

FILED

MAR 30 2005

HEARING BOARD
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

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

MARY ROMAIDIS
CLERK
HEARING BOARD
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

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In the Matter of the Application of)
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VALERO STATION #3803) No. 3489
)
For a Variance from Regulation 8, Rule7,) ORDER DENYING VARIANCE
Section 301.2)
_____)

The above-entitled matter is an Application for Variance from the provisions of Regulation 8, Rule 7, Section 301.2 of the Rules and Regulations of the Bay Area Air Quality Management District. The Application for Variance (Short Term) was filed on January 25, 2005, and requested relief for 89 days from April 1, 2005 through June 28, 2005.

Sandy Huff, Operations and Environmental Specialist, appeared on behalf of Valero Station #3803 ("Applicant").

Kathleen Walsh, 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 March 17, 2005.

The Hearing Board provided the public an opportunity to testify at the hearing, as required by the California Health and Safety Code, but no one did so. The Hearing Board heard evidence, testimony and argument from the Applicant and the APCO.

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

AB

1 BACKGROUND

2 Applicant Valero Station #3803 is a large gasoline dispensing facility (“GDF”) comprising
3 of 14 fueling points and a convenience market. It is equipped with four 10,000 gallon underground
4 tanks, a two-point Phase I vapor recovery system, and a vacuum assist Phase II vapor recovery
5 system with 30 nozzles. The annual gasoline throughput for this facility is limited to 3.27 million
6 gallons.

7 Regulation 8, Rule 7, Section 301 of the District Rules and Regulations requires GDFs to
8 equip stationary tanks used to store gasoline with a Phase I vapor recovery system, certified by the
9 California Air Resources Board (“CARB”). Under this Regulation, all Phase I vapor recovery
10 systems must meet the applicable CARB certification standards (Regulation 8-7-301.2).

11 In March, 2000 the State Air Resources Board (“CARB”) approved the Enhanced Vapor
12 Recovery (“EVR”) program regulations. EVR requirements for Phase I vapor recovery systems for
13 underground tanks have been implemented on a phased schedule beginning in 2001; effective
14 April 1, 2005, however, all Phase I systems for underground tanks must be certified to meet the EVR
15 requirements.

16 Applicant’s lease for the Facility terminates September 21, 2005. Consequently, Valero is
17 unwilling to upgrade the Phase I vapor recovery system to meet the EVR requirements that take
18 effect April 1, 2005. Applicant seeks a Short-Term Variance of 89 days to June 28, 2005 at which
19 time the Facility would be closed. The additional time is intended to relocate employees, if
20 possible, and delay lay-offs, and to generate income to offset fixed costs for rent and taxes.

21 DISCUSSION

22 The Hearing Board may grant a variance only if each of the criteria set forth in Health and
23 Safety Code § 42352 are met. The burden is on the Applicant to establish the basis for making an
24 affirmative Finding as to each of the criteria. The failure to make even one of the required Findings
25 requires that the Hearing Board deny the requested variance. Section 42352(a)(2) requires a Finding
26 that “due to conditions beyond the control of the [Applicant] requiring compliance would result in

1 either (A) an arbitrary or unreasonable taking of property, or (B) the practical closing and elimination
2 of a lawful business.”

3 In this matter, Applicant has not proved that requiring compliance with Regulation 8,
4 Rule 7, Section 301.2 would result in a taking of property or the practical closing of a lawful
5 business. Applicant merely wishes to continue the benefits of operation for a portion of the
6 remaining lease term without upgrading its Phase I vapor recovery system. According to evidence
7 presented at the hearing, however, while this would allow Applicant to reduce losses of
8 approximately \$90,000 in fixed costs for rent and taxes under the terms of the lease, the Applicant
9 could also reduce its losses by spending \$35,000, the cost to do the minimum that is necessary to
10 meet the EVR upgrade requirements, and operate until the expiration of the lease. Under the plan
11 proposed by the Applicant, a loss of at least \$50,000 would necessarily be incurred; if the Applicant
12 spends \$35,000 for the EVR upgrade, however, the net loss would not exceed this amount. In fact,
13 it is entirely possible that the Applicant would recover the entire \$35,000 expenditure by continuing
14 to operate the station for the six months remaining under the lease since evidence indicated that the
15 facility has gross gasoline sales of approximately \$470,000 per month. Thus the Finding required
16 by Health and Safety Code §42352(a)(2) cannot be made.

17 SPECIFIC FINDINGS

18 The Hearing Board finds that requiring compliance with Regulation 8, Rule 7,
19 Section 301.2 would not result in an arbitrary or unreasonable taking of property or the practical
20 closing of a lawful business.

21 THEREFORE, THE HEARING BOARD ORDERS:

22 A variance from Regulation 8, Rule 7, Section 301.2 of the Bay Area Air Quality
23 Management District Rules and Regulations is hereby denied.

