

**** Draft for Discussion Purposes Only ****

**DRAFT GUIDELINES
FOR VARIANCE PROVISION
FOR HAIRSPRAYS**

(This document will be addressed at a meeting on June 5, 1997, to initiate discussion on variance guidelines the Air Resources Board committed to develop for hairspray manufacturers that may request variances from the June 1, 1999, 55 percent VOC hairspray standard.)

Purpose

The purpose of this document is to provide guidance to companies (applicants) who may need to apply for a variance from the 55 percent volatile organic compound (VOC) standard for hairspray that becomes effective on June 1, 1999. Through question-and-answer format, this document addresses the variance process and mitigation requirements pertaining to hairspray.

Background

At the public hearing conducted on March 27, 1997, the Air Resources Board (ARB) adopted amendments to the consumer products regulation [Title 17, California Code of Regulations (CCR), sections 94507-94517] pertaining to hairspray. The principal effect of these amendments is to postpone the effective date of the 55 percent VOC standard for hairspray by 17 months, from January 1, 1998, to June 1, 1999. Additionally, the amendments modify the variance provision (section 94514) to require applicants seeking variances from the 55 percent VOC standard to propose a plan to mitigate the excess emissions generated during the duration of the variance. Applicants are also required to submit their mitigation plan as part of the variance application. However, the amendments also allow the Executive Officer of the ARB to waive part or all of the mitigation requirement in the event it would "result in an extraordinary economic hardship" on the applicant, or for other "good cause."

It is important to recognize that a variance provides only temporary and limited relief from the regulation. It should only be used as a last resort, only after a diligent and timely effort has been put forth, and all opportunities to achieve compliance have been exhausted.

Development Process Timeline

- (1) Initial meeting was held with industry and other interested parties on April 16, 1997, to begin discussion on the mitigation requirement and draft guidelines.

- (2) Full public process over Summer 1997, including workshops, meetings, and conference calls with all interested parties, to develop workable guidelines.
- (3) Variance provision guidelines completed and available to industry by the second quarter of 1998.

The following questions and answers are intended to assist applicants in preparing their variance applications.

Questions and Answers Regarding Variance Provision for Hairsprays

1. Who may request a variance hearing?

Anyone subject to the regulation may request a variance hearing. Any applicant who believes they cannot comply with the regulations because of reasons beyond their reasonable control may request a variance hearing if they submit an application that provides enough information to satisfy the application criteria [(section 94514(a)] listed in Question #3.

2. What is a variance?

A variance is an executive order (variance order) signed by the Executive Officer of the ARB, or his/her designee, which allows an applicant to temporarily continue to sell a product in California that does not comply with the regulatory requirements for that category such as the VOC standard established for that product category. The variance provision allows any applicant who cannot comply with the requirements of the regulations, because of reasons beyond the applicant's reasonable control, to request relief from the regulatory requirements. The antiperspirant and deodorant, consumer products, and aerosol coatings regulations all have variance provisions. The variance provisions are contained in sections 94505, 94514, and 94525 of these regulations, respectively. However, because of the applicability of the hairspray standard, this guidance document will refer only to language contained in the variance provision in section 94514 of the consumer products regulation.

3. When must an application be submitted if a variance from the June 1, 1999, 55 percent VOC standard is needed?

The latest time at which an application for a variance from the 55 percent standard could be submitted to the ARB in order for a decision to be made before the June 1, 1999, standard effective date would be April 1, 1999. However, we strongly recommend that applications be submitted as early as January 1999, to ensure that there is adequate time for ARB staff to collect and review data, and to set a variance hearing date. The applicant is encouraged to work closely

with ARB staff when preparing their application to ensure it contains sufficient information to minimize any delay in setting a hearing date.

4. How is a variance hearing requested?

The first step in initiating the variance process is for an applicant to submit a written application to the Executive Officer. To warrant a variance hearing, the application should contain information, including:

- (1) the specific grounds on which the variance is sought, including the justification on why they believe they meet the variance criteria,
- (2) the proposed date(s) by which compliance with standards set forth by the regulation will be achieved,
- (3) a compliance report reasonably detailing the method(s) by which compliance will be achieved,
- (4) an estimate of the excess emissions that would occur during the variance period, and
- (5) a plan describing how the applicant will mitigate the excess VOC emissions that would be emitted during the period of the variance.

Once the Executive Officer receives an application containing information that meets the above criteria, the variance hearing must be held within 75 days. The Executive Officer will schedule the variance hearing. In most cases, the hearing date is scheduled at a time convenient both for the applicant and the Executive Officer or his/her designee.

