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HEARING BOARD
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

Lisa Harper
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**

AIR POLLUTION CONTROL OFFICER of the BAY
AREA AIR QUALITY MANAGEMENT DISTRICT,

DOCKET NO. 3598

Complainant,

vs,

**CONDITIONAL ORDER
FOR ABATEMENT**

Cheuk Fung, individually, and *d/b/a* Max Gas, Warm
Springs Valero, and Warm Springs Gas; Cheuk M. &
Juilan Fung Trust; a Gasoline Dispensing Facility located
at 39925 Mission Boulevard, Fremont, California, Site
No. D0587, *a/k/a* Max Gas; and a Gasoline Dispensing
Facility located at 47700 Warm Springs Boulevard,
Fremont, California, Site No. C8687, *a/k/a* Warm Springs
Valero and/or Warm Springs Gas,

Respondents.

On or about September 27, 2010, the Air Pollution Control Officer (“APCO”) of the Bay Area Air Quality Management District (“District”), Complainant in the above-entitled matter, filed with this Hearing Board an Accusation and Request for Order for Abatement (“Accusation”) against Cheuk Fung, individually, and *d/b/a* Max Gas, Warm Springs Valero, and Warm Springs Gas; Cheuk M. & Juilan Fung Trust; a Gasoline Dispensing Facility located at 39925 Mission Boulevard, Fremont, California, Site No. D0587, *a/k/a* Max Gas; and a Gasoline Dispensing Facility located at 47700 Warm Springs Boulevard, Fremont, California, Site No.

1 C8687, a/k/a Warm Springs Valero and/or Warm Springs Gas (all of whom are hereafter referred
2 to as "Respondents"); and Does 1 through 10, inclusive requesting that the Hearing Board order
3 Respondents to cease and desist transferring gasoline from the underground gasoline storage
4 tanks to motor vehicles at their two gasoline dispensing facilities, which are located at 39925
5 Mission Boulevard, Fremont, Site D0587, known as Max Gas, and 47700 Warm Springs
6 Boulevard, Fremont, Site C8687, known as Warm Springs Valero (together "Facilities"), thirty
7 days from the date of hearing in this matter until Respondents install enhanced vapor recovery
8 ("EVR") Phase II system equipment certified by the California Air Resources Board ("ARB") in
9 accordance with the requirements of District Regulation 8, Rule 7, Section 302.1.

10 The Clerk of the Hearing Board provided notice of the hearing on the Accusation in
11 accordance with the requirements of Health and Safety Code section 40823. Respondents did
12 not file a Notice of Defense. The Hearing Board heard the request for an Abatement Order on
13 October 28, 2010.

14 Randi Wallach, Assistant Counsel, appeared for the Air Pollution Control Officer.

15 Respondents were not present at the hearing.

16 Mr. Troy Hash testified for the APCO.

17 The Hearing Board provided the public with an opportunity to testify at the hearing, as
18 required by the Health and Safety Code. No members of the public testified. The Hearing Board
19 heard evidence, testimony and oral argument from the APCO. The Hearing Board granted the
20 District's Request for Official Notice in Support of Accusation and Request for Order for
21 Abatement. The Hearing Board admitted the District's Exhibit Nos. 1-6.

22 The Hearing Board closed the hearing after receiving evidence, testimony and argument,
23 and took the matter under submission for decision. After consideration of the evidence, the
24 Hearing Board found the following findings of fact and conclusions of law, and voted to issue a
25 Conditional Order for Abatement as set forth below:

26 **FINDINGS OF FACT**

27 1. Cheuk Fung, an individual, owns and/or operates the gasoline dispensing facilities

1 (“GDFs”) that are located at 39925 Mission Boulevard, Fremont, Site D0587, known as Max
2 Gas, and 47700 Warm Springs Boulevard, Fremont, Site C8687, known as Warm Springs
3 Valero. The Cheuk M. and Juilan Fung Trust owns the property underlying both Facilities.

4 2. The Facilities are subject to the jurisdiction of the District. The annual gasoline
5 throughput at Max Gas is approximately 1.8 million gallons and the annual gasoline throughput
6 at Warm Springs Valero is approximately 660,000 gallons.