24 Moved by: Terry A. Trumbull, Esq.

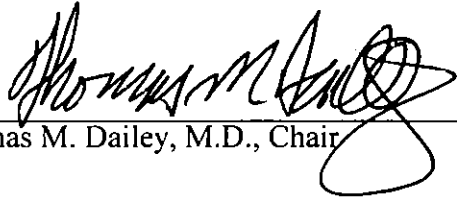
25 Seconded by: Allan R. Saxe, Esq.

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AYES: Christian Colline, P.E., Allan R. Saxe, Esq., Terry A. Trumbull, Esq., and Thomas M. Dailey, M.D.

NOES: Julio Magalhães, Ph.D.



Thomas M. Dailey, M.D., Chair

3-30-05
Date

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HEARING BOARD
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In the Matter of the Application of)
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EAST AVENUE SERVICES) No. 3490
)
For a Variance from Regulation 8, Rule 7,) ORDER GRANTING VARIANCE
Section 301.2)
_____)

The above-entitled matter is an Application for Variance from the provisions of Regulation 8, Rule 7, Section 301.2 of the Rules and Regulations of the Bay Area Air Quality Management District. The Application for Variance was filed on February 4, 2005, and requested relief for the period from April 1, 2005 through September 30, 2005.

Edwin F. Coats, Jr., President, East Avenue Services, appeared on behalf of East Avenue Services ("Applicant").

Kathleen Walsh, 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 March 17, 2005.

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

The Hearing Board declared the hearing closed after receiving evidence, testimony and argument, and took the matter under submission for decision. After consideration of the evidence,

ARB

1 the Hearing Board voted to grant the request for variance, as set forth in more detail below:

2 BACKGROUND

3 Applicant East Avenue Services (“EAS”) operates a gasoline dispensing facility (“GDF”)
4 located at 4186 East Avenue in Livermore, California (“Facility”). The Facility is a small business
5 as defined in California Health and Safety Code § 42352.5, and emits less than 10 tons per year of air
6 contaminants.

7 The Facility is equipped with four 4,000-gallon and one 6,000-gallon underground storage
8 tanks, a coaxial Phase I vapor recovery system, and a balance Phase II vapor recovery system with
9 six gasoline nozzles. Annual throughput is limited by permit to 1.5 million gallons; however,
10 monthly sales of gasoline are significantly less at approximately 20,000 gallons. In addition to
11 gasoline sales, the Facility has service bays and performs minor automotive service and repair. EAS
12 operates vehicle rental businesses – National Rental Car and Penske Trucks, which are serviced at
13 the Facility. A small retail operation sells soft drinks and snacks.

14 In 1999, EAS completed a required upgrade of its underground storage tanks. They
15 maintained the existing coaxial (single point system) Phase I vapor recovery system, which met
16 the requirements of District Regulations at that time. EAS financed this work with a \$300,000 loan,
17 which has not yet been retired.

18 Regulation 8, Rule 7, Section 301 of the District Rules and Regulations requires gasoline
19 dispensing facilities (“GDF”) to equip stationary tanks used to store gasoline with a Phase I vapor
20 recovery system, certified by the California Air Resources Board (“CARB”). Under this Regulation,
21 all Phase I vapor recovery systems must meet the applicable CARB certification standards
22 (Regulation 8, Rule 7, Section 301.2).

23 In March of 2000, CARB approved the Enhanced Vapor Recovery (“EVR”) program
24 regulations. EVR requirements for Phase I vapor recovery systems for underground tanks have been
25 implemented on a phased schedule beginning in 2001; effective April 1, 2005, however, all Phase I
26 systems for underground tanks must be certified to meet the EVR requirements. No single-point

1 system has yet been certified as EVR-compliant; thus the required upgrade for EAS would entail
2 expensive and extensive work to expose the tanks to change over to a two-point system. The cost for
3 this upgrade would be substantial.

4 Due to ongoing financial problems, Applicant decided to sell the business. After initial
5 discussions with Robinson Oil, Applicant entered into an agreement to sell the business to another
6 party. When that deal fell through, Applicant entered into an agreement to sell the business to
7 Robinson Oil. The parties opened the 120-day escrow during the week of March 7, 2005. Once
8 the sale is final, Robinson Oil plans to demolish the existing facility and completely rebuild the
9 GDF. At that time they will install an EVR-certified Phase I vapor recovery system.

10 As a condition of the sale, EAS must continue to operate as a GDF. EAS also needs to
11 continue operation until the sale of the business is complete in order to service the \$300,000 loan
12 for the tank upgrades completed in 1999.

13 DISCUSSION

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

19 EAS will be in violation of Regulation 8, Rule 7, Section 301.2 if gasoline is delivered to the
20 Facility after April 1, 2005 unless the Phase I vapor recovery system is a CARB-certified EVR
21 system.

22 The violation would be the result of conditions beyond the reasonable control of the Applicant
23 and requiring immediate compliance would result in an arbitrary taking of property or the practical
24 closing and elimination of a lawful business for a number of reasons.

25 The financial state of the business is fragile. Since the City of Livermore approved a number
26 of new GDFs, EAS' sales have dropped. It has been operating at a net loss since fiscal year 2003-04.

1 This is a family owned and run business. In the recent past, one family member had to leave the
2 business and Mr. Coates has taken no salary since November, 2003.

