

FILED

MAR 16 2006

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

HEARING BOARD
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

MARY ROMAIDIS
CLERK
HEARING BOARD
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

In the Matter of the Application of:

ALAMEDA VALERO

For a Variance from Regulation 8, Rule 7,
Section 302.1

Docket No. 3512

**ORDER DENYING
VARIANCE**

The above-entitled matter is an Application for Variance from the provisions of Regulation 8, Rule 7, Section 302.1 of the Rules and Regulations of the Bay Area Air Quality Management District ("District"). The Application for Variance (Short-Term) was filed on January 20, 2006 and requested relief for 88 days from January 20, 2006 to April 17, 2006.

Fuad Ateyeh, owner of Alameda Valero, ("Applicant"), appeared on behalf of Applicant. Susan Adams, Assistant Counsel, appeared for the Air Pollution Control Officer ("APCO").

The Clerk of the Hearing Board provided notice of the hearing on the Application in accordance with the requirements of the Health and Safety Code. The Hearing Board heard the request for variance on February 16, 2006. The APCO opposed the granting of a Variance. At the hearing, Applicant amended its Application for Variance by deleting its original request for a Variance from District Regulation 8, Rule 7, Section 302.3.

The Hearing Board provided the public with an opportunity to testify at the hearing, as required by the Health and Safety Code. No members of the public testified. The Hearing Board heard evidence, testimony and argument from Applicant and APCO.

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

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1 Hearing Board voted to deny the Application for Variance, as set forth in more detail below:

2 **BACKGROUND**

3 Alameda Valero is a gasoline dispensing facility (“GDF”) located at 1725 Park Street,
4 Alameda, California 94501. The facility contains four fueling dispensers and a convenience
5 store. The GDF has a twelve-month gasoline throughput limit of 2.2 million gallons. From
6 August, 2003 to August, 2004, Applicant had an actual throughput of 1.57 million gallons. The
7 GDF is equipped with three 10,000-gallon underground storage tanks with a Phase I enhanced
8 vapor recovery (EVR) system, which Applicant installed in January 2006. Each of the fueling
9 dispensers has a Healy vacuum assist Phase II vapor recovery system with six “Healy 600”
10 nozzles, for a total of twenty-four nozzles.

11 Regulation 8, Rule 7, Section 302 of the District’s Rules and Regulations requires GDFs
12 to operate only Phase II systems that are certified by the California Air Resources Board
13 (“CARB”) (Regulation 8-7-302.1). As of April 2003, CARB has phased in a requirement that
14 Phase II equipment be certified as compatible with On-Board Vapor Recovery (“ORVR”)
15 equipment in motor vehicles. Existing GDFs, such as the Applicant, with an actual gasoline
16 throughput of more than one million and less than two million gallons (measured in 2003), had
17 to be ORVR-compatible as of January 1, 2006.

18 During an inspection of the GDF in January 2006, the District determined that Applicant
19 had not installed ORVR-compatible equipment as of the deadline. The District also determined
20 that as of April 1, 2005, Applicant’s Healy 600 nozzles had been decertified as non-compliant
21 with the leak retention standard. On January 19, 2006, the District issued Notice of Violation
22 No. A47269 for failure to have installed CARB-certified Phase II ORVR-compatible nozzles as
23 of January 1, 2006.

24 Applicant seeks a Short-Term Variance from January 20, 2006 until April 17, 2006 in
25 order to submit an application for an Authority to Construct (“A/C”) the Phase II ORVR-
26 compatible equipment, obtain the equipment and have it installed. Applicant anticipates closing
27 the GDF for two to three days to complete the installation. As of the hearing date, Applicant had
28 submitted an A/C application, which the District staff had determined was still incomplete. It

1 does not appear that Applicant intends to close the convenience store during the upgrade work.