In the event the application does not contain enough information that meets the above criteria, the applicant is contacted to obtain the additional information necessary to satisfy all the criteria. A hearing date cannot be scheduled until this step is completed. To ensure there is adequate time for ARB staff to collect and review data, and to set a variance hearing date, it is recommended that the applicant submit their application as early as possible. It would also benefit the applicant to alert the ARB staff as early as January 1999, if they expect they will need to apply for a variance. The applicant is encouraged to work closely with ARB staff when preparing their application to ensure it contains sufficient information to minimize any delay in setting a hearing date.

(Note: We will need to add another paragraph here regarding the requirements for the timing of the application review process for variances as specified in section 60030, Title 17, California Code of Regulations. This regulation on permit procedures requires the Executive Officer to: (1) determine whether a variance application is complete within 30 days of the receipt of the application, (2) determine whether an application is complete within 15 days of the receipt of additional information submitted to supplement a deficient application, and (3) make a decision on whether to grant a variance within 90 days of the receipt of a complete application.)

5. To whom shall the variance application be submitted?

The variance application shall be sent to:

Ms. Genevieve Shiroma
Chief
Air Quality Measures Branch
Stationary Source Division
California Air Resources Board
P.O. Box 2815
Sacramento, California 95812

6. How is notice of the variance hearing provided?

Notice for the variance hearing is provided at least 30 days prior to the hearing date in the manner listed below:

- Sent to the applicant by certified mail.
- Published in the California Regulatory Notice Register.
- Sent to the persons or companies listed in the consumer products variance hearing mailing list.
- Made available at the Public Information Office of the Air Resources Board in Sacramento, California (address provided in Question #6).

Anyone can be added to the consumer products variance hearing mailing list by contacting Ms. Genevieve Shiroma.

7. Where is the variance hearing conducted?

The variance hearing location will be identified in the notice. We expect that most of the variance hearings will be conducted at the:

Air Resources Board
2020 L Street
Lower Level, Board Hearing Room
Sacramento, California 95814

8. Who may attend the variance hearing?

The variance hearing may be attended by the:

- Applicant (optionally, with Legal Counsel)
- Hearing Officer
- ARB Staff Counsel for Hearing Officer
- ARB staff
- ARB Staff Counsel
- Clerk of the Board
- Court Reporter
- Members of the public

9. Once an application contains information that meets the application criteria and a variance hearing is scheduled, what interactions take place between the applicant and ARB staff?

After setting the hearing date, and prior to the hearing, the ARB staff works closely with the applicant to obtain important specific information from them. Conference calls are conducted and considerable correspondence often occurs between ARB staff and applicant. This process is very important because the information collected from the applicant helps ARB staff determine whether or not the variance criteria are met. The specific information collected includes financial records, manufacturing and sales records, product formulations and VOC contents, specifics of the compliance plan, and the specifics of how the excess VOC emissions will be mitigated. All information provided by the applicant are fully evaluated by ARB staff. Based on the evaluation, the ARB staff will make a recommendation at the hearing as to whether or not the variance request should be granted. As a courtesy, the ARB staff informs the applicant of their recommendation at least a day prior to the variance hearing.

10. What are the criteria for granting a variance?

The decision to grant a variance is based on whether the following criteria [section 94514(d)] are met:

Variance Criteria

It is the responsibility of the applicant, not ARB staff, to justify that the variance criteria below have been satisfied.

- (1) That, because of reasons beyond the reasonable control of the applicant, requiring compliance with the standards would result in extraordinary economic hardship.
- (2) That the public interest in mitigating the extraordinary hardship to the applicant by issuing the variance outweighs the public interest in avoiding any increased emissions of air contaminants that would result from issuing the variance.
- (3) That the compliance report proposed by the applicant can reasonably be implemented, and will achieve compliance as expeditiously as possible.
- (4) That excess emissions occurring during the variance period will be mitigated, or justification is provided for partial or full relief from this requirement because of extraordinary conditions.

11. How is confidential information treated?

Information submitted to the Executive Officer by an applicant may be claimed as confidential [section 94514(c)], and such information shall be handled in accordance with the procedures specified in Title 17, CCR, sections 91000-91022 (Attachment A). The Executive Officer may consider such confidential information in reaching a decision on a variance application. To help us protect trade secrets, the applicant shall designate in their variance application which parts of these documents they consider confidential. All information designated by the applicant as confidential will be handled strictly in accordance with the confidentiality regulations. In addition, all confidential information will be kept in locked file cabinets and will be accessible to authorized ARB staff on an "as needed" basis only. For more information on the protection of confidential information, please contact Mr. Robert Jenne, ARB Senior Staff Counsel, at (916) 322-3762.

