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OCT 06 2011

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)
)
CALIFORNIA CLEANERS) No. 3617
)
For a Variance from Regulation 11,) ORDER GRANTING VARIANCE
Rule 16, Section 304.15)
_____)

The above-entitled matter is an Application for Variance from the provisions of Regulation 11, Rule 16, Section 304.15 of the Rules and Regulations of the Bay Area Air Quality Management District (the "District"). The Application for Variance was filed on June 28, 2011, and requested relief for the period from July 1, 2011, through July 1, 2012.

Owners David S. Hahn and Kim Y. Hahn appeared on behalf of California Cleaners ("Applicant").

Nancy M. Wang, 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 August 25, 2011.

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 Applicant and the APCO. The APCO opposed the granting of the variance.

The Hearing Board declared the hearing closed after receiving evidence, testimony and

1 argument, and took the matter under submission for decision. After consideration of the evidence,
2 the Hearing Board voted to grant the request for variance, as set forth in more detail below:

3 BACKGROUND

4 Applicant operates one Perchloroethylene (“Perc”) solvent dry cleaning machine at its dry
5 cleaning facility located at 2425 California Street, Mountain View, California (the “Facility”).
6 Applicant’s machine (designated Source #S-1 by the District) is a Permac closed-loop, 45-pound load
7 capacity dry cleaning machine that was manufactured in or about 1990. The Perc machine is operated
8 pursuant to a District Permit to Operate, which limits the Facility’s Perc solvent usage to 100 gallons
9 per year. Emissions from the Facility are approximately 135 pounds per year of Perc vapor.

10 Under Regulation 11, Rule 16, Section 304.15 of the District Rules and Regulations, the
11 operation of any Perc machine with a date of manufacture prior to July 1, 1995, is prohibited effective
12 July 1, 2010. Applicant is subject to the July 1, 2010; phase out deadline because its Perc machine
13 was manufactured prior to July 1, 1995. Applicant executed a compliance and settlement agreement
14 (“Agreement”) with the District and paid a civil penalty to extend its phase out deadline until July 1,
15 2011. In return for the extension, Applicant agreed “to adhere to an expeditious schedule to achieve
16 compliance related to the Perc equipment phase out,” which included ceasing operation of the Perc
17 machine and removing the machine from service no later than July 1, 2011. As of the date of this
18 hearing (August 25, 2011), however, Applicant is still operating the Perc machine. Applicant seeks a
19 variance from July 1, 2011, until July 1, 2012, to allow more time to negotiate and execute a new
20 lease for the property at which the Facility is located. Upon securing the new lease, Applicant intends
21 to replace the Perc machine with a used hydrocarbon dry cleaning machine, using funds that it has
22 recently secured from family members.

23 Based on the information supplied by Applicant at the hearing, the Hearing Board determined
24 that Applicant is a small business for purposes of applying the statutory small business factors set
25 forth in the California Health and Safety Code Section 42352.5(b)(2) to the criteria set forth in
26 Section 42352(a)(2).

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DISCUSSION

The Hearing Board may grant a variance upon finding that all of the criteria set forth in Health and Safety Code Section 42352(a) are met. The burden is on Applicant to establish the basis for making each of the Findings. In this matter, Applicant has provided sufficient evidence to demonstrate that each of the criteria has been met.

The District and the Applicant agreed at the hearing that Applicant was in violation of Regulation 11, Rule 16, Section 304.15 because it was continuing to operate its Perc machine after its Perc phase out deadline (originally July 1, 2010, but extended by the Agreement until July 1, 2011).

At the hearing, Applicant informed the Hearing Board that Applicant had not replaced the Perc machine at the Facility with an alternative dry cleaning machine due to uncertainty surrounding its lease and financial hardship. Applicant testified that Applicant's lease on the property at which the Facility is located expired in 2009, and that, despite Applicant's best efforts, Applicant is still negotiating with the landlord over the terms of a new five-year lease. Applicant testified that the landlord has offered to execute a new lease at the current rent, but that Applicant is seeking a lower rent given its current financial situation. Applicant testified that it is currently operating under a month-to-month lease, and that, without the security of a long-term lease, it did not seem prudent to invest in a replacement dry cleaning machine, which, according to Applicant's research, would be significant. For example, Applicant stated that two equipment distributors informed Applicant in 2010 that a new machine would cost \$50,000 or more. Recently, however, Applicant located a used hydrocarbon machine for sale for \$23,000. Applicant states that it will also need to pay permitting and installation costs for the replacement machine, as well as costs associated with removing the existing Perc machine.

