



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 exercising this enforcement 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

AIR RESOURCES BOARD

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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 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,

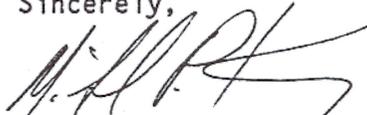
"a polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the SIP revision authority until they have been approved by both the State and the Administrator. Should either entity determine that granting the variance would prevent attainment 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