

**FILED**

**NOV 13 2003**

HEARING BOARD  
BAY AREA AIR QUALITY  
MANAGEMENT DISTRICT  
MARY ROMAIDIS  
CLERK  
HEARING BOARD  
BAY AREA AIR QUALITY  
MANAGEMENT DISTRICT

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

In the Matter of the Application of )  
)  
**LARK AVENUE CAR WASH** ) No. 3436  
)  
For a Variance from Regulation 8, ) ORDER GRANTING VARIANCE  
Rule 7, Sections 301.2 and 301.13 and )  
Regulation 2, Rule 1, Section 307 )  
\_\_\_\_\_ )

The above-entitled matter is an Application for Variance from the provisions of Regulation 8, Rule 5, Sections 301.2 and 301.13 and Regulation 2, Rule 1, Section 307. The Applicant amended its request at the hearing on October 30, 2003 to include Regulation 8, Rule 7, Section 301.13.

Tom Balch, Balch Petroleum & Builders, Inc., and Robert Miller, Chief Financial Officer, Lark Avenue Car Wash, appeared for Lark Avenue Car Wash ("Applicant").

Toby Sherwood, 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. A hearing was held on October 30, 2003.

The Hearing Board provided the public opportunity to testify at the hearing as required by

ARB

1 the California Health and Safety Code, but no one did so. The Hearing Board heard the  
2 Applicant's and APCO's evidence and argument. The APCO did not oppose the granting of this  
3 Variance.

4 The Hearing Board declared the hearing closed after receiving evidence, testimony and  
5 argument, and took the matter under submission for decision. After consideration of the evidence,  
6 the Hearing Board voted to grant the Variance, as set forth in more detail below:

#### 7 BACKGROUND

8 Applicant operates a gasoline dispensing facility at 5005 Almaden Expressway, San Jose,  
9 California 95118 under permit from the Bay Area Air Quality Management District ("District").  
10 Applicant is subject to Regulation 8, Rule 5, Section 301.2 which requires that Phase I vapor  
11 recovery systems be installed as required by California Air Resources Board (CARB)  
12 certifications; Regulation 8, Rule 7, Section 301.13, which requires that a Phase I storage tank pass  
13 a pressure decay (ST-30) test to show vapor tightness; and Regulation 2, Rule 1, Section 307  
14 requiring compliance with permit conditions.

15 Applicant's representatives at the hearing testified that in addition to dispensing gasoline,  
16 the facility also operates a car wash and provides a convenience store for its customers. These  
17 profit sources together generate revenue for the company.

18 Applicant's facility was equipped in 1977 with underground gasoline storage tanks in a  
19 remote fill configuration. These tanks were replaced using the same configuration in 1998 by  
20 Balch Petroleum & Builders, Inc.

#### 21 DISCUSSION

22 On April 15, 1998, Applicant received from the District an Authority to Construct for  
23 Gasoline Dispensing Facility 3830 to upgrade the underground storage fuel tanks at the facility. The  
24 upgrade required the use of pre-existing remote fills and the installation of a two-point Phase I vapor  
25 recovery system. Balch Petroleum & Builders, Inc. performed the upgrade at the facility.

26

1 The results of the ST-30 test that was performed upon completion of construction were  
2 transmitted to the District on May 19, 1998 and indicated that Applicant was in compliance. At that  
3 time, the ST-30 testing protocol required that the fill caps to the fuel storage tanks be in place during  
4 the test.

5 On June 18, 2003, Applicant was again certified as having passed an ST-30 test, which was  
6 also performed with the fuel tank fill caps in place. To the best of its knowledge, Applicant was in  
7 compliance as of this date. However, in 2001, the ST-30 source test protocol was changed to require  
8 that the fuel storage tank fill caps be removed during the test. Therefore, the June 18, 2003 test  
9 results did not, in fact, conform with the requirements of the revised ST-30 testing protocol. It was  
10 not until the completion of the ST-30 test on June 18, 2003 and subsequent discussion of the results  
11 with District Compliance & Enforcement Division staff that Applicant became aware that its system  
12 was not properly certified.

13 Immediately upon the discovery of its non-compliance status, Applicant began discussions  
14 with District staff on taking measures to come into compliance.

15 On October 29, 2003, Applicant received a letter from the OPW company requesting the use  
16 of Applicant's facility as a test site for the California Air Resources Board (CARB) for the purpose of  
17 testing reconfigurations of remote fill gasoline dispensing and vapor recovery systems. Applicant  
18 requests variance relief from Regulation 8, Rule 7, Section 301.2 in order to continue to dispense  
19 gasoline from the improperly certified remote fill configuration to and including April 30, 2004. If by  
20 that date the facility is designated a CARB testing site, and the OPW company has commenced with  
21 the testing of the remote fill as per the CARB program, Applicant would be exempt from having to  
22 seek variance protection.

23 If the facility is not designated a CARB testing site, or if the OPW company has not  
24 commenced with testing by April 30, 2004, Applicant will abandon the remote fill and install a direct  
25 fill with Enhanced Vapor Recovery (EVR) equipment. To show good faith and prepare an alternative  
26 compliance path in parallel with its variance application, Applicant has submitted an application to

1 the District for an Authority to Construct a direct fill system in the event the facility is not designated  
2 a CARB test site or if the testing by the OPW company following said designation has not begun.