Applicant stated that its income, comprising profits from the Facility and social security benefits, roughly equal its business and living expenses, including equipment depreciation and a home mortgage, resulting in little or no net income. Applicant stated that, as a result, it was unable to

1 come up with the money to purchase a replacement machine. Applicant also testified that it has a
2 poor credit rating and likely cannot qualify for a commercial loan. Applicant testified that as a final
3 resort, it recently sought financial help from family members, who agreed to loan Applicant the
4 money Applicant needs to acquire the used hydrocarbon machine.

5 Applicant also stated it had considered shutting down the dry cleaning operation or
6 contracting out its dry cleaning to another facility (*i.e.*, becoming a “drop shop”) as alternative means
7 of coming into compliance with the Perc phase out, but determined that neither option was feasible.
8 Applicant estimated at the hearing that while dry cleaning comprises only approximately 20% to 30%
9 of the volume of garments processed by California Cleaners, it generates the “majority” of the income
10 for the Facility. Further, Applicant testified that the Facility’s reputation is based on high quality dry
11 cleaning, but the reputation of drop shops is poor, so it did not consider becoming a drop shop to be
12 an option, even temporarily.

13 The District offered testimony indicating that Perc is a toxic air contaminant and has been
14 designated a probable human carcinogen by the International Agency for Research on Cancer
15 (“IARC”). As a result, in 2007 the California Air Resources Board (“CARB”) amended the *Airborne*
16 *Toxic Control Measure for Emissions of Perchloroethylene (Perc) from Dry Cleaning Operations*
17 (“Perc ATCM”), which is codified in title 17 of the California Code of Regulations, section 93109.
18 The District stated that the District adopted its phase out requirements, including Regulation 11, Rule
19 16, Section 304.15, from which Applicant now seeks relief, to incorporate the state law phase out
20 requirements into the District rules. Under both sets of regulations, new Perc machines were
21 prohibited as of January 1, 2008, and existing Perc dry cleaning machines must be phased out on July
22 1, 2010, or the date on which the machine reaches 15 years of age, whenever is later. Thus, Perc dry
23 cleaning will be eliminated in the state by January 1, 2023.

24 The District offered testimony that of the approximately 165 dry cleaning facilities in the
25 District that were required to phase out their Perc machine on July 1, 2010, Applicant is the only one
26 still operating a Perc machine. All of the other facilities have installed alternative dry cleaning

1 machines, become drop shops, or shut down.

2 The District further presented testimony that the 165 facilities that were subject to the July 1,
3 2010, phase out deadline were not the only Perc facilities operating in the District. In addition, there
4 were between 150 and 200 facilities within the District that continued operating their Perc machines
5 after July 1, 2010, because those machines were less than 15 years old as of July 1, 2010. Those
6 remaining machines are required to cease operating and be removed from service on their 15-year
7 birthday, calculated from the date of manufacture. The District presented testimony that an older
8 machine such as Applicant's emits approximately 50% more Perc vapors than a latest generation Perc
9 machine. Further, according to the District, the 15-year phase out schedule reflected CARB's
10 determination after surveying the industry that a facility could reasonably be thought to have recouped
11 the equity from a Perc machine after 15 years of commercial usage.

12 Finally, the District proffered testimony establishing that at a Perc usage of 100 gallons per
13 year (the Facility's permit limit), the Facility would create a cancer risk of approximately 90 in a
14 million. Records obtained from the Facility over the last few years established that the Facility's
15 actual usage was between 18 and 40 gallons per year, as compared to an average of 40 to 50 gallons
16 per year at all Bay Area Perc dry cleaning facilities. At 18 gallons per year, the cancer risk would be
17 16 in a million.

18 SPECIFIC FINDINGS

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

- 20 1. As of July 1, 2011, Applicant was in violation of Regulation 11, Rule 16,
21 Section 304.15 of the District Rules and Regulations by continuing to operate the Perc machine.
- 22 2. Taking into account the small business considerations set forth in Health and Safety
23 Code section 42352.5(b), the Hearing Board finds that, due to conditions beyond the reasonable
24 control of Applicant, requiring compliance with Regulation 11, Rule 16, Section 304.15 would
25 result in an arbitrary and unreasonable taking of property or the practical closing of a lawful
26 business. The violation was beyond Applicant's reasonable control. Applicant's inability to

1 secure a new long-term lease on the property, at sustainable rent terms for the business, was due in
2 large part to the landlord's expectations and larger economic conditions that are beyond
3 Applicant's reasonable control. Furthermore, it was reasonable for Applicant to defer investing in
4 and installing a replacement dry cleaning machine until it secured a new long-term lease on the
5 property.

