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OCT 12 2005

HEARING BOARD
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

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MANAGEMENT DISTRICT**

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

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In the Matter of the Application of)
)
BEACON SERVICE STATION) No. 3501
)
For a Variance from Regulation 8, Rule 7,) ORDER GRANTING VARIANCE
Section 302.3)
_____)

The above-entitled matter is an Application for Variance from the provisions of Regulation 8, Rule 7, Section 302.3 of the Rules and Regulations of the Bay Area Air Quality Management District. The Application for Variance was filed on August 12, 2005, and requested relief for the period from August 12, 2005 through November 8, 2005.

Sandeep Singh Nibber, Managing Partner, Beacon Service Station, appeared on behalf of Beacon Service Station ("Applicant").

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

The Clerk of the Hearing Board provided notice of this hearing on the Application for Variance in accordance with the requirements of the California Health and Safety Code. The Hearing Board heard the request for variance on September 29, 2005. During the hearing, the Applicant made two amendments to its application, amending the dates of the variance period and the specific provisions from which the Applicant sought relief. The original variance application requested variance relief for the period from August 12, 2005, through November 8, 2005. At the hearing, the Applicant amended its application to request relief for the period from August 12, 2005, through September 25, 2005. The variance application also originally requested relief from Regulation 8, Rule 7, Section 302.15 and Condition # 15455, Part 5 of Applicant's

ALB

1 Permit to Operate. The Applicant amended its application at the hearing to request relief from
2 Regulation 8, Rule 7, Section 302.3 instead.

3 The Hearing Board provided the public an opportunity to testify at the hearing as required
4 by the California Health and Safety Code, but no one did so. The Hearing Board heard evidence,
5 testimony and argument from the Applicant and the APCO. The APCO did not oppose the
6 granting of the variance.

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

10 BACKGROUND

11 Applicant Beacon Service Station ("Beacon") operates a gasoline dispensing facility ("GDF")
12 located at 1088 Marina Boulevard in San Leandro, California 94577 ("Facility"). The Facility is a
13 small business, as defined in California Health and Safety Code § 42352.5, and emits less than
14 10 tons per year of air contaminants.

15 The Facility is equipped with three 10,000-gallon underground storage tanks, a two-point
16 Phase I vapor recovery system, and a balance Phase II vapor recovery system with six gasoline
17 nozzles. During the variance period, the Facility was equipped with a Vacuum-Assisted Hasstech
18 Phase II vapor recovery system. Annual throughput is limited, by permit, to 3.1 million gallons;
19 however, monthly sales of gasoline are somewhat less at approximately 150,000 gallons. In addition
20 to gasoline sales, the Facility operates a small convenience store. The Facility is staffed by five
21 employees, all of whom would be laid off if the Facility were to cease operations for any extended
22 period of time.

23 Regulation 8, Rule 7, Section 302.3 of the District Rules and Regulations requires gasoline
24 dispensing facilities ("GDF") to maintain all Phase II vapor recovery equipment to be properly
25 operating, as specified by the manufacturer and applicable Executive Orders of the California Air
26

1 Resources Board ("CARB"), and to be free of defects, as defined in Section 41960.2(c) of the
2 California Health and Safety Code and California Code of Regulations, Title 17, Section 94006.

3 Regulation 8, Rule 7, Section 302.15 prohibits anyone from operating a Vacuum Assist
4 Phase II vapor recovery system unless certain tests designed to determine compliance with air to
5 liquid volume ration requirements, including the District's test ST-39 or CARB test TP-201.5, have
6 been conducted and passed in the preceding twelve month period.

7 The Facility conducted and passed the ST-39 test in February 2005, and thus, was not required
8 to conduct ST-39 again until February 2006. However, the Applicant experienced a number of
9 problems with the Facility's Vacuum Assist Phase II vapor recovery system in the months that
10 followed, and on each occasion, the Applicant hired a service contractor who fixed the problem.
11 As a result, in order to consolidate the annual source tests deadlines into one date, the Applicant
12 included a re-test of ST-39 along with other scheduled source tests when those tests were performed
13 on July 12, 2005. This time, the Facility failed the ST-39 test and remained unable to pass it
14 through the variance period.

15 In an attempt to enable the Facility's Phase II system to pass the ST-39 test, the Applicant
16 replaced all six gasoline dispensing nozzles at the Facility; however, the Phase II system again failed
17 when ST-39 was conducted with the new nozzles. Though the Phase II system still functioned to
18 capture and abate some vapors, it failed to draw enough vapors to meet the applicable abatement
19 efficiency requirements. To bring the Phase II system into compliance, the Applicant apparently was
20 advised to replace the control panel to the system.

21 However, under CARB's Enhanced Vapor Recovery ("EVR") program regulations, the
22 Facility was under a January 1, 2006, deadline to upgrade its Phase II vapor recovery system to a
23 Phase II balance system. Accordingly, rather than conduct further repairs on the Facility's ailing
24 Vacuum Assist Phase II system, the Applicant decided to achieve compliance by replacing the
25 existing Phase II system with a new Phase II balance system. To this end, the Applicant contracted
26 with Fahy Construction Company, Inc., ("Fahy") to install the upgrade. Fahy completed the

1 installation the week of September 19, 2005. Source tests conducted on September 25, 2005,
2 demonstrated that the new Phase II system was operating in compliance with applicable District
3 Rules and Regulations.

