  
8 absence of the other party) with the Presiding Officer or other member of the Board.

9 The Board does not accept e-mail correspondence directed to the presiding officer.

10 **E-FILING**: The Board requests parties e-file pleadings and other papers in this case  
11 with the Board unless it is infeasible to do so. For large exhibits, the Board can accept filing by  
12 Dropbox or other file sharing system. The following additional conditions apply to e-filings:

- 13 1. The date of "filing" will be the date/time email filings or paper filings are  
14 received by the Board. Email filings received by the Board after 5:00 p.m. on a  
15 business day will be considered filed on the next business day. Please note that  
16 e-mail is not always received immediately. There may be a significant delay  
17 between the time you send your e-mail, and the time the Board receives it. The  
18 office has experienced delays of up to two hours, so please plan accordingly.
- 16 2. The email address for e-filing is [eluh@eluh.wa.gov](mailto:eluh@eluh.wa.gov).
- 17 3. The subject line of any email containing documents you wish to e-file must  
18 include the following: "E-filing for PCHB No. 22-089" and may also include  
19 additional descriptors (e.g., Summary Judgment Motion).

19 **E-SERVICE**: The parties may agree to use electronic service among the parties, with  
20 hard copy to be mailed the same day for any party who requests the same.

21 **IX. MISCELLANEOUS**



1 If a party has difficulty accessing email for e-filing, the party may file paper copies with  
2 the Board. All **paper filings** should be **single-sided, and two-hole** punched at the top.

3 **ORDER**

4 **This order shall govern the proceedings, unless subsequently modified by order of**  
5 **the Board for good cause upon a party's motion, or at the discretion of the Presiding**  
6 **Officer or the Board.**

7 SO ORDERED this 16<sup>th</sup> day of December, 2022.

8 **POLLUTION CONTROL HEARINGS BOARD**

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NEIL L. WISE, Presiding