6 Requiring immediate compliance by shutting down or turning into a drop shop would have
7 resulted in an arbitrary taking of property or the practical closing and elimination of a lawful
8 business. Had Applicant shut down its dry cleaning operation while it was waiting to secure a new
9 lease, Applicant would have lost the majority of the revenue of the business, further deteriorating
10 its poor financial condition. Further, because the Facility's reputation has been built on high
11 quality dry cleaning, turning into a likely lower-quality "drop shop" facility would have had a
12 significant impact on the business. Neither option was viable for this business.

13 3. The hardship due to requiring immediate compliance with Regulation 11, Rule 16,
14 Section 304.15 would be without a corresponding benefit in reducing air contaminants. Excess
15 emissions resulting from the violation during the 6-month variance period (July 1, 2011 to
16 December 31, 2011) will be very small; however, the economic burden to Applicant associated with
17 complying with the Perc phase out requirement would have been considerable. The Hearing Board
18 will be granting a variance for a limited period of time, during which time the Facility's total
19 allowable Perc usage will be limited to 6.7 gallons. As a result, the Facility's Perc emissions will be
20 limited.

21 Perc usage of 6.7 gallons over a 6-month period translates to an annual usage rate of less than
22 18 gallons per year. District testimony established that at 18 gallons per year, the cancer risk would
23 be 16 in a million. However, cancer risk is calculated assuming continuous exposure over 70 years.
24 Here, the emissions will be occurring only over a period of 6 months, not over 70 years. Therefore,
25 the actual cancer risk created by Applicant's Perc usage during the variance period will not be
26 significant.

1 4. Applicant could not have curtailed operations in lieu of obtaining a variance
2 without significant financial hardship. As stated above, the Facility could not have feasibly closed
3 its dry cleaning operation or turned into a drop shop, even temporarily, while waiting to execute a
4 new lease and to procure and install a replacement machine.

5 5. During the variance period, Applicant will reduce excess emissions to the
6 maximum extent feasible by limiting its solvent usage to no more than 6.7 gallons of Perc.

7 6. Applicant shall quantify all emissions and Perc usage during the variance period
8 and report these emission and sales data to the District no later than December 31, 2011.
9 Applicant shall also pay excess emissions fees for all emissions during the variance period, July 1,
10 2011, through December 31, 2011, to be submitted to the Clerk of the Hearing Board, c/o
11 BAAQMD, 939 Ellis Street, San Francisco, CA 94109.

12 THEREFORE, THE HEARING BOARD ORDERS:

13 1. A variance from Regulation 11, Rule 16, Section 304.15 of the Bay Area Air
14 Quality Management District Rules and Regulations is hereby granted from July 1, 2011, through
15 December 31, 2011.

16 2. During the variance period, Applicant's net usage of Perchloroethylene solvent
17 shall not exceed 6.7 gallons.

18 3. No later than 15 days after executing a new lease for the property at which the
19 Facility is located, Applicant shall submit: (a) to the City of Mountain View any application(s)
20 necessary to secure a permit(s) to install a non-Perc dry cleaning machine at the Facility; and (b) to
21 the Bay Area Air Quality Management District an application for an Authority to Construct a non-
22 Perc dry cleaning machine at the Facility or a registration application for the non-Perc machine, as
23 applicable.

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3 4. Applicant shall notify the Hearing Board in writing when it has executed a new
4 lease for the property at which the Facility is located and has submitted all necessary applications
5 for permits and/or registrations for a Perc dry cleaning machine as described in Paragraph 3 above.

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7 Moved by: Christian Colline, P.E.

8 Seconded by: Julio Magalhães, Ph.D.

9 AYES: Christian Colline, P.E., Julio Magalhães, Ph.D., and Thomas M. Dailey,
10 M.D.

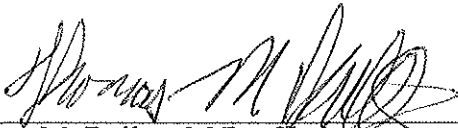
11 NOES: Rolf Lindenhayn, Esq. and Terry A. Trumbull, Esq.

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Thomas M. Dailey, M.D., Chair

10-6-11
Date

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