3 Under these circumstances, it would be an unreasonable burden to require EAS to have the
4 Facility upgraded prior to April 1, 2005, or the completion of the sale of the business. The Applicant
5 upgraded these underground storage tanks in 1999 but at that time CARB had not yet amended the
6 vapor recovery regulations to require the EVR upgrade. To require a further upgrade now would
7 require extensive and expensive work to expose the tanks as required for the upgrade.

8 In addition to being prohibitive, the cost of this work would also be wasteful under the
9 circumstances. EAS is in the process of selling the Facility to a company that plans to demolish the
10 existing Facility and replace the existing equipment. One of the terms of the sale is that the Facility
11 remain in operation until the transfer is complete.

12 The burdens to the Applicant would be without a corresponding benefit in reducing air
13 contaminants. The purpose of the EVR requirements is to improve the reliability of Phase I vapor
14 recovery systems. If the Applicant monitors performance of the system, as directed by this Hearing
15 Board, proper operation of the existing system can be maintained through the variance period.

16 EAS currently sells far less gasoline than allowed under its permit from the District. The
17 Applicant cannot further curtail operations without incurring a significant economic burden.
18 Moreover, curtailing operation would not be expected to reduce excess emissions, if any.

19 SPECIFIC FINDINGS

20 The Hearing Board finds pursuant to Health and Safety Code section 42352 that:

21 1. As of April 1, 2005, Applicant will be in violation of Regulation 8, Rule 7,
22 Section 301.2 of the District Rules and Regulations, which requires that all Phase I vapor recovery
23 systems at gasoline dispensing facilities shall be certified by the California Air Resources Board
24 ("CARB") if the Facility operates after that date without upgrading to an EVR-compliant system.

25 2. Due to conditions beyond the reasonable control of the Applicant, requiring
26 compliance with Regulation 8, Rule 7, Section 301.2 would result in an arbitrary and unreasonable

1 taking of property or the practical closing of a lawful business. EAS is not in a position financially
2 to upgrade the Phase I vapor recovery system to be EVR-compliant. If immediate compliance is
3 required, Applicant would be unable to service the debt previously incurred to meet regulatory
4 requirements related to underground storage tanks, and would be unable to fulfill a condition of
5 the agreement for sale of the business that it remain open until the transaction is complete.

6 3. The hardship due to requiring immediate compliance with Regulation 8, Rule 7,
7 Section 301.2 would be without a corresponding benefit in reducing air contaminants. Excess
8 emissions, if any, will be minimized by visual checks of the Phase I vapor recovery system to
9 confirm compliance following each fuel delivery.

10 4. Applicant considered curtailing operations in lieu of obtaining a variance but could
11 not have done so without significant financial hardship.

12 5. During the variance period, the Applicant shall reduce excess emissions to the
13 maximum extent feasible by visual checks of the Phase I vapor recovery system to confirm
14 compliance following each fuel delivery.

15 6. During the variance period, the Applicant will monitor or otherwise quantify
16 emission levels, and report the results, as required by the District.

17
18 **THEREFORE, THE HEARING BOARD ORDERS:**

19 A variance from Regulation 8, Rule 7, Section 301.2 of the Bay Area Air Quality
20 Management District Rules and Regulations is hereby granted from April 1, 2005 through
21 September 30, 2005, or the date the sale of the property is finalized, whichever comes first, subject
22 to the following conditions:

- 23 1. Applicant shall visually inspect the Phase I vapor recovery system after each fuel delivery
24 to ensure that the system is operating properly. The Applicant shall maintain written
25 records of the inspection and certification of compliance, and shall provide copies of those
26 records to the District upon request.

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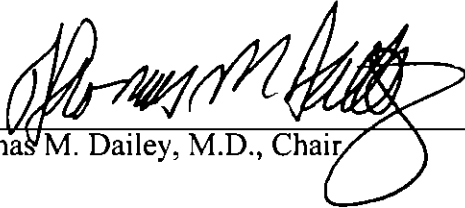
- 2. Applicant shall have the Facility Phase I vapor recovery system inspected and serviced by an outside contractor by April 15, 2005. If the contractor determines that any repair or service is necessary, Applicant shall complete that maintenance within 30 days of the inspection or seek additional relief from the Hearing Board. The results of the inspection shall be submitted, in writing, to the Hearing Board and the District no later than April 30, 2005.
- 3. Applicant shall have the required source tests for the Facility completed on or before April 30, 2005. If the source test contractor determines that any repair or service is necessary, Applicant shall complete that maintenance within 30 days of the source test or seek additional relief from the Hearing Board. The results of the source test shall be submitted, in writing, to the Hearing Board and the District on or before June 6, 2005.

Moved by: Christian Colline, P.E.


Seconded by: Allan R. Saxe, Esq.

AYES: Christian Colline, P.E., Allan R. Saxe, Esq., Terry A. Trumbull, Esq., and Thomas M. Dailey, M.D.

NOES: Julio Magalhães, Ph.D.



Thomas M. Dailey, M.D., Chair



Date