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OFFICE OF THE GENERAL COUNSEL
SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT
NICHOLAS A. SANCHEZ, State Bar No. 207998
Assistant Chief Deputy Counsel
JOSEPHINE LEE, State Bar No. 308439
Senior Deputy District Counsel
21865 Copley Drive
Diamond Bar, California 91765-0940
Telephone: (909) 396-2302
Fax: (909) 396-2961

Attorneys for Petitioner
SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

D/A
2/7/24

BEFORE THE HEARING BOARD OF THE

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

In the Matter of

ENERY HOLDINGS, LLC
Facility ID No. 186899

Health and Safety Code § 42350

CASE NO. 6248-1

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT'S MOTION TO STRIKE OR DISMISS PETITION FOR REGULAR VARIANCE

MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: February 7, 2024
Time: 9:30 AM
Place: Hearing Board
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, (hereinafter referred to as "District", "South Coast AQMD", or "Respondent"), Respondent in the above-captioned Petition for Regular Variance filed with the South Coast AQMD Hearing Board (hereinafter referred to as "Hearing Board"), moves pursuant to Hearing Board Rule 6(d) to dismiss Enery Holdings, LLC's Petition for Regular Variance because it seeks relief that is beyond the Hearing Board's jurisdiction.

INRODUCTION

Petitioner Enery Holdings, LLC (hereinafter referred to as "Petitioner" or "Enery") operates a ICEGEN peaker power plant located in Carson, CA ("Facility"). The Facility is located within South Coast AQMD's jurisdiction and subject to South Coast AQMD's rules and regulations. The Facility is subject to Title V as well as the District's RECLAIM program under Regulation XX.

Enery filed a Petition for Regular Variance ("Petition"), Case No. 6248-1, scheduled to be heard before the Hearing Board on February 7, 2024. The Petition seeks relief from the following rules or regulations: (i) District Rule 2004(b)(4); (ii) District Rule 2004(d)(1); (iii) District Rule 2012(c)(3)(A); (iv) District Rule 2004(e); and (v) District Rule 2012, Appendix A Chapter 2-E. Petitioner seeks variance relief to begin January 1, 2021. This request for retroactive relief is beyond the Hearing Board's jurisdiction.

To the extent that Petitioner seeks variance relief moving forward, California Health and Safety Code § 42350(b)(3) broadly prohibits the granting of a variance "from the emission cap requirement" in districts such as South Coast AQMD, which maintains an emission-capped trading program known as RECLAIM, codified as District Regulation XX. Further, District Rule 2004(l) states that no variance may be granted from specific RECLAIM rules, including the missing data provisions of Appendix A to 2012 and subdivisions (b) and (d) of Rule 2004. Accordingly, Petitioner's request for relief from certain RECLAIM requirements is not cognizable.

If there are any remaining rules that are not expressly prohibited from variance relief, Petitioner has failed to demonstrate that compliance is beyond Petitioner's reasonable control. Plainly, the Petition is backwards looking and seeks to challenge outstanding Notices of Violation ("NOVs") issued by the District regarding Enery's 2021 RECLAIM Audit Report. A regular variance hearing is the improper forum to contest a prior-issued NOV.

Petitioner seeks retroactive variance relief to shield itself from NOVs that have already been issued. Granting retroactive variance relief is beyond the Hearing Board's jurisdiction, and this Motion to Strike or Dismiss the Petition for Regular Variance should be granted.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Variance relief cannot be granted retroactively.

No Petitioner is guaranteed a right to a variance. The standard for all individuals and businesses is compliance with District's rules and regulations. However, the Hearing Board may grant a variance to provide special relief from District rules and regulations provided a Petitioner can meet all of the six statutory findings set forth under Health and Safety Code § 42352.

