

State of California
AIR RESOURCES BOARD

Resolution 96-3

January 25, 1996

Agenda Item No.: 96-1-5

WHEREAS, sections 39600 and 39601 of the Health and Safety Code authorize the Air Resources Board (the Board or ARB) to adopt standards, rules and regulations and to do such acts as may be necessary for the proper execution of the powers and duties granted to and imposed upon the Board by law;

WHEREAS, Health and Safety Code sections 43013 and 43018 authorize the Board to adopt and implement motor vehicle fuel specifications for the control of air contaminants and sources of air pollution which the Board has found to be necessary, cost-effective, and technologically feasible to carry out the purposes of Division 26 of the Health and Safety Code;

WHEREAS, following a hearing in November 1991, the Board adopted regulations for California reformulated gasoline (CaRFG), applicable beginning March 1, 1996; these regulations include a comprehensive set of specifications affecting eight different gasoline properties and are designed to ensure that commercial gasoline is a significantly cleaner-burning fuel;

WHEREAS, section 2271 of the CaRFG regulations (section 2271, Title 13, California Code of Regulations (CCR)) authorizes the Executive Officer to grant a variance from the CaRFG standards to any party that temporarily cannot comply, provided that the Executive Officer makes certain specified findings;

WHEREAS, in 1995 the Legislature enacted Senate Bill 709 (Stats. 1995, Chapter 675), which added a new section 43013.2 to the Health and Safety Code requiring the Board, among other things, to adopt regulations establishing guidelines for the consideration of variances and the imposition of fees and conditions;

WHEREAS, SB 709 requires these regulations to include: (1) methods for estimating excess emissions due to a variance, (2) factors to be considered in determining what is beyond the reasonable control of the applicant, and (3) a schedule of fees to cover the reasonable and necessary costs to the ARB in processing a variance;

WHEREAS, SB 709 further requires the regulations to be initially adopted by the Board as emergency regulations, after conducting at least one public workshop;

WHEREAS, under California law emergency regulations, upon approval by the Office of

Administrative Law (OAL), are legally effective for a 120-day period; this period provides time for staff to complete the administrative requirements and resubmit the regulations to OAL as a non-emergency submission, to replace the emergency regulations upon final OAL approval;

WHEREAS, staff has consulted with refiners and other interested parties, and has conducted a public workshop to discuss draft amendments to the CaFRG variance provisions in section 2271;

WHEREAS, the staff has proposed amendments to section 2271 that would implement SB 709 and ensure the reasonable and equitable implementation of the variance provisions;

WHEREAS, the proposed amendments to section 2271 would levy a fee on a variance applicant of \$0.15 per gallon for all gasoline sold under a variance, specify factors for the Executive Officer to consider in making the findings for granting a variance, and make various other changes to clarify the variance procedures and make them more specific;

WHEREAS, the Board has considered the impact of the proposed amendments on the economy of the State;

WHEREAS, the California Environmental Quality Act and Board regulations require that no action which may have significant adverse environmental impacts be adopted as originally proposed, if feasible alternatives or mitigation measures are available which would substantially reduce or avoid such impacts;

WHEREAS, a public hearing and other administrative proceedings have been held in accordance with the provisions of Chapter 3.5 (commencing with section 11340), Part 1, Division 3, Title 2 of the Government Code; and

WHEREAS, the Board finds that:

The variance amendments approved herein will streamline the handling of variance applications, discourage attempts to use variances inappropriately as a compliance tool, protect the investments of parties who will comply with the CaRFG regulations, and protect the public interest in minimizing the potential for excess emissions due to variances;

Public and private entities that could be significantly impacted by the amendments have been consulted in their development;

The amendments are authorized by California law and satisfy the requirements of SB 709;

The economic and cost impacts of the amendments have been analyzed as required by California law, and the analysis of these impacts is set forth in the Staff Report for this regulatory action;

The amendments will not have any adverse impact on the economy of the State;

The amendments will not result in any significant adverse environmental impacts.

Adoption of the amendments as emergency regulations is necessary for the immediate preservation of the public peace, health and safety, or general welfare, as specified in section 43013.2(c) of the Health and Safety Code;

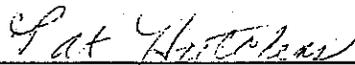
NOW, THEREFORE, BE IT RESOLVED that the Board hereby approves the amendments to section 2271, Title 13, CCR, as set forth in Attachment A hereto;

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to adopt the amendments set forth in Attachment A as emergency regulations, with such other conforming modifications as may be appropriate, and submit them to the Office of Administrative Law (OAL) pursuant to Government Code section 11346.1;

BE IT FURTHER RESOLVED that during the 120-day period that the emergency regulations are legally effective, the Board directs the Executive Officer to complete all administrative requirements specified in the Administrative Procedure Act and resubmit the amendments to OAL as a non-emergency submission, to replace the emergency regulations.

