

GUIDELINES FOR HAIRSPRAY VARIANCES

Stationary Source Division

September 8, 1998

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 a 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. The reason for granting the 17-month extension is that while generally the 55 percent VOC standard is technologically feasible, it is not commercially feasible by January 1, 1998. Even though manufacturers have invested significant research and development funds, and have made substantial progress, they needed additional time to address various technical problems, develop and refine prototype formulations, and conduct test marketing of their products.

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.

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

QUESTIONS AND ANSWERS REGARDING HAIRSPRAY VARIANCES

1. 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 their 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 as it applies to hairsprays.

2. Who may request a variance hearing?

Anyone subject to the June 1, 1999, 55 percent VOC standard may request a variance hearing. Any applicant who believes they cannot comply with the 55 percent VOC standard because of reasons beyond their reasonable control may request a variance hearing if they submit an application that provides information which thoroughly satisfies the application criteria [(section 94514(a)] listed in Question #5.

3. When can a variance application be submitted?

A variance application can be submitted at any time; however, we strongly recommend that it be submitted as early as possible once the applicant determines that they will be unable to comply with the 55 percent VOC standard by June 1, 1999.

4. How late can a variance application be submitted in order for a decision to be made before June 1, 1999?

As a practical matter, the latest time at which an application for a variance from the 55 percent VOC standard could be submitted to the ARB in order for a decision to be made before June 1, 1999, is April 1, 1999. However, we strongly recommend that the application be submitted by January 1999, to ensure there is adequate time for ARB staff to work with the applicant in reviewing 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.

5. 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 the following information:

Application Criteria

- (a) the specific grounds on which the variance is sought,
- (b) the proposed date(s) by which compliance with the 55 percent VOC standard will be achieved,
- (c) a compliance report reasonably detailing the method(s) by which compliance will be achieved, and
- (d) a plan describing how the applicant will mitigate the excess VOC emissions that would be emitted during the period of the variance.

6. What is the procedure for determining if a variance application contains sufficient information to schedule a variance hearing?

The following procedure is used to determine if a variance application meets the application criteria specified in Question #5:

- (a) *Application Completeness Determination.* Within 30 days after receiving the variance application, the Executive Officer will inform the applicant, in writing, that either the submittal meets the criteria specified in Question #5 and is accepted for filing, or that the submittal is deficient. If the submittal is found to be deficient, the Executive Officer will identify the additional information required to make the submittal complete and acceptable for filing.
- (b) *Application Completeness Determination After Receiving Additional Information.* Within 15 days after receiving any additional information provided in response to a determination by the Executive Officer that an application is deficient, the Executive Officer will inform the applicant, in writing, either that the new information is sufficient to meet the criteria specified in Question #5 and is therefore complete and accepted for filing, or that the application is deficient. If the application is found to be deficient, the Executive Officer will identify the additional information required to make the application complete and acceptable for filing.
- (c) *Scheduling Variance Hearing Date.* A variance hearing will be held within 75 days after the Executive Officer determines that the application is complete and accepted for filing. 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.

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. A hearing will be scheduled only for variance applications that are determined to be complete.

7. 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 95812-2815

For packages that require a street number, the address is:

2020 L Street
Sacramento, California 95814

8. Once a variance application has been determined to be complete and a variance hearing has been scheduled, what interactions take place between the applicant and ARB staff?

After setting the hearing date the ARB staff works closely with the applicant before the hearing to obtain important specific information. Conference calls are conducted and considerable correspondence often occurs between the ARB staff and applicant. This process is very important because the information collected from the applicant helps ARB staff formulate a recommendation about whether or not the criteria for granting a variance are met (Question #12). The specific information collected includes, but is not limited to, financial records, manufacturing and sales records, product formulations and VOC contents, specifics of the compliance plan, and specifics on how the excess VOC emissions will be mitigated, or the justification on why this requirement should be partially or fully waived. 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 on 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.

9. 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 (street address provided in Question #7).

Anyone can be added to the consumer products variance hearing mailing list by contacting Ms. Genevieve Shiroma at (916) 322-7072.

10. 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 following location:

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

11. Who may attend the variance hearing?

The variance hearing may be attended by the following people:

- 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

12. 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 criteria for granting a variance have been satisfied. The criteria are listed below:

- (a) That, because of reasons beyond the reasonable control of the applicant, requiring compliance with the 55 percent VOC standard would result in extraordinary economic hardship.
- (b) 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.
- (c) That the compliance report proposed by the applicant can reasonably be implemented, and will achieve compliance as expeditiously as possible.