Variance relief is also intended to be time-limited. While the Hearing Board has discretion in setting the effective date of any decision, the effective date is typically when the final decision is filed. (Cal. Health & Safety Code § 40863; see also Hearing Board Rule 7(b) [a "decision of the Hearing Board shall become effective upon the concurring vote of three or more of its members."].) The Hearing Board shall specify the effective date and duration of a variance, which is not to exceed one year unless the "variance includes a schedule of increments of progress specifying a final compliance date by which…[Petitioner] will be brought into compliance with applicable emissions standards." (Cal. Health & Safety § 42358.) As an additional check to ensure statutory compliance, all Hearing Board variance orders must be submitted to the California Air Resources Board ("CARB") for review. (*See* Cal. Health & Safety Code § 42360; 42362 ["state board may revoke or modify any variance …[that] does not meet the [statutory] requirements…".])

CARB has established that variances cannot apply retroactively. According to an advisory published December 13, 1993, CARB states that it "does not believe that the intent of the Legislature was to provide a safe harbor for violators who belatedly apply for variances. To do so would interfere with the discretion of [districts] in enforcing district rules and render a number of the findings required by the Health and Safety Code meaningless for the retroactive portion of the variance." (Exhibit A [CARB Advisory No. 102].) In reaching this conclusion, CARB interpreted the plain language of Section 42352 as inherently forward-looking. The Hearing Board must find that the Petitioner "is" or "will be" in violation, "will reduce excess emissions to the maximum extent feasible," and "will monitor or otherwise quantify emission levels" if requested. (Cal. Health and Safety Code § 42352(a)(1), (a)(5), and (a)(6) [emphasis added].) CARB determined that these

required findings "could not possibly be given full effect if the variance were to apply retroactively." (CARB Advisory No. 102, Letter Attachment at 1.)

In accordance with CARB's statutory interpretation, Petitioner's request for the regular variance to begin on January 1, 2021, cannot be granted. (See Petition at 10.) It is beyond the Hearing Board's authority to approve a retroactive variance, let alone one that seeks variance coverage to extend more than three years in the past.

II. Three of the rules included in the Petition are expressly prohibited from variance relief.

While any person may apply to the Hearing Board for a variance from the rules and regulations of the District, not all variances can be granted. (Cal. Health and Safety Code § 42350.) Specifically, "[i]n districts with emission-capped trading programs, no variance shall be granted from the emission cap requirement." (Id. at subd. (b)(3).) Further, District Rule 2004(l) states that no variance may be granted from specific RECLAIM rules, including the missing data provisions of Appendix A to 2012, and subdivisions (b) and (d) of Rule 2004. (District Rule 2004(l)(B) and (C).) The California Legislature and District Governing Board have clearly articulated the restrictions placed on obtaining variance relief from RECLAIM requirements.

The Petition seeks variance relief from the following provisions of Regulation XX, which codifies the District's RECLAIM program: (i) District Rule 2004(b)(4); (ii) District Rule 2004(d)(1); (iii) District Rule 2012(c)(3)(A); (iv) District Rule 2004(e); and (v) District Rule 2012, Appendix A Chapter 2-E. (Petition at 4.) Subject to the explicit prohibition under District Rule 2004(l), Petitioner's request for a variance from District Rule 2004(b)(4), 2004(d)(1) and Rule 2012, Appendix A Chapter 2-E [Missing Data Procedures] cannot be granted as a matter of law. At minimum, the request for variance relief from these regulations should be stricken from the Petition.

III. The Petition does not describe how compliance with the remaining two rules is beyond Enery's reasonable control.

It is Petitioner's burden to establish that (i) Petitioner is or will be in violation of District Rules 2012(c)(3)(A) and 2004(e), and (ii) non-compliance is due to circumstances beyond its

reasonable control. (Cal. Health and Safety Code § 42352(a)(1) and (a)(2).) The Petition fails to meet these requisite findings and should be dismissed.

The Petition seeks relief from District Rule 2004(e), which prohibits the submission of inaccurate quarterly certification of emissions ("QCER"). Specifically, Rule 2004(e)(1) states that "any [QCER] determined by the Executive Officer to be inaccurate, shall constitute a violation of this rule, unless the report was corrected by the Facility Permit holder in accordance with the requirements of paragraph (c)(1)." Rule 2004(e)(2) asserts that a violation of (e)(1) constitutes a single, separate violation for each day in the quarter.