BE IT FURTHER RESOLVED that, in order to complete the procedures for non-emergency regulations, the Board directs the Executive Officer to make the approved amendments set forth in Attachment A, with such other conforming modifications as may be appropriate, available to the public for a comment period of 15 days, and thereafter either to adopt the amendments with such additional modifications as may be appropriate in light of the comments received, or to present the amendments to the Board for further consideration if warranted in light of the comments.

I hereby certify that the above is a true and correct copy of Resolution 96-3, as adopted by the Air Resources Board.



Pat Hutchens, Board Secretary

ATTACHMENT A

The text of the original proposal is shown in **bold underline** to indicate additions to and ~~strikeout~~ to show deletions from the existing regulation. The modifications now being made available for comments are shown in ~~shaded~~ **bold double-underline** to indicate additions to and ~~shaded~~ ~~strikeout~~ to show deletions from the original proposal.

Amend section 2271, Title 13, California Code of Regulations, to read as follows:

Section 2271. Variances

- (a) **Applications for Variances.** Any person who cannot comply with the standards set forth in sections 2262.1 through 2262.7 because of reasons beyond the person's reasonable control may apply to the executive officer for a variance. **Except for emergency variances as provided in section (h), the application shall be accompanied by a fee of \$6700.00 to cover the costs of processing the variance. If the applicant withdraws the application before the variance hearing is held, \$4100.00 of the fee shall be refunded.** The application shall set forth:
- (1) The applicable section(s) in **from** which the variance is sought;
 - (2) The specific grounds upon which the variance is sought;
 - (3) The proposed date(s) by which compliance with the provisions of the applicable section(s) will be achieved; and
 - (4) A **compliance** plan reasonably detailing the method by which compliance will be achieved. **The proposed compliance plan shall include increments of progress (i.e., specific events and dates) that describe periodic, measurable steps toward compliance during the proposed term of the variance.**
- (b) **(1) Notices and Public Hearings for Variances.** Upon receipt of an application for a variance containing the information required in section (a), the executive officer shall hold a hearing to determine whether, or under what conditions and to what extent, a variance from the requirements of the applicable section(s) is necessary and will be permitted. Notice of the time and place of the hearing shall be sent to the applicant by certified mail not less than 20 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 20 days prior to the hearing.

(2) Treatment of Confidential Information. Information submitted to the executive officer by a variance applicant may be claimed as confidential. ~~If an applicant claims information as confidential, the applicant shall also provide accompanying documentation in support of the claim of confidentiality. The documentation shall include the material identified in Title 17, CCR, section 91022(c).~~ Information claimed as confidential shall be handled in accordance with the procedures specified in Title 17, California Code of Regulations (CCR), sections 91000 to 91022 except that: (A) at the time the information is submitted, the submitter must provide accompanying documentation in support of the claim of confidentiality, including the documentation identified in section 91022(c), and (B) for the purposes of this section 2271, the time period specified in section 91022(e)(2) is 10 days instead of 21 days. The executive officer may consider such confidential information in reaching a decision to grant or deny a variance.

- (c) **Public Participation in the Variance Process.** At least 20 days prior to the hearing, the application for the variance shall be made available to the public for inspection. Interested members of the public shall be allowed a reasonable opportunity to testify submit written and oral testimony at the hearing, and their testimony shall be considered.
- (d) **Necessary Findings for Granting Variances.** The decision to grant or deny a variance shall be based solely upon substantial evidence in the record of the variance proceeding. No variance shall be granted unless the executive officer makes all of the following findings are made:
- (1) That, because of reasons beyond the reasonable control of the applicant, requiring compliance with the applicable section(s) would result in an 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; and
 - (3) That the compliance plan proposed by the applicant can reasonably be implemented and will achieve compliance as expeditiously as possible.
- (e) **Factors to be Considered in Making the Necessary Findings for Granting Variances.**

In making the findings specified in section (d)(1), the factors set forth below shall be considered. It is the responsibility of the applicant to provide the information necessary to adequately evaluate these factors.

(1) Regarding the finding specified in section (d)(1):

(A) To demonstrate that noncompliance is “beyond the reasonable control of the applicant,” the applicant must demonstrate that reasonably diligent and timely efforts to achieve compliance have been made. Where a variance is sought from initial compliance with the March 1, 1996 requirements, the applicant shall show that timely capital expenditures and efforts to obtain the permits for necessary refinery modifications have been made, and that the applicant has been reasonably diligent in attempting to follow the periodic compliance plans required by section 2269, “Submittal of Compliance Plans.” Where a variance is sought due to a breakdown, the applicant shall demonstrate that the breakdown could not have been prevented or mitigated by the application of standard industrial practices. “Standard industrial practices” means elements of design, methods of operation, and levels of oversight and maintenance that are regarded as generally accepted practice in the applicant’s type of business.