2 Based on the information supplied in the Application for Variance and at the hearing, the
3 Hearing Board determined that the Applicant is a small business for purposes of applying the
4 statutory small business factors set forth in the Health and Safety Code Section 42352.5(b)(2) to
5 the criteria of Section 42352(a)(2).

6 DISCUSSION

7 The Hearing Board made several specific inquiries to assess when the Applicant learned
8 of the new Phase II ORVR-compatibility requirements and to determine what actions were taken
9 by the Applicant to meet these requirements. Applicant has owned the GDF since 1995 as an
10 independent operator. Applicant is a member of GDF trade associations and has received trade
11 publications, which have informed GDF operators of the deadlines to meet the Phase II ORVR-
12 compatibility requirements. At the hearing, Applicant informed the Hearing Board that he had
13 attended a trade association event in the Fall 2005, at which he also learned of the Phase II
14 ORVR-compatibility requirements. He did not dispute that he may have received the District's
15 compliance advisory, "Impending ORVR Compliance Deadlines," dated August 17, 2005,
16 which the District mailed to all GDF permittees; in fact he acknowledged that he has received
17 many such advisories from the District in the past.

18
19 Applicant testified that he thought his station was in compliance with the new ORVR-
20 compatibility requirements since the nozzles at his station were made by Healy ("Healy 600")
21 and the District's Compliance Advisory issued August 17, 2005 also listed some Healy nozzles
22 ("Healy 800 or 900") as compliant. Applicant also indicated that his contractor was unable to
23 give him a definite determination on whether his system was ORVR-compliant. Applicant
24 acknowledged not contacting the District to obtain a definitive determination on whether his
25 Phase II vapor recovery system complied with the new requirements. The District presented
26 testimony indicating that most gasoline dispensing facilities in the District complied with the
27 ORVR-compatibility requirements by the January 1, 2006 deadline.

28 Applicant acknowledged at the hearing that he must close the GDF for some period to

1 install the ORVR-compatible equipment. The expected period of the closure is estimated to be
2 a few days. He stated that he has to incur additional costs because of arranging for the
3 installation to occur immediately. Applicant stated that the least expensive way of bringing his
4 station into compliance would cost about \$20,000 in labor and equipment. Applicant testified
5 that his annual net income from the station is about \$80,000 on annual sales of \$3.2 million.
6 Applicant acknowledged that some of his costs for compliance are the costs which the Applicant
7 must bear, in any event, to upgrade the Phase II system to be ORVR-compatible equipment.

8
9 **SPECIFIC FINDINGS**

10 The Hearing Board is unable to make the finding required by Health and Safety Code
11 Section 42352 (2). This section requires a Finding that "due to conditions beyond the control of
12 [Applicant] requiring compliance would result in either (A) an arbitrary or unreasonable taking
13 of property, or (B) the practical closing and elimination of a lawful business."

14 Applicant has failed to prove that the need for this Variance was beyond his reasonable
15 control. In particular, Applicant was aware of the new ORVR-compatibility requirements but
16 did not take reasonable and appropriate actions to determine if his station was compliant. In
17 addition, testimony on the costs of achieving compliance, and the income of the Applicant,
18 show that requiring compliance with Regulation 8, Rule 7, Section 302.1 would not result in an
19 arbitrary or unreasonable taking of property or practical closing of a lawful business.

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21 **THEREFORE, THE HEARING BOARD ORDERS:**

22 A Variance from Regulation 8, Rule 7, Section 302.1 of the Bay Area Air Quality
23 Management District Rules and Regulations is hereby denied.

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Moved by: Terry A. Trumbull, Esq.
Seconded by: Thomas M. Dailey, M.D.
AYES: Julio Magalhães, Ph.D., Jeffery R. Raines, P.E.,
Terry A. Trumbull, Esq., and Thomas M. Dailey, M.D.
NOES: Allan R. Saxe, Esq.
ABSTAINED: None



Thomas M. Dailey, M.D., Chair

3-13-06
Date