4 DISCUSSION

5 The Hearing Board may grant a variance upon finding that the criteria set forth in Health and
6 Safety Code § 42352 are met. The burden is on the Applicant to establish the basis for making each
7 of the Findings. In this matter, Applicant has provided sufficient evidence to demonstrate that each
8 of the criteria has been met. Applicant is a small business entitled to the special considerations set
9 forth in Health and Safety Code § 42352.5(b).

10 Applicant was in violation of Regulation 8, Rule 7, Section 302.3 during the entire variance
11 period, because the Facility operated with a Vacuum Assist Phase II vapor recovery system that was
12 unable to pass the ST-39 test.

13 The violation was the result of conditions beyond the reasonable control of the Applicant and
14 requiring immediate compliance would have resulted in an arbitrary taking of property or the
15 practical closing and elimination of a lawful business.

16 The violation was beyond the Applicant's reasonable control. In the months preceding the
17 Facility's first failed ST-39 test on July 12, 2005, the Applicant was diligent in repairing the problems
18 that arose with the Vacuum Assist Phase II system. Accordingly, it does not appear that the
19 Applicant could have avoided the system failure it encountered on July 12, 2005.

20 Requiring immediate compliance would have required either shutting down the business while
21 the Applicant waited for the completion of the EVR upgrade or requiring the Applicant to bear the
22 expense of repairing the same Phase II system that he was attempting to replace. However, the
23 Vacuum Assist Phase II system still partially abated emissions. Also, the Applicant very quickly
24 hired a contractor to install the Phase II balance system. Finally, had the Facility shut down for the
25 variance period, the Facility's staff of five employees would have lost their jobs. As a result, it would
26 have been unreasonable to require the Facility to shut down while waiting for the contractor to

1 complete the EVR upgrade. In addition, requiring the Applicant to repair the Vacuum Assist system
2 would have been wasteful, given that the system, which still abated some vapors, was to be replaced
3 in only approximately one month.

4 The burdens to the Applicant would be without a corresponding benefit in reducing air
5 contaminants. Although the emissions resulting from the violation have not been measured, the
6 emissions were likely small. In contrast, the economic burden associated with shutting down the
7 facility would have been considerable. The Applicant would have lost approximately \$12,000.00 per
8 day in revenue, and would have lost his entire staff of five employees.

9 Requiring the Applicant to curtail its operations would require a partial shutdown of the
10 facility and could have resulted in loss of revenue and loss of employees.

11 SPECIFIC FINDINGS

12 The Hearing Board finds pursuant to Health and Safety Code Section 42352 that:

13 1. As of August 12, 2005, Applicant was in violation of Regulation 8, Rule 7,
14 Section 302.3 of the District Rules and Regulations, which requires gasoline dispensing facilities
15 ("GDF") to maintain all Phase II vapor recovery equipment to be properly operating, as specified by
16 the manufacturer and applicable Executive Orders of the California Air Resources Board ("CARB"),
17 and to be free of defects, as defined in Section 41960.2(c) of the California Health and Safety Code
18 and California Code of Regulations, Title 17, Section 94006.

19 2. Due to conditions beyond the reasonable control of the Applicant, requiring
20 compliance with Regulation 8, Rule 7, Section 302.3 would result in an arbitrary and unreasonable
21 taking of property or the practical closing of a lawful business. The Applicant could not
22 reasonably have avoided the system failure he encountered on July 12, 2005. The Applicant was
23 diligent in repairing problems that arose with the Vacuum Assist Phase II system prior to
24 July 12, 2005, and acted quickly to obtain a contractor to install the Phase II balance system EVR
25 upgrade. Moreover, it would have been unreasonable to require the Facility to shut down while
26 waiting for the contractor to complete the EVR upgrade. In addition, requiring the Applicant to

1 repair the Vacuum Assist Phase II system would have been unreasonable because the system
2 partially functioned and was soon to be replaced.

3 3. The hardship due to requiring immediate compliance with Regulation 8, Rule 7,
4 Section 302.3 would be without a corresponding benefit in reducing air contaminants. Excess
5 emissions resulting from the violation were small, but the economic burden associated with
6 shutting down the facility would have been considerable.

7 4. Applicant could not have curtailed operations in lieu of obtaining a variance
8 without significant financial hardship.

9 5. During the variance period, the Applicant reduced excess emissions to the
10 maximum extent feasible by hiring a contractor to install the Phase II balance system EVR upgrade
11 as soon as was possible.

12
13 THEREFORE, THE HEARING BOARD ORDERS:

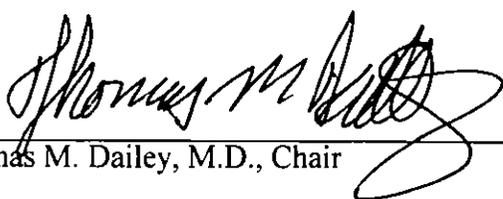
14 A variance from Regulation 8, Rule 7, Section 302.3 of the Bay Area Air Quality
15 Management District Rules and Regulations is hereby granted from August 12, 2005, through
16 September 25, 2005.

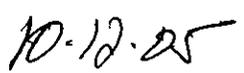
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18 Moved by: Terry A. Trumbull, Esq.

19 Seconded by: Rolf Lindenhayn, Esq.

20 AYES: Rolf Lindenhayn, Esq., Julio Magalhães, Ph.D., Jeffery R. Raines, P.E.,
21 Terry A. Trumbull, Esq., and Thomas M. Dailey, M.D.

22 NOES: None

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26 
Thomas M. Dailey, M.D., Chair


Date