(B) To demonstrate that requiring compliance would result in an “extraordinary economic hardship,” the applicant must make a substantial showing that no alternative to a variance would eliminate or mitigate the need for a variance. Potential alternatives that the applicant shall address include the following: (i) obtaining complying gasoline from outside sources, or obtaining blending materials that would allow production of complying gasoline, and (ii) using the California Predictive Model (as specified in Title 13, CCR, section 2265) to maximize the production of complying gasoline, or to minimize the degree of noncompliance, through the use of a PM alternative gasoline formulation. The applicant shall compare the economics of operations without a variance, for the period over which the variance is proposed, with the economics of operations after the variance compliance plan has been implemented (e.g., the economic hardship during the term of the variance shall be measured against the eventual cost of long-term compliance.) The operations may include facets of the applicant’s business other than gasoline operations, if those facets are directly affected by the ability to conduct the gasoline business. An applicant may also address any supply shortages that could result from the failure to grant a variance and the economic affects of such shortages on the persons who do, or could, receive gasoline from the applicant.

(2) Regarding the finding specified in section (d)(2):

(A) The executive officer shall consider the potential effects of issuing or denying the variance on the applicant's customers, the producers of complying fuel, the general public, and upon air quality. The executive officer shall also consider whether granting the variance will place the applicant at a cost advantage over other persons, including those persons who produce complying gasoline.

(B) To evaluate the potential effect upon air quality, the excess emissions from granting the variance shall be estimated as follows.

1. (i) Exhaust emissions: The fractional change in emissions from using the variance gasoline shall be estimated with the California Predictive Model (model). Inputs to the model shall be the limits to be placed on the regulated properties of the variance gasoline by the variance conditions and the limits set forth in sections 2262.1 through 2262.7 that correspond in form (flat or averaging) to the variance limits. For each air basin in which the variance gasoline will be sold, the estimate of excess exhaust emissions shall be the fractional change in emissions (output by the model), times the estimated fraction of gasoline use in the air basin represented by the variance gasoline, times the inventory of exhaust emissions from gasoline-powered vehicles in the air basin.

2. (ii) Evaporative hydrocarbon emissions: Excess evaporative emissions shall be estimated for a limit greater than 7.0 pounds per square inch (psi) on the Reid vapor pressure (RVP) of variance gasoline. This estimate shall apply only for the period when RVP is limited to 7.0 psi. The true vapor pressure corresponding to the RVP limit for variance gasoline shall be divided by the true vapor pressure corresponding to RVP at 7.0 pounds per square inch. For each air basin in which the variance gasoline will be sold, the estimate of excess evaporative emissions shall be that ratio, minus 1.0, times the estimated fraction of gasoline use in the air basin represented by the variance gasoline, times the inventory of emissions due to the evaporation of gasoline from all sources in the air basin.

(3) Regarding the finding specified in section (d)(3):

The applicant shall demonstrate why the proposed compliance plan is the most expeditious way to achieve compliance, and the applicant shall demonstrate sufficient control over the implementation of the plan to make the plan practical. In the case of a proposed variance that would begin on March 1, 1996, the compliance plan shall identify and provide a date for each key step that remains to be accomplished for attaining compliance. As applicable, these steps shall include financing, engineering plans, ordering and contracts, receipt of major equipment, commencement and completion of construction, and testing.

(f) Conditions and Fees in Variance Orders. In imposing fees and conditions in variance orders, the executive officer shall take into account the potential for such fees and conditions to place the applicant at a cost advantage over other persons, including those persons who produce complying gasoline.

(1) Conditions.

(A) Any variance order shall specify a final compliance date by which the requirements of the applicable section(s) will be achieved. Any variance order shall also contain a condition that specified increments of progress necessary to assure timely compliance be achieved, and such other conditions, ~~such as limitations on the gasoline specifications;~~ that the executive officer, as a result of the testimony received at the hearing, finds necessary to carry out the purposes of Division 26 of the Health and Safety Code. Such conditions may include, but are not limited to, reporting requirements, limitations on the gasoline specifications, and the elements of the variance compliance plan as proposed by the applicant, with any modifications made by the executive officer.

(B) Any variance order granting a variance from section 2262.1 shall impose a substitute gasoline Reid vapor pressure limit as stringent as feasible under the circumstances, in no case to exceed 9.0 pounds per square inch. For areas where, and in seasons when, federal regulations require a lesser maximum Reid vapor pressure limit, a variance order shall not impose a Reid vapor pressure limit that is less stringent than the federal limit.