13. 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.

14. How is the variance hearing conducted?

A public hearing [section 94514 (b)] is held to decide whether, under what circumstances, and to what extent a variance from the 55 percent VOC standard 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. The confidential testimony is recorded on audio tape and kept

confidential in accordance with the procedures described in Question #13. 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 two to four weeks of the hearing.

15. 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 criteria for granting a variance 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.

16. 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 55 percent VOC standard must be achieved, the increments of progress necessary to assure timely compliance, and such other conditions as the Executive Officer finds necessary. 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)].

17. 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:

- (a) An applicant could temporarily or permanently generate emission reductions by reducing the VOC content of one or more of the regulated or unregulated consumer products they sell in California;
- (b) An applicant could acquire or purchase emission reductions generated from another company that sells regulated or unregulated consumer products in California; and
- (c) An applicant could use hairspray emission reduction credits (HERCs) that they have generated, acquired, or purchased.

However, it is emphasized that the applicant is not limited to the above options. They are free to identify, develop, and present any other potential mitigation option to the Executive Officer on their own.

18. Section 94514(a)(4) requires the submittal of a plan describing how the excess emissions will be mitigated. What kind of information should be described in a mitigation plan?

The kind of information that is to be described in a mitigation plan will vary according to the type of mitigation option being pursued. Examples of some types of mitigation options that may be pursued and the kind of information, at the minimum, that should be described in the mitigation plans are provided below:

- (a) An applicant that chooses to reduce the VOC content of one or more consumer products that they sell in California should describe the kind of information that will be submitted to the ARB to demonstrate mitigation. At the minimum, the mitigation plan should contain the information listed below:
- list of names and stock keeping units of the applicable reformulated products;
 - VOC content of pre- and post-formulations of the applicable products;
 - documented sales records of applicable products and methodology (subject to Executive Officer approval) used to calculate the sales;
 - official statement stating that the applicable products have been reformulated for the sole purpose of mitigating the excess emissions generated in the variance; and
 - excess emissions estimate based on documented sales records of the hairspray product in the variance application and the methodology (subject to Executive Officer approval) used to calculate the sales.
- (b) An applicant that chooses to acquire or purchase emission reductions generated from another company that sells regulated or unregulated consumer products in California should describe the kind of information that will be submitted to the ARB to demonstrate mitigation. At the minimum, the mitigation plan should contain the information listed below:
- official statement from the company generating the emission reductions stating that they have submitted all relevant data and documentation, including those listed in section (a), to the ARB, that they possess a certain amount of emission reductions, and that the emission reductions are available for use by hairspray companies for the sole purpose of mitigating the excess emissions;
 - official records demonstrating that the company generating the emission reductions have given or sold a certain amount of emission reductions to the applicant for the sole purpose of mitigating the excess emissions;
 - official statement from the applicant stating that they are using a certain amount of the emission reductions obtained to mitigate the excess emissions; and
 - excess emissions estimate based on documented sales records of the hairspray product in the variance application and the methodology (subject to Executive Officer approval) used to calculate the sales.

- (c) An applicant that chooses to use HERCs that they have generated, acquired, or purchased should use the procedures outlined in section 94568 of the Hairspray Credit Program (Title 17, Article 5, California Code of Regulations) to describe the kind of information that will be submitted to the ARB to demonstrate mitigation.

It is emphasized that the applicant may need to provide additional data and documents as deemed necessary by the ARB.

19. Under what circumstances could the 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 Executive 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 include, but is not limited to, the following factors:

- the time period for the variance is of short duration; or
- the cost to purchase emission reduction credits for mitigation is too prohibitive.

However, it is emphasized that the applicant is not limited to the above factors. They are free to provide any additional factors to justify why they believe the mitigation requirements should be partially or fully waived. Conversely, the Executive Officer could consider a mitigation requirement that increases with the variance duration.

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

The actual language is found in Title 17, California Code of Regulations, Division 3, Chapter 1, Subchapter 8.5, Article 2, Consumer Products, section 94514, Variances, and is provided in Attachment B.

21. Who is the ARB staff contact for additional questions on the variance provision?

The ARB staff contact is:

Mr. Edward Wong
Implementation Section
Air Quality Measures Branch
Stationary Source Division
(916) 327-1507
(916) 327-5621 (FAX)
ewong@arb.ca.gov (email)

ATTACHMENT A

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

ATTACHMENT B

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

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.