

**FILED**

**OCT 2 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	)	
	)	
AMERICAN GAS	)	No. 3539
	)	
For a Variance from Regulation 8, Rule 7, Section 302.	)	<u>ORDER DENYING VARIANCE</u>
	)	

The above-entitled matter is an Application for a Variance from the provisions of Regulation 8, Rule 7, Section 302, filed on August 24, 2007 ("Application").

Azad Ameri appeared on behalf of American Gas ("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 requested relief for the period August 24, 2007, through September 23, 2007. The Hearing Board heard the request for Variance on September 6, 2006.

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 Hearing Board heard evidence and argument from the Applicant. The APCO was opposed to the

ARB

1 granting of the Variance.

2 After the Applicant presented its case, the Hearing Board voted to deny the Variance, as set  
3 forth in more detail below:

4 BACKGROUND

5 Applicant is a business partnership operating a gasoline dispensing facility ("GDF") in  
6 Moraga, California ("Facility"). Applicant is not considered a small business as described by  
7 California Health and Safety Code Section 42352.5(b)(2).

8 Pursuant to the California Air Resources Board Executive Order G-70-191AA, GDFs with  
9 a 2003 annual throughput of less than 1 million gallons must be equipped with an Onboard  
10 Refueling Vapor Recovery (ORVR) compatible Phase II recovery system by March 1, 2006. The  
11 Facility reported a throughput of 640,000 gallons in 2003. A routine inspection performed by the  
12 District at the Facility on August 22, 2007, revealed that Applicant's Phase II vacuum assist  
13 system was non-compliant, and that an upgrade was required. Following that inspection,  
14 Applicant was issued a notice of violation, and all nozzles at the Facility were "tagged out," or  
15 shut down, thus preventing further dispensing of gasoline. The most recent renewals of the  
16 District operating permit for the Facility occurred on June 1, 2006, and June 1, 2007, respectively.

17 Applicant assumed operational management of the Facility on April 20, 2007. Prior to  
18 that, the Facility was leased to an individual/business entity unassociated with Applicant.  
19 According to Applicant, the lessor prior to April 20, 2007, was Kang Properties, Inc. After that  
20 date, Applicant assumed the lease in partnership with Mr. Kang of Kang Properties, Inc.  
21 Applicant stated at the hearing that Mr. Kang owns and operates a GDF in the Lake Tahoe area  
22 that, similar to the Facility, was required to be upgraded to an ORVR-compatible Phase II system,  
23 and that the upgrade to the Lake Tahoe GDF did occur.

24 At the hearing, Applicant stated that he had over 30 years experience in the gasoline retail  
25 business. Applicant stated that he is familiar with all aspects of the business, including  
26 compliance with District regulations. Applicant stated that when he assumed operation control of

1 the Facility in April of 2007, he did not attempt to determine whether the Facility was in  
2 compliance with Executive Order G-70-191AA, because he assumed that the District would not  
3 issue a permit to a GDF unless the facility was in compliance with District regulations.

4 The Hearing Board also heard testimony from Scott Owen, a supervisor in the Engineering  
5 Division of the District, and Militus Alagwu, a District inspector familiar with the Facility. Mr.  
6 Owen stated that whether a GDF is equipped with a compliant Phase II system can be determined  
7 through a simple visual inspection. Mr. Owen also stated that renewal of District operating  
8 permits is normally an "administrative" exercise that does not include review of a facility's  
9 compliance status.

10 Inspector Alagwu stated that he last spoke to the prior lessee of the Facility in February  
11 and March of 2006, and that at that time he received a verbal assurance that although the Facility  
12 had not installed compliant equipment by the March 1, 2006, deadline, the Phase II upgrade would  
13 occur expeditiously. Inspector Alagwu stated that he did not issue a notice of violation at that time  
14 because the District was following a policy of "giving people some leeway" regarding that  
15 compliance deadline. Inspector Alagwu gave as the reason for not conducting a follow-up  
16 inspection until August of 2007 is that he has responsibility for a large geographic area and was  
17 occupied with other matters.

#### 18 DISCUSSION

19 Pursuant to Health and Safety Code Section 42352, the Hearing Board may grant a  
20 Variance upon a finding that the criteria of that section are met. In this case, Applicant has not  
21 carried its burden of proving that the violations for which the variance was sought were beyond its  
22 reasonable control to avoid as required by Health & Safety Code Section 42352(a)(2).

23 There is some question as to whether Applicant had the means to determine whether the  
24 Facility was in compliance prior to assuming operational management of the Facility on April 20,  
25 2007. However, there is no need to reach this question. Applicant had from April 20 until August  
26 22, 2007, to determine the compliance status and begin taking steps to perform the necessary

1 upgrade. It was clearly within Applicant's reasonable control to do so.

2 The Hearing Board does not agree with Applicant's assertion that it was reasonable to  
3 assume compliance based on renewal of the operating permit. No evidence was offered of any  
4 representation from the District that operating permit renewal represents a finding of compliance.  
5 Nor is this a reasonable assumption, since it is not apparent how the District would determine  
6 compliance with the relevant requirements absent an actual inspection, the fact of which would  
7 very likely be known to the permit holder.

8 The evidence regarding the timing of District inspections in this matter is irrelevant, as are  
9 the assurances given to the District inspector by the facility operator in February and March of  
10 2006. As a general rule, persons subject to District regulations are responsible for determining  
11 which regulations apply to them and whether they are in compliance. The Application presents no  
12 unusual circumstances that might support an exception to this rule.

13  
14 SPECIFIC FINDING

15 The Hearing Board finds pursuant to Health and Safety Code Section 42352(a)(2) that the  
16 conditions leading to noncompliance with District Regulation 8, Rule 7, Section 302, were not

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

1 beyond Applicant's reasonable control, and that a finding pursuant to this section can not be made  
2 to support the issuance of a Variance.

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

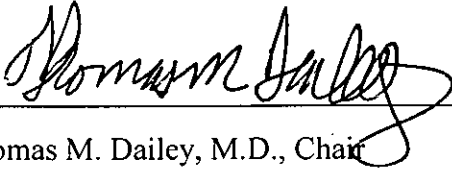
THEREFORE, THE HEARING BOARD ORDERS:

The Application for Variance from District Regulation 8, Rule 7, Section 302 is denied.

Moved by: Terry A. Trumbull, Esq.

Seconded by: Rolf Lindenhayn, Esq.

AYES: Julio Magalhães, Ph.D., Rolf Lindenhayn, Esq., Christian Colline, P.E., and  
Thomas M. Dailey, M.D.

  
\_\_\_\_\_  
Thomas M. Dailey, M.D., Chair

9.29.07  
Date