The Petition also seeks relief from Rule 2012(c)(3)(A), which requires a RECLAIM facility of a major NOx source to "install, maintain and operate a reporting device to electronically report total daily mass emissions of NOx and daily status codes to the District" and to submit the data daily. The rule provides a 24-hour grace period to submit such data, after which NOx emissions are to be calculated under the missing data requirements under Rule 2012 Appendix A, Chapter 2. (Rule 2004(c)(3)(A).)

As a principal matter, Petitioner repeatedly disavows that it is or will be in violation of District rules. (See e.g., Petition at 5, 6, and 10 [maintaining Petitioner believes it has reasonably and completely complied with RECLAIM requirements].) Petitioner cannot have it both ways. It cannot seek variance relief from District rules while contesting the requisite finding that it is or will be in violation. The Petition effectively requests the Hearing Board to make a compliance determination that it was not in violation of the RECLAIM rules and to grant a retroactive variance to shield Petitioner from the District's enforcement actions. As discussed further below, this is an improper use of the variance proceeding. The appropriate forum for Petitioner to resolve its dispute regarding alleged violations of District rules and regulations cited in the NOVs is through negotiations with counsel for the District. No such authority has been conferred to the District Hearing Board through a variance proceeding.

Even if Petitioner can establish that it is or will be in violation of Rules 2004 and 2012, nothing in the Petition supports that compliance is beyond reasonable control. Rule 2004(e)(2) prohibits the submission of inaccurate QCERs and specifies how to calculate the violation duration.

Since as early as December 2022, Petitioner has been put on notice that it failed to submit accurate QCERs for Quarters 2 and 3 in the 2021 compliance year. (See Petition, Appendix 1 NOV P76069 issued December 16, 2022.) While a substantial portion of the Petition discusses the violation of 2004(e) cited for the 2021 compliance year, Petitioner has made no showing that submitting accurate QCERs in compliance with 2004(e) now or moving forward is beyond its reasonable control. Relatedly, though not included in the Petition, Petitioner also has not demonstrated that it is beyond its control to comply with Rule 2004(c)(1), which provides a pathway to correct an inaccurate QCER prior to the end of the reconciliation period for the last quarter of the compliance year.

Similarly, Petitioner has failed to demonstrate that it cannot comply with Rule 2012(c)(3)(A)'s requirement to operate a reporting device and daily report total mass NOx emissions to the District. While a substantial portion of the Petition discusses issues with delayed reporting for the 2021 compliance year (Petition at 5 and 6), there is no discussion on what circumstances prevent Petitioner from complying with the daily reporting requirement now or moving forward. Nor does the Petition explain how it is beyond Enery's control to report the daily NOx emission data within the 24-hour extension period. To the extent Petitioner is seeking reprieve from Rule 2012(c)(3)(A)'s reference to missing data calculations under Rule 2012 Appendix A, Chapter 2, this is expressly prohibited from variance relief per Rule 2004(l)(B).

Petitioner has offered no basis to support that it is beyond Petitioner's reasonable control to comply with Rules 2004(e)(2) and 2012(c)(3)(A), or the compliance alternatives offered in each rule. Accordingly, the Petition should be dismissed.

IV. It is improper to challenge a Notice of Violation through a regular variance proceeding.

While there are various valid reasons to grant a variance from District rules and regulations, contesting a prior enforcement action is not one of them. The Petition challenges the validity of Notices of Violation that were issued to the Facility: NOV P76069 (issued December 16, 2022) and NOV P76079 (issued February 17, 2023). (Appendix 1 and 2 of Petition). Petitioner's main disputes concern the District's compliance determinations on its 2021 RECLAIM Audit Report.

