

**FILED**

FEB 25 2009

HEARING BOARD  
BAY AREA AIR QUALITY  
MANAGEMENT DISTRICT

**Lisa Harper**  
Clerk of the Boards  
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 )  
)  
Retail Alliance, LLC ) No. 3564  
)  
For a Variance from Regulation 8, Rule 7, ) ORDER GRANTING VARIANCE  
Sections 302. )  
\_\_\_\_\_ )

The above-entitled Application for a Regular Variance from the provisions of Regulation 8, Rule 7, Section 302, Regulation 2, came on regularly for hearing on February 5, 2009, before the Hearing Board of the Bay Area Air Quality Management District.

Rob Wood, appeared on behalf of Retail Alliance, LLC (“Retail Alliance” or “Applicant”).  
Adan Schwartz, Senior Assistant Counsel, appeared as counsel for the Air Pollution Control Officer (“APCO” or “the District”).

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 Variance application requests relief for the period October 1, 2008 through August 31, 2009.

The Hearing Board provided the public an opportunity to testify at the hearing, as required by the California Health and Safety Code. No member of the public offered testimony. The

1 Hearing Board heard evidence and argument from the Applicant and the District. The District  
2 opposed the application for Variance.

3 After the Applicant presented its case, the Hearing Board voted to grant the variance, as set  
4 forth in more detail below:

5 BACKGROUND

6 Applicant owns and operates a Gasoline Dispensing Facility (“GDF”) located in Fairfield,  
7 California (“the Facility”). The Facility is subject to District Regulation 8, Rule 7, Section 302,  
8 which requires that any dispensing of gasoline to cars be accomplished through a “Phase II” vapor  
9 recovery system that is certified by the California Air Resources Board. By Executive Order VR-  
10 203, the California Air Resources Board (“CARB”) has required that by April 1, 2009, GDFs in  
11 California must install and operate what is commonly termed a Phase II “enhanced vapor  
12 recovery”, or “EVR,” system. Applicant operates two other GDFs in the Bay Area. No  
13 information was presented indicating past compliance problems at any of Applicant’s GDF  
14 facilities.

15 Through its Application and testimony presented at the hearing, Applicant established that  
16 the Facility lies in the path of a road and intersection realignment and, because of this, has for  
17 some time been targeted for inverse condemnation by the City of Fairfield (“City”). Applicant  
18 submitted an agreement between itself and the City of Fairfield, which provides for Applicant to  
19 reassign its lease of the ground beneath the Facility upon the later of: 1) April 1, 2009, 2) such  
20 time as the City’s construction activities require the Facility to cease operating, or 3) proper notice  
21 by the City. The Agreement also provides for payment by the City to Applicant of \$525,000.

22 Mr. Wood, the owner of Retail Alliance, testified that his longstanding expectation has  
23 been that the Facility would be required to shut down on or about April 1, 2009. Mr. Wood  
24 testified that he has been in regular communication with officials at the City and that, based on  
25 information provided by them, he had strong reasons to believe that work on the road realignment  
26 would render his station unusable by April 1, 2009. Mr. Wood was thus surprised to learn that

1 delays in completion of the road realignment resulted in a revised prediction of August 1, 2009, as  
2 the date when the Facility would have to cease operating. Due to this unexpected turn of events,  
3 Applicant is faced with the prospect of upgrading to a Phase II EVR system in order to keep  
4 operating an additional five months.

5 Applicant estimated the cost of installing Phase II EVR at approximately \$50,000.  
6 Applicant also testified that his lease payments are approximately \$8,300 per month. Based on  
7 this, and based on predicted lost income opportunities, Applicant estimated total business losses  
8 due to shutting down the station on April 1, 2009 to be \$85,000.

9 The District estimated excess emissions to be one half of one pound per day of Volatile  
10 Organic Compounds. Scott Owen, a Senior Permitting Engineer at the District, was asked what  
11 percentage of these excess emissions could be avoided if Applicant upgraded only the nozzles and  
12 hoses to be compliant with Phase II EVR, leaving aside the more cost-intensive improvements.  
13 Mr. Owen offered an approximate guess that upgrading nozzles and hoses would reduce excess  
14 emissions by 50%.