12. How is the hearing conducted?

A public hearing [section 94514 (b)] is held to decide whether, under what circumstances, and to what extent a variance from the standards is necessary and will be allowed. The Executive Officer designates a Hearing Officer to preside over the hearing. At the hearing testimony is taken from the applicant, ARB staff, and members of the public. All public testimony and questioning are entered into the public record for the hearing. If the applicant wishes to present confidential information the Hearing Officer closes the public portion of the hearing and the applicant, Hearing Officer, ARB staff, and respective Counsels adjourn to a private chamber to hear the confidential testimony. After the confidential testimony, the public portion of the hearing is re-opened for any additional testimony. At the close of the hearing the Hearing Officer informs the applicant that they will receive a written decision from the Executive Officer within 2-4 weeks of the hearing.

13. How is a decision made?

After considering all the evidence, both public and confidential, presented at the hearing the Hearing Officer makes a judgment about whether or not the variance criteria have been met. The Hearing Officer then makes a recommendation to the Executive Officer, or his/her designee. The Executive Officer, or his/her designee, makes the final decision about the variance request and its conditions.

14. How is a variance granted?

If the Executive Officer approves the variance request, a variance order [section 94514(e)] is sent to the applicant. The variance order will specify a final compliance date by which compliance with the standards will be achieved, and the increments of progress necessary to assure timely compliance. The variance order ceases to be effective upon failure of the recipient to comply with any condition of the variance [section 94514(f)]. Also, upon the application of any person, the Executive Officer may review, and for good cause, modify, or revoke a variance from the requirements of the standards after holding a public hearing [section 94514(g)].

15. What mitigation options can be considered?

The mitigation options are identified by the applicant. Examples of some potential options for mitigating the excess emissions generated from a variance are listed below:

- (1) An applicant could reformulate one or more of the consumer products they sell in

California to offset the excess emissions generated;

- (2) An applicant could use hairspray emission reduction credits (HERCs) that they have acquired or purchased from a product manufacturer;
- (3) An applicant could purchase discrete (*i.e., generated in a specific year*) emission reduction credits (ERCs) from the open market to mitigate the excess emissions generated. ERCs could be purchased from the following sources:
 - existing trading programs for discrete VOC ERCs, including California Air Quality Management and Air Pollution Control District (District) programs for the early retirement of older vehicles;
 - additional District programs from which ERCs will be available after adoption of the proposed statewide regulation on Interchangeable Air Pollution Emission Reduction Credits (*i.e., New Source Review programs*); and
- (4) An applicant might pay a mitigation fee to fund activities that would offset the excess emissions generated. See Question #16 below.

16. How could the fees be used to mitigate the excess emissions?

An applicant would establish an escrow account for the fees, maintain it themselves, and enter into an agreement with the Executive Officer on the disposition of the funds. The applicant would agree that the monies would only be used to fund projects which mitigate the environmental impact of volatile organic compounds that are commonly emitted from consumer products. The applicant would further agree not to use these monies in such a manner to directly or indirectly benefit themselves, including the generation of business goodwill.

(More discussion is necessary on how to set the fees. However, the fees would be set at a level that would serve to discourage manufacturers from requesting a variance because they find a variance a cheaper option than compliance. Fees could either be specified in these guidelines as set quantities, or decided upon by the Hearing Officer on a case by case basis.)

17. Under what circumstances would mitigation requirements be partially or fully waived due to “extraordinary economic hardship” or “other good cause”?

The decision to waive the mitigation requirements due to circumstance is up to the Hearing Officer to make on a case-by-case basis. Some possible circumstances in which the variance mitigation requirement might be partially or fully waived for an applicant are if the mitigation causes such extraordinary economic hardship to the applicant to jeopardize the viability of their business, and if the variance is granted for a very short duration (e.g., three months or less). The Hearing Officer could also consider a mitigation requirement that increases with variance duration.

18. Where and what is the actual language for the variance provision?

The actual language is found in Title 17, CCR, Division 3, Chapter 1, Subchapter 8.5, Article 2, Consumer Products, section 94514, Variances, and is provided in Appendix B.