(See Petition at 5 [stating communication issues during "27 MDP days listed in Enery's 2021 RECLAIM Audit Report…[are] beyond the control of Enery."].) All of the rules from which Petitioner seeks variance relief were cited as alleged violations in the Notices of Violation that were issued in 2022. (Compare Petition at 4 with Appendix 1 and 2 of Petition). While there is no prohibition from a facility seeking a variance after a Notice of Violation is issued, a variance sought by a violator in order to retroactively shield itself from prior enforcement cannot be granted. (See CARB Advisory No. 102 [concluding the Legislature did not intent to "provide a safe harbor for violators who belatedly apply for variances."].) Further, holding a hearing on a petition for retroactive variance relief could open the floodgates to other such requests, casting the Hearing Board as the arbiter of District enforcement actions. This is a misuse of the Hearing Board's variance procedures and contravenes CARB's advisory regarding retroactive variances. While counsel for the District has made numerous attempts to meet and confer with Petitioner's counsel prior to filing this Motion in order to discuss the merits of the Petition, no response has been provided. Further, by dismissing the Petition, Petitioner is not denied its due process rights. Any facility can negotiate or contest a Notice of Violation through the proper procedures, including in a proceeding before a trial court should enforcement litigation be filed. (See Cal. Health and Safety Code § 42403.)

For the foregoing reasons, the Petition for Regular Variance should be dismissed.

DATED: January 17, 2024

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

By: Josephine Lee

Josephine Lee
Attorney for Plaintiff

ATTACHMENT 1

California Environmental Protection Agency

AIR RESOURCES BOARD
Compliance Division

ADVISORY

(Retroactive Variances)

Number 102

December 13, 1993

ARB Policy Regarding the Issuance of Retroactive Variances

Attached is a letter recently issued by the Air Resources Board's (ARB) Legal Division outlining ARB's position as it pertains to whether or not variances can be issued retroactively.

As stated in the enclosed letter, it is the position of the ARB that variances cannot apply retroactively. A source cannot protect itself from enforcement action unless it has a variance in hand. ARB does not believe that the intent of the Legislature was to provide a safe harbor for violators who belatedly apply for variances. To do so would interfere with the discretion of air pollution control district personnel in enforcing district rules and render a number of the findings required by the Health and Safety Code meaningless for the retroactive portion of the variance.

In a case where the violation precedes the application for a variance but the circumstances do not constitute an"emergency", the District enforcement staff should take into consideration the circumstances when entering into settlement negotiations with the source. Some of the appropriate factors which the District could consider when excercising this enforcment discretion are set forth in Health and Safety Code Section 42403.

We recommend that you review the attached letter and inform your staff and hearing board members, as appropriate, regarding the impropriety of issuing a "retroactive" variance. If you have any questions or need additional information, please call the Air Resources Compliance Division at (800) 952-5588.

James J. Morgester, Chief
Compliance Division
P. O. Box 2815
Sacramento, CA 95812

Attachment

STATE OF CALIFORNIA · PETE WILSON, Governor

AIR RESOURCES BOARD
2020 L STREET
P.O. BOX 2815
SACRAMENTO, CA 95812

August 31, 1993

David P. Schott
District Counsel
Monterey Bay Unified APCD
24580 Silver Cloud Court
Monterey, California 93940

Re: Variances

Dear Mr. Schott

You have asked whether variances can be issued to sanction illegal conduct which occurred prior to the filing of the request for the variance. It is the position of the Air Resources Board (ARB) that variances cannot apply retroactively, but only prospectively from the date of issuance. Thus, variances cannot sanction violations of district rules and regulations which occur either before a variance application is filed or even after a variance application is filed but prior to the decision of the hearing board to grant the variance. To allow otherwise would have the effect of interfering with the discretion of air pollution control district personnel in enforcing district rules and would render a number of the findings required by Health and Safety Code section 42352 meaningless for the retroactive portion of the variance.

The Health and Safety Code does not specifically address the issue of retroactivity. Although section 40863 seems to allow retroactive applicability by indicating that the decision of the hearing board "shall become effective upon filing unless the hearing board orders otherwise", section 42352(a) implies that variances are to be prospective only by requiring a finding that petitioner "is, or will be, in violation", rather than "was, or has been, in violation." In addition, the findings that during the period the variance is in effect, "the applicant will reduce excess emissions to the maximum extent feasible" (section 42352(a)(5)) and "the applicant will monitor or otherwise quantify emission levels from the source, if requested to do so by the district" (section 42352(a)(6)) could not possibly be given full effect if the variance were to apply retroactively.