15 The District opposed the granting of the variance based on its view that a delay in  
16 construction was not reasonably unforeseeable, and that the economic hardship of upgrading to  
17 Phase II EVR was not, by itself, justification for granting a variance. The District also noted that  
18 there is a legal question as to whether a variance could have the effect of relieving Applicant from  
19 compliance with a State law such as the Executive Order requiring the Phase II EVR upgrade.

#### 20 21 DISCUSSION

22 Applicant credibly testified that it entered into a quitclaim agreement with the City of  
23 Fairfield believing in good faith that the Facility would necessarily be closed by April 1, 2009.  
24 That the Facility was in the path of a road realignment and that this realignment has been delayed  
25 are both beyond Applicant's reasonable control. The Hearing Board believes Applicant has acted  
26 honestly and forthrightly in trying to make the best of a difficult situation. Requiring the Facility  
to either shut down or upgrade to Phase II EVR on April 1 would impose a significant hardship on

1 Applicant towards the end of avoiding a half pound a day of excess emissions. According to  
2 testimony from District staff, excess emissions will be a quarter pound per day if Applicant  
3 complies with the easier and less expensive aspects of Phase II EVR.

4 SPECIFIC FINDINGS

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

6 1. Applicant will be in violation of District Regulation 8, Rule 7, Section 302.

7 2. Due to circumstances beyond the reasonable control of the Applicant, requiring  
8 compliance with District Regulations will result in an unreasonable taking or practical closure of  
9 Applicant's lawful business.  
10

11 3. The hardship due to requiring immediate compliance with District Regulation 8, Rule  
12 7, Section 302 would be without a corresponding benefit in reducing air contaminants.

13 4. Because there is a direct correlation between the quantity of gas dispensed and  
14 emissions, curtailing operations (selling less gas) in lieu of obtaining a variance would impose a  
15 hardship on Applicant.  
16

17 5. Applicant will be reducing excess emissions to the maximum extent feasible by  
18 upgrading nozzles and hoses to Phase II EVR standards.

19 6. Applicant is required by its District permit to keep records of gasoline throughput,  
20 which is the primary indicator of emissions from the Facility.

21 THEREFORE, THE HEARING BOARD ORDERS:

22  
23 The variance from District Regulation 8, Rule 7, Section 302, is granted for the period of  
24 April 1, 2009 through and including July 31, 2009, subject to the following conditions:  
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26

1           1.       No later than April 1, 2009, Applicant shall equip all gasoline dispensing equipment at  
2 the Facility with nozzles and hoses compliant with Executive Order VR-203. Applicant shall provide  
3 a written report to the Hearing Board and the District at the completion of this work;

4           2.       For the period of the Variance, Applicant shall not sell gasoline at the Facility on  
5                “Spare the Air” days, as declared by the District;

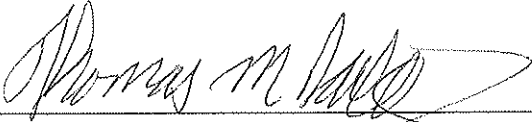
6           3.       No later than August 31, 2009, Applicant shall provide the Hearing Board and the  
7                District a report summarizing all gasoline sales during the Variance Period.  
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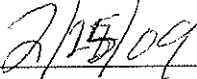
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10 Moved by:    Christian Colline, P.E.

11 Seconded by: Thomas M. Dailey, M.D.

12 AYES:         Julio Magalhães, Ph.D., Terry A. Trumbull, Esq., Christian Colline, P.E., and  
13                Thomas M. Dailey, M.D.,

14 NAYES:       Rolf Lindenhayn, Esq.  
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20 Thomas M. Dailey, M.D., Chair

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22 \_\_\_\_\_  
23 Date  
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