7 3. Volatile organic compounds (“VOCs”) are organic compounds that evaporate
8 quickly into the atmosphere. VOCs, reacting with oxides of nitrogen in sunlight, create ground
9 level ozone. Ground level ozone is the primary component of photochemical smog, which is a
10 significant air quality problem in the Bay Area. Ozone aggravates respiratory diseases, reduces
11 visibility, causes eye irritation, and damages vegetation. One of the common sources of VOCs is
12 gasoline vapors. Gasoline vapor, which contains hydrocarbons, is an air contaminant. Gasoline
13 contains benzene, a known carcinogen. In the Bay Area, gasoline dispensing facilities are a
14 major source of VOC emissions.

15 4. A GDF “vapor recovery system” collects gasoline vapors that are discharged
16 during gasoline transfer operations and processes the vapors to prevent their release into the
17 atmosphere.

18 5. A GDF vapor recovery system comprises a “Phase I” system, which controls
19 gasoline vapors during the transfer of gasoline from gasoline cargo tanks to a GDF’s stationary
20 storage tank, and a “Phase II” system, which controls gasoline vapors during transfer of gasoline
21 between the GDF’s stationary storage tank and a motor vehicle.

22 6. District Regulation 8, Rule 7, Section 302.1 prohibits a person from transferring
23 gasoline between a GDF’s stationary storage tank and a motor vehicle without an ARB-certified
24 Phase II system in place and in operation.

25 7. State law requires that stations in existence as of April 1, 2005 with underground
26 stationary gasoline storage tanks had to install an enhanced vapor recovery (“EVR”) Phase II
27 system as of April 1, 2009. As of April 1, 2009, only EVR Phase II equipment was ARB-

1 certified, and any Phase II system that was not ARB-certified as EVR Phase II was de-certified.

2 8. The District is authorized to tag “out of order” components at a GDF that are not
3 certified by ARB. Until such components are replaced, repaired or adjusted and the District has
4 reinspected the components (or authorized use of the components pending reinspection), no one
5 may operate them.

6 9. The District conducted an extensive public outreach program to GDF owners and
7 operators about the EVR Phase II upgrade requirements and District Regulation 8-7-302.1
8 through public workshops, delivery of District compliance advisories, and on-site compliance
9 assistance visits at GDFs.

10 10. Respondents were fully aware of the requirement to have installed the Phase II
11 EVR system as of April 1, 2009.

12 11. Respondents did not curtail or cease dispensing gasoline at the Facility on or after
13 April 1, 2009.

14 12. On numerous occasions, the District inspected the Facility to remind Respondents
15 of the April 1, 2009 deadline and to monitor the progress of the EVR Phase II system upgrade, if
16 any.

17 13. On July 15, 2009, the District issued Max Gas NOV No. A50883 for conducting
18 gasoline dispensing operations with an uncertified EVR Phase II system as of April 1, 2009, in
19 violation of District Regulation 8-7-302.1. A copy of this NOV was entered into evidence as
20 the District’s Exhibit No. 1.

21 14. On July 8, 2009, the District issued Warm Springs Valero Notice of Violation
22 (“NOV”) No. A50879 for conducting gasoline dispensing operations with an uncertified EVR
23 Phase II system as of April 1, 2009, in violation of District Regulation 8-7-302.1. A copy of this
24 NOV was entered into evidence as the District’s Exhibit No. 2.

25 15. Respondents did contact the District and obtain compliance agreements for each
26 of the Facilities that enabled Respondents to continue operating after April 1, 2009 so long as
27 Respondents were diligently working to upgrade their vapor recovery systems. However,

1 Respondents have been in breach of the agreements since November 2, 2009 pursuant to
2 Paragraph 19 of the agreements, as Respondents have met neither the September 1, 2009 nor
3 November 1, 2009 compliance dates, nor sought or received any further extensions from the
4 District. Copies of the compliance agreements were entered into evidence as the District's
5 Exhibit Nos. 3 and 4.