Moreover, the provision that upon making the six findings, "the hearing board shall prescribe requirements other than those imposed by statute... rule, regulation, or order of the district board..." would be truncated by the impossibility of prescribing such other requirements upon activity which is past. Presumably these other requirements are intended to limit emissions to the maximum extent feasible and become the standard of conduct for a source while operating pursuant to a variance. Yet, there would have been no alternative control on the emissions which occurred in the past, so the variance would essentially be giving a source protection while excusing all accountability. The variance hearing could become a paradigm of confession and avoidance.

We are aware that the realities of operating a business may run counter to the ideal of having the time to plan adequately, and that caseload and case complexity may conspire to thwart the ability of hearing boards to issue quick decisions. However, we do not believe a source can protect itself from enforcement action unless it has a variance in hand. The mere application for a variance, even if it is ultimately granted, is not sufficient, in our view, to overcome the burden on the source to comply in a timely manner with District rules or seek a remedy expeditiously enough to avoid violations and sanctions.

In many cases, the applicant can be expected to be aware of incipient noncompliance, such as when a regulation has a future-effective date and there are insufficient vendors to provide the required control equipment in a timely manner. In other cases, where the violation precedes the application for a variance but the circumstances do not rise to the level of "emergency", District enforcement staff can take the relevant circumstances into account when entering into settlement negotiations with the source operator or when determining whether to file a complaint against the source. Some of the appropriate factors which the District could consider in exercising its enforcement discretion are set forth in Health and Safety Code section 42403.

The retroactive application of variances would divest not only the Air Pollution Control Officer, but also other possible prosecutors, such as the ARB, the District Attorney, or the Attorney General, of their ability to prosecute violations of district rules. We believe that such a farreaching intrusion into the realm of prosecutorial discretion requires a more positive statement of legislative intent than the Health and Safety Code provides. The fact that taking "corrective action", which includes termination of the violation "or the grant of a variance " (i.e. not the mere application for a variance), significantly reduces but but does not eliminate the amount of penalties for which the source may be liable evinces a legislative intent that the granting of a variance should not completely insulate a source from enforcement action during the pre-variance period (see Health and Safety Code sections 42400.2 and 42402.2(a)).

Our view gains further support from the Supreme Court's opinion in Train Natural Resources Defense Council, (1975) 421 US 60, 7 ERC 1735, 1746, where now Chief Justice Rehnquist stated in the federal context, where the Environmental Protection Agency (EPA) needs to approve a variance as a SIP revision,

> "a polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the SIP revision authority until they have been approved by both the State and the Administrator. Should either entity determine that granting the variance would prevent attainment or maintenance of national air standards, the polluter is presumably within his rights in seeking

judicial review. This litigation, however, is carried out on the polluter's time, not the public, for during its pendency the original regulations remain in effect, and the polluter's failure to comply may subject him to a variety of enforcement procedures." (See also, Getty Oil v. Ruckelshaus (D.C. Del.1972) 342 F.Supp.1006, 4 ERC 1141, 1148).

In conclusion, we do not believe the Legislature intended to provide a safe harbor for violators who belatedly apply for variances. Although our view that a variance shall be effective prospectively only may present some administrative inconvenience to the District, we believe the integrity of the variance process, including the requirements for findings and alternative operating conditions, as well as the need for expeditious compliance with District rules, demand this.

If you wish to discuss this matter further, please call Leslie Krinsk, Senior Staff Counsel, at (916) 323-9611.

Sincerely,

Michael P. Kenny
General Counsel

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2024, I emailed the *Motion to Dismiss or Strike Petition for Regular Variance* in Case No. 6248-1 to the Clerk of the South Coast AQMD Hearing Board with accompanying emailed and postal service on the counsel for Petitioner, Mr. Manuel Duran, at 4532 E. Cesar E. Chavez Ave., Los Angeles, CA 90022, manuel@duran-cedillo.com.

DATED: January 17, 2024

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

By: _____
Lucy Tom-Cao