19. Who are the ARB staff contacts for additional questions on the variance provision?

(Once the guidelines are completed, the ARB staff contacts will be identified.)

**** Draft for Discussion Purposes Only ****

ATTACHMENT A

**Title 17
California Code of Regulations
Sections 91000 to 91022
Disclosure of Public Records**

(Not Included in this Electronic Version)

Draft Guidelines for Variance Provision for Hairsprays
Second Discussion Meeting, June 5, 1997, Sacramento, California
California Air Resources Board, Stationary Source Division

**** Draft for Discussion Purposes Only ****

ATTACHMENT B

**Title 17
California Code of Regulations
Section 94514
Variances**

Draft Guidelines for Variance Provision for Hairsprays
Second Discussion Meeting, June 5, 1997, Sacramento, California
California Air Resources Board, Stationary Source Division

**** Draft for Discussion Purposes Only ****

**Title 17
California Code of Regulations
Consumer Products
Section 94514
Variances**

- (a) *Applications for variances.* Any person who cannot comply with the requirements set forth in Section 94509, because of extraordinary reasons beyond the person's reasonable control may apply in writing to the Executive Officer for a variance. The variance application shall set forth:
- (1) the specific grounds upon which the variance is sought;
 - (2) the proposed date(s) by which compliance with the provisions of Section 94509 will be achieved;
 - (3) a compliance report reasonably detailing the method(s) by which compliance will be achieved, and
 - (4) for applicants requesting a variance from the June 1, 1999, 55 percent VOC standard for hairspray products, the variance application shall also include a plan describing how the applicant will mitigate the excess VOC emissions that would be emitted during the period of the variance.
- (b) *Notices and public hearings for variances.* Upon receipt of a variance application containing the information required in subsection (a), the Executive Officer shall hold a public hearing to determine whether, under what conditions, and to what extent, a variance from the requirements in Section 94509 is necessary and will be permitted. A hearing shall be initiated no later than 75 days after receipt of a variance application. Notice of the time and place of the hearing shall be sent to the applicant by certified mail not less than 30 days prior to the hearing. Notice of the hearing shall also be submitted for publication in the California Regulatory Notice Register and sent to every person who requests such notice, not less than 30 days prior to the hearing. The notice shall state that the parties may, but need not be, represented by counsel at the hearing. At least 30 days prior to the hearing, the variance application shall be made available to the public for inspection. Interested members of the public shall be allowed a reasonable opportunity to testify at the hearing and their testimony shall be considered.
- (c) *Treatment of Confidential Information.* Information submitted to the Executive Officer by a variance applicant may be claimed as confidential, and such information shall be handled in accordance with the procedures specified in Title 17, California Code of Regulations, Sections 91000-91022. The Executive Officer may consider such

confidential information in reaching a decision on a variance application.

- (d) *Necessary findings for granting variances.* No variance shall be granted unless all of the following findings are made:
 - (1) that, because of reasons beyond the reasonable control of the applicant, requiring compliance with Section 94509 would result in extraordinary economic hardship.
 - (2) that the public interest in mitigating the extraordinary hardship to the applicant by issuing the variance outweighs the public interest in avoiding any increased emissions of air contaminants which would result from issuing the variance.
 - (3) that the compliance report proposed by the applicant can reasonably be implemented, and will achieve compliance as expeditiously as possible.
- (e) *Variance orders.* Any variance order shall specify a final compliance date by which the requirements of Section 94509 will be achieved. Any variance order shall contain a condition that specifies increments of progress necessary to assure timely compliance, and such other conditions that the Executive Officer, in consideration of the testimony received at the hearing, finds necessary to carry out the purposes of Division 26 of the Health and Safety Code.
- (f) *Situations in which variances shall cease to be effective.* A variance shall cease to be effective upon failure of the party to whom the variance was granted to comply with any term or condition of the variance.
- (g) *Modification and revocation of variances.* Upon the application of any person, the Executive Officer may review, and for good cause, modify or revoke a variance from requirements of Section 94509 after holding a public hearing in accordance with the provisions of subsection (b).
- (h) *Special conditions in variance orders for hairspray products.* In imposing conditions in variance orders granted from the June 1, 1999, 55 percent VOC standard for hairspray products, the Executive Officer, in addition to any other conditions that may be imposed, shall require the applicant to mitigate the excess VOC emissions that would be emitted during the period of the variance. If this mitigation requirement would result in an extraordinary economic hardship to the applicant, or if other good cause exists, the Executive Officer may waive all or part of this requirement.