6 16. As of October 26, 2010, the Facilities had not completed the required EVR Phase
7 II upgrade and were operating in violation of District Regulation 8-7-302.1. The District
8 inspector photographed the Facilities in operation and out of compliance with the Phase II EVR
9 requirements on October 26, 2010; these photographs were entered into evidence as the District's
10 Exhibit Nos. 5 and 6.

11 **CONCLUSIONS OF LAW**

12 Pursuant to Health and Safety Code sections 40750, 40752 and 42451(a), the APCO, who
13 is appointed by the District Board of Directors, is authorized to enforce all rules and regulations
14 adopted or prescribed by the District Board and is authorized to seek an Order for Abatement
15 from the District's Hearing Board to stop violations of a District rule or regulation prohibiting or
16 limiting the discharge of an air contaminant into the air.

17 Pursuant to Health and Safety Code Section 42451(a), the Hearing Board may issue an
18 Order for Abatement if it finds that a person is operating a gasoline dispensing facility in
19 violation of a District rule or regulation that prohibits or limits the discharge of an air
20 contaminant into the air.

21 Cause for determination that Respondents are in violation of District Regulation 8-7-
22 302.1 is established by Findings of Fact Nos. 1, 2, 11, 13, 14, 15 and 16.

23 Cause for issuance of an order that Respondents abate this violation is established by
24 Findings of Fact Nos. 1 through 16, inclusive.

1 **ORDER**

2 **Cause being found therefore, pursuant to Sections 42451(a) and 42452 of the**
3 **California Health and Safety Code, THE HEARING BOARD of the BAY AREA AIR**
4 **QUALITY MANAGEMENT DISTRICT hereby ORDERS:**

5 1. That the APCO's Request for a Conditional Order for Abatement ("Order") shall
6 be and hereby is GRANTED as follows: Respondents Cheuk Fung, Max Gas, Warm Springs
7 Valero, and Warm Spring Gas, as well as any other gasoline dispensing facility doing business at
8 39925 Mission Boulevard, Fremont, California and/or 47700 Warm Springs Boulevard, Fremont,
9 California, and their agents, employees, successors and assigns are hereby ordered to cease
10 gasoline dispensing operations at the Facilities on or before November 27, 2010, until:

- 11 a. Respondents come into compliance with Regulation 8, Rule 7, Section 302.1
12 by installing an ARB-certified EVR Phase II system that complies with the
13 system manufacturer's specifications and with the terms and conditions of the
14 District authority to construct the EVR Phase II system at the Facility; and
15 b. Respondents submit the EVR Phase II upgrade "start-up notification" to
16 Respondents' District permit engineer, as required by the EVR Phase II
17 system's authority to construct, with a copy submitted simultaneously to this
18 Hearing Board and to the District Legal Division, attention Brian C. Bunger,
19 via facsimile or certified mail;

20 2. That this Conditional Order for Abatement shall become effective immediately.

21 3. That the Hearing Board shall retain jurisdiction over this matter until Respondents
22 come into compliance with the EVR Phase II requirements of Regulation 8, Rule 7, Section
23 302.1 and submit "start-up notification" in accordance with the requirements set forth in
24 Paragraph 1 of this Conditional Order for Abatement.

25 Moved by: Terry A. Trumbull, Esq.

26 Seconded by: Rolf Lindenhayn, Esq.

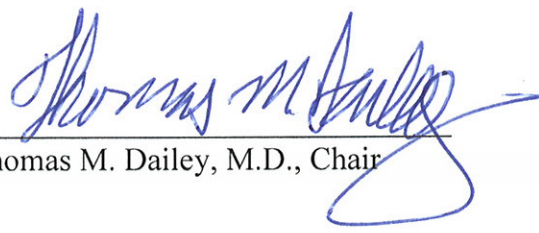
27 AYES: Christian Colline, P.E., Rolf Lindenhayn, Esq., Julio Magalhães,

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Ph.D., Terry A. Trumbull, Esq., and Thomas M. Dailey, M.D.

NOES: None

ABSTAINED: None


Thomas M. Dailey, M.D., Chair

11-3-10
Date