

FILED

JUN - 1 2007

HEARING BOARD
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

MARY ROMAIDIS
CLERK
HEARING BOARD
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

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

In the Matter of the Application of)

KENWOOD GAS)

No. 3533

For a Variance from Regulation 8, Rule 7,)
Sections 302.1; 302.2)

ORDER GRANTING VARIANCE

The above-entitled matter is an Application for Variance from the provisions of Regulation 8, Rule 7, Section 302.1 and 302.2 of the Rules and Regulations of the Bay Area Quality Management District (the "District"). Applicant filed the Application for a Variance on April 9, 2007 and requested relief for the period from April 6, 2007 through July 3, 2007.

Ali Kazemini, owner, and Marvin Pederson, Attorney for the Applicant, appeared on behalf of Kenwood Gas ("Applicant").

Todd Gonsalves, Assistant Counsel, appeared for the Air Pollution Control Office ("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 Thursday, May 10, 2007. During the hearing, the Applicant amended 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 from the period April 6, 2007 to July 3, 2007. At the hearing, the Applicant amended its application to request relief for the period from April 9, 2007, the date of filing the application, through July 3, 2007, unless the Applicant provides a Certificate of Complete Compliance before July 3, 2007, in which case the period of variance shall be until the actual date of full compliance. The Variance Application also originally requested relief from Regulation 8, Rule 7, Sections 301.1, 301.2, and 301.3 and Condition Number

ARB

1 15677 of Applicant's Permit to Operate. The Applicant amended its Application at the hearing to
2 request relief from Regulation 8, Rule 7, Sections 302.1 and 302.2.

3 The Hearing Board provided the public an opportunity to testify at the hearing as required by the
4 California Health and Safety Code, but no one did so. The Hearing Board heard evidence, testimony,
5 and argument from the Applicant, the Applicant's attorney, and from the APCO. The APCO did not
6 oppose the 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, the
9 Hearing Board voted to grant the request for Variance, as set forth in more detail below.

10 BACKGROUND

11 Applicant Kenwood Gas ("Kenwood") operates a Phase II Vapor Recovery System ("Phase II
12 System") at a gasoline dispensing facility and convenience store located at 8850 Sonoma Highway in
13 Sonoma, California (the "Facility"). The Facility is a small business, as defined in California Health and
14 Safety Code Section 42352.5, and emits less than 10 tons per year of air contaminants.

15 Gas station operators in California may only install and operate Phase II System certified for use
16 in the State by the California Air Resources Board ("CARB"). The purpose of a Phase II System is to
17 recover gasoline vapors from motor vehicle gasoline tanks during fueling. The facility is currently
18 operating without a Phase II System.

19 Applicant purchased the Facility in January, 2005. From the time of the purchase to the present
20 date, the Facility has operated a Hirt VCS-200 Phase II system ("Hirt 200") which operates by collecting
21 gasoline vapors and burning them. The Hirt 200 was CARB-certified at the time Applicant purchased
22 the Facility. However, CARB subsequently revoked the certification of, or "decertified," the Hirt 200.

23 The effective date of the decertification as to Applicant's Phase II system is not clear. The
24 effective date of the decertification depended on the gasoline throughput of the affected Facility and
25 ranged as early as September 1, 2005, to as late as March 1, 2006. As of the District's April 4, 2007,
26 inspection of the Facility, Applicant had no throughput records onsite, a violation of District regulations,
27 and thus, the effective date of the decertification as to the Facility remains unknown.

1 The APCO is informed that, though decertified, Applicant's Hirt 200 is currently operational.
2 When CARB certified the Hirt 200, the system was believed to abate at least 95% of the gasoline vapor
3 recovered during motor vehicle refueling.

4 None of the Applicant's service contractors ever informed them that CARB had decertified their
5 Phase II system and that it needed to be replaced. (App., p. 6) In addition, Applicant was unaware that
6 the Facility's Phase II system was a Hirt 200.

7 Hirt 200 systems are very rare in the District, as almost all of them have been replaced. In
8 October 2005, District Permit staff, evidently understanding Applicant's Phase II system to be a Hirt
9 VCS-400 Phase II system ("Hirt 400") and not a Hirt 200, inserted language into the Facility's Permit to
10 Operate relevant only to Hirt 400's.

11 It was not until District source Test and Inspection staff visited the site on April 4, 2007, that
12 District staff discovered Applicant's Phase II system was a Hirt 200 and not a Hirt 400. Applicant filed
13 the instant Application for Variance on April 9, 2007.

14 Ali Kazemini, owner of the Facility, testified that the Facility is the source of revenue necessary
15 to pay his ongoing financial obligations and to pay for the costs of bringing the system into compliance.
16 Applicant would have to lay off its four employees, which would cause the employees harm and loss of
17 income.