(C) The executive officer may require, as a condition of granting a variance, that a cash bond, or a bond executed by two or more good and sufficient sureties or by a corporate surety, be posted by the party to whom the variance was granted to assure performance of any construction, alteration, repair, or other work required by the terms and conditions of the variance. Such bond may provide that, if the party granted the variance fails to perform such work by the agreed date, the cash bond shall be forfeited to the state board, or the corporate surety or sureties shall have the option of promptly remedying the variance default or paying to the state board an amount, up to the amount specified in the bond, that is necessary to accomplish the work specified as a condition of the variance.

(D) The variance order shall limit the amount of variance gasoline sold or supplied from the applicant's production or import facility during each 30-day period of the variance, or during such other time period as the executive officer may specify. In determining the limit on the amount of variance gasoline, the Executive Officer shall consider available data on the applicant's production of complying gasoline. The limit shall not exceed the applicant's capacity to produce complying gasoline.

(E) The variance order shall specify that once a quantity of variance gasoline has been sold or supplied by the applicant in accordance with the variance, subsequent transactions involving that variance gasoline by another producer, distributor, retailer, end user, or other person shall also be exempt from the applicable requirements.

(2) Fees. A fee of \$0.15 shall be levied on the applicant for each gallon of gasoline sold or released for sale under variance during the term of the variance. The fee shall be paid by the applicant periodically, in advance of the sale or release of variance gasoline in each period. The executive officer shall specify the payment schedule in the variance order.

(g) Duration of Variances.

(1) A variance shall be granted only for the minimum period necessary for the applicant to attain compliance with the applicable regulations. Except for a variance related to a physical catastrophe, no variance which is issued due to conditions of breakdown, repair, or malfunction of equipment shall have a duration, including extensions, of more than six months; 120 days; however, a variance may be extended for up to 90 additional days if the applicant demonstrates that the requirements of sections (d) and (e) are met. In order to receive an extension of a variance, the applicant must submit an application as specified in section (a), and a hearing must be held as specified in sections (b) and (c).

(2) Variances Related to a Physical Catastrophe. Notwithstanding the provisions of section (g)(1), a refiner may be granted a variance with a duration of more than 120 days, or a variance extension of more than 90 days, if the applicant demonstrates that the additional time is necessary due to a physical catastrophe, and the requirements of sections (d) and (e) are met. In order to receive a variance or variance extension, the applicant must submit an application as specified in section (a) and a hearing must be held as specified in sections (b) and (c). As used in this section, "physical catastrophe" means a sudden unforeseen emergency beyond the reasonable control of the refiner, causing the severe reduction or total loss of one or more critical refinery units that materially impact the refiner's ability to produce

complying gasoline. "Physical catastrophe" does not include events which are not physical in nature such as design errors or omissions, financial or economic burdens, or any reduction in production that is not the direct result of qualifying physical damage.

- (h) Emergency Variances. ~~(1)~~ The executive officer may, after holding a hearing without complying with the provisions of sections (b) and (c), issue an emergency variance to a person from the requirements of the applicable section(s) upon a showing of reasonably unforeseeable extraordinary hardship and good cause that a variance is necessary. The applicant for an emergency variance shall pay a fee of \$2500.00. Section (f) shall apply to emergency variances, except that a variance order is not required to specify a final compliance date by which the requirements of the applicable sections(s) will be achieved. In connection with the issuance of an emergency variance, the executive officer may waive the requirements of section (f)(1)(C).

~~(2)~~ No emergency variance may ~~extend for a period~~ have a duration of more than 45 days. If the applicant for an emergency variance does not demonstrate that he or she can comply with the provisions of the applicable section(s) within such 45-day period, an emergency variance shall not be granted unless the applicant makes a prima facie demonstration that the findings set forth in section (d) should be made. The executive officer shall maintain a list of persons who have informed the executive officer in writing of their desire to be notified by telephone in advance of any hearing held pursuant to section (h), and shall provide advance telephone notice to any such person as soon as practicable, considering the nature of the emergency.

- (i) 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 substantially to comply with any condition of the variance.
- (j) 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 the requirements the applicable section(s) after holding a hearing in accordance with the provisions of sections (b) and (c).

NOTE: Authority cited: sections 39600, 39601, 43013, 43013.2, 43018, and 43101, Health and Safety Code; and Western Oil and Gas Ass'n. v. Orange County Air Pollution Control District, 14 Cal.3d 411, 121 Cal.Rptr. 249 (1975). Reference: sections 39000, 39001, 39002, 39003, 39010, 39500, 39515, 39516, 41511, 40000, 43000, 43013.2, 43016, 43018, and 43101, Health and Safety Code; and Western Oil and Gas Ass'n. v. Orange County Air Pollution Control District, 14 Cal.3d 411, 121 Cal.Rptr. 249 (1975).