3 Applicant seeks variance from Regulation 8, Rule 7, Section 301.13 which requires that the  
4 ST-30 test be conducted with the fuel storage tank fill caps removed. Applicant can pass this test  
5 only with the fill caps on.

6 Applicant seeks a variance from Regulation 2, Rule 1, Section 307, which requires  
7 compliance with permit conditions—in particular, Permit Condition No. 4—which requires passing  
8 the ST-30 test once every twelve months.

9 Applicant is not considered a small business as described by California Health & Safety Code  
10 Section 42352.5(b)(1). District staff estimated that for the variance period September 15, 2003  
11 through April 30, 2004, excess emissions are 1.5 pounds per day. The District has not requested  
12 Applicant to monitor or quantify actual emissions.

#### 13 SPECIFIC FINDINGS

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

15 1. Applicant is in violation of (a) Regulation 8, Rule 7, Section 301.2 which requires that  
16 Phase I vapor recovery systems be installed as required by CARB certifications; (b) Regulation 8,  
17 Rule 7, Section 301.13, which requires that a Phase I storage tank pass a pressure decay (ST-30)  
18 test to demonstrate vapor tightness; and (c) Regulation 2, Rule 1, Section 307 requiring  
19 compliance with permit conditions.

20 2. Due to conditions beyond the reasonable control of the Applicant, requiring compliance  
21 with Regulation 8, Rule 7, Sections 301.2 and 301.13 and Regulation 2, Rule 1, Section 307 would  
22 result in an arbitrary and unreasonable taking of property. If immediate compliance were required,  
23 an unreasonable burden would be imposed on Applicant resulting in the practical closing and  
24 elimination of a lawful business.

25 Based on testing results obtained from the Applicant's contractor, Balch Petroleum &  
26 Builders, Inc., Applicant had every reason to believe that it was in compliance, and upon discovery

1 that it was not in compliance, made every good faith effort to come into compliance.

2 3. The hardship due to requiring immediate compliance with District Regulation 8, Rule 7,  
3 Sections 301.2 and 301.13 and Regulation 2, Rule 1, Section 307 would be without a corresponding  
4 benefit in reducing air contaminants. The District staff estimated that during the period September  
5 15, 2003 through April 30, 2004 excess emissions will be approximately 1.5 pounds of volatile  
6 organic compounds per day. The District has not requested Applicant to monitor or quantify actual  
7 emissions.

8 Converting the facility to a direct fill configuration would have a further adverse impact  
9 without corresponding air quality benefit because the fuel trucks, upon completion of product  
10 delivery at night, would have to back out onto the Almaden Expressway, thereby posing potential  
11 safety problems for transportation and requiring additional personnel to conduct traffic control.

12 4. Applicant considered curtailing operations in lieu of obtaining a Variance but is unable to  
13 do so due to adverse economic impact in the loss of approximately \$100,000 in monthly revenue.  
14 The three revenue sources at the facility—the car wash, service station and convenience store—are  
15 interdependent. Curtailing the operations of the gasoline dispensing system would reduce customer  
16 flow to the car wash facility and convenience store. Further adverse impact on the labor force that  
17 operates the facility would also follow as a consequence of reduced customer flow.

18 5. During the period the variance is in effect, Applicant will reduce excess emissions to the  
19 maximum extent feasible by replacing the fill cap gaskets when they show any indication of wear.  
20 Applicant will conduct weekly inspections of the fill caps and their gaskets, and maintain logs of  
21 these inspections. If the facility is not designated a CARB test site by April 30, 2004, or if the OPW  
22 company has not begun remote fill system testing should the facility be so designated, Applicant will  
23 abandon the remote fill and commence with converting the gasoline dispensing system to a direct fill  
24 configuration.

25 6. The District has not requested Applicant to monitor or otherwise further quantify actual  
26 emissions.

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THEREFORE, THE HEARING BOARD ORDERS:

A. A Variance from District Regulation 8, Rule 7, Sections 301.2 and 301.13 and Regulation 2, Rule 1, Section 307, with respect to Permit Condition No. 4, be and is hereby granted from September 15, 2003 to and including April 30, 2004, subject to the following conditions:

1. Applicant shall conduct a weekly inspection of the two fill caps and their gaskets at the facility to ensure their proper operating condition.

2. Applicant shall maintain a log of these inspections, and provide said logs to the Hearing Board in writing, in an original and eight copies, on January 2, 2004, April 1, 2004 and May 15, 2004. The report should be addressed to: Ms. Mary Romaidis, Clerk, Hearing Board, Bay Area Air Quality Management District, 939 Ellis Street, San Francisco, California 94109. Reports to other offices or individuals at the Bay Area Air Quality Management District are not reports to the Hearing Board.

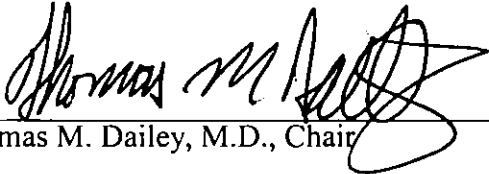
3. Applicant shall pay excess emission fees in accordance with District Regulation 3, Schedule A.

Moved by: Terry Trumbull, Esq.

Seconded by: Christian Colline, P.E.

AYES: Christian Colline, P.E., Thomas M. Dailey, M.D., Julio Magalhães, Ph.D., Allan R. Saxe, Esq., Terry Trumbull, Esq.

NOES: None.

  
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Thomas M. Dailey, M.D., Chair

11-13-03  
Date