18 DISCUSSION

19 Applicant will be in violation of Regulation 8, Rule 7, Sections 302.1 and 302.2 if it dispenses
20 gasoline from its decertified Phase II System before Applicant installs a compliant vapor recovery
21 system. However, emissions from the decertified system are presently negligible, and Applicant's non-
22 compliance is not the fault of Applicant, and Applicant had no reasonable way to know that its system
23 might not be compliant. On recommendation of its contractor, Applicant purchased and installed
24 eighteen Hirt 400 nozzles on the advice of his contractor, and the District staff takes note that even
25 experts have a difficult time distinguishing between the Hirt 200 and the Hirt 400 systems.

26 It would be an undue hardship to the Applicant and its employees to close its Facility while
27 Applicant brings its vapor recovery system into compliance because Applicant would have to cease
28 operations, and closure would be a hardship to the Applicant's community because applicant's Facility

1 is the only fueling station within seven miles. Closure would be a serious inconvenience to local
2 residents and visitors to the area. There would be no corresponding benefit if Applicant's Facility were
3 to be closed.

4 Applicant has a working mechanical monitor in place and has instructed all of its employees in
5 its proper use, and the District did not request that the Applicant further monitor actual emissions.

6 SPECIFIC FINDINGS

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

8 1. Applicant will be in violation of District Regulation 8, Rule 7, Section 302.1 and 302.2
9 during the variance period. Regulation 8, Rule 7, Section 302.1 of the District Rules and Regulations
10 prohibits the transfer of gasoline from stationary tanks into motor vehicle fuel tanks at a gasoline
11 dispensing facility unless a CARB certified Phase II vapor recovery system is used during each transfer.
12 Regulation 8, Rule 7, Section 302.2 of the District Rules and Regulations requires that all Phase II vapor
13 recovery systems shall be maintained as per the most recent CARB certifications and the manufacturer's
14 specifications.

15 2. Due to circumstances beyond the reasonable control of the Applicant, requiring
16 compliance will result in an unreasonable taking or practical closure of the Applicant's lawful business.
17 While gasoline station operators are responsible for knowing the nature of their equipment, the Hearing
18 Board finds that it was beyond the reasonable ability of Applicant to know that the Facility is operating
19 a decertified Hirt 200 and not a certified Hirt 400. The Applicant testified as to the economic hardship
20 it would suffer if it were required to cease operations. Applicant's employees would also incur financial
21 hardship. The Applicant's violation was beyond its reasonable control because they reasonably relied on
22 maintenance contractors to inform them as to whether the equipment had to be replaced for any reason.
23 Differences in appearance between the two systems are limited to subtleties that only experts are able to
24 discern requiring Applicant's Facility to shut down in a time period necessary to replace the Hirt 200
25 with a certified Phase II system would therefore constitute an unreasonable taking.

26 3. The hardship due to requiring immediate compliance with Regulation 8, Rule 7, Section
27 302.1 and 302.2 would be without a corresponding benefit in reducing air contaminants. Applicant's
28 Phase II system, though decertified, remains functional and the Hearing Board finds that emissions from

1 the system are negligible based upon the testimony of District staff Scott Owen, Supervising Air Quality
2 Engineer.

3 4. Applicant considered curtailing operations in lieu of obtaining a variance, but could not
4 have done so without significant financial hardship, because any operations with a decertified Phase II
5 system would violate District Regulations.

6 5. Applicant is reducing excess omissions to the maximum extent feasible because Applicant
7 has instructed its employees to take care to observe the monitoring box in the Facility to ensure that
8 excess emissions are reduced to the maximum extent feasible.

9 6. Applicant is required to conduct annual source tests on equipment at the Facility and must
10 monitor and record the facilities gasoline throughput. The APCO does not propose additional
11 monitoring requirements.

12 THEREFORE, THE HEARING BOARD ORDERS:

13 A variance from Regulation 8, Rule 7, Sections 302.1 and 302.2 of the District Rules and
14 Regulations is hereby granted from April 9, 2007 through and including July 3, 2007, or the date as of
15 which the District determines Applicant has achieved compliance with Regulation 8, Rule 7, Sections
16 302.1, and 302.2, whichever shall first occur, subject to the following conditions:

- 17 • Applicant must submit an Application for Authority to Construct a compliant Phase II
18 system within 15 days from the hearing date; that is, no later than May 25, 2007.
- 19 • The current HIRT 200 system shall be kept in place and operative during the period of
20 this variance.
- 21 • Applicant shall pay the excess emission fees for a period of eleven (11) days at 21 lbs per
22 day, pursuant to District Regulation 3, Schedule A.

23 ///

24 ///

25 ///

26 ///

27 ///

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

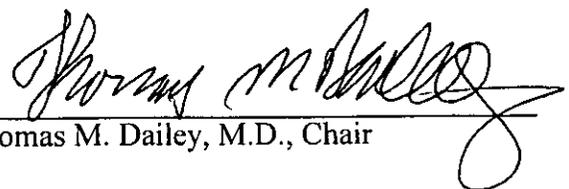
Moved by: Rolf Lindenhayn, Esq.

Seconded by: Terry A. Trumbull, 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

NON-PARTICIPATING: N/A



Thomas M. Dailey, M.D., Chair

5-30-07

Date