

**San Joaquin Valley Air Pollution Control District
CENTRAL REGION HEARING BOARD MEETING**

Central Region Office Governing Board Room
1990 E. Gettysburg Ave., Fresno, CA 93726

ACTION SUMMARY MINUTES

Wednesday, November 20, 2013

*Meeting held in the
Central Region Office (Fresno)*

1. CALL MEETING TO ORDER

The Chair, Jerry Boren, called the meeting to order at 10:01 a.m.

2. ROLL CALL

Jerry Boren (Chair) - Engineer	Present
Dr. Lorraine Goodwin, M.D. – Medical	Present
Daniel Hartwig – Public	Present
Gerry Mulligan – Public	Present

Central Region (Fresno): Seyed Sadredin, Executive Director/APCO; Ryan Hayashi, Supervising Air Quality Specialist; Patrick Houlihan, Senior Air Quality Specialist; Annette Williamson, Legal Counsel for the District; Brandon Swedblom, Network Systems Analyst; Michelle Franco, Deputy Clerk to the Board; Michael Carrera, Air Quality Compliance Manager; Stephanie Shaw, Legal Technician; Mehri Barati, Director of Administrative Services, Morgan Lambert, Director of Compliance; David Warner, Director of Permit Services; Carol Flores, Operations and Program Support Supervisor

3. APPROVE MINUTES OF October 16, 2013

The Chair asked if there were any comments regarding the Minutes for October 16, 2013. Hearing no comments, the Chair declared the minutes were approved as submitted.

4. PUBLIC HEARING

The Chair swore in all those present to testify for all matters.

<u>Docket No.</u>	<u>Type</u>	<u>Company Name</u>
A. C-12-11X	Extension	Naval Air Station Lemoore 700 Avenger Avenue Lemoore, CA 93246

Petitioners: Kim Rasmussen and Commander Russell Dickison

Patrick Houlihan presented the Staff Report.

NASL has requested an extension of a previously granted regular variance from the applicable requirements of District Rules 2070.7.0, 2201, and 2520 in addition to applicable conditions of the subject Permits to Operate (PTOs). The requested

variance period would be from October 20, 2013, until March 1, 2014. If granted, the variance would allow the two subject test cells to exceed their daily fuel usage limit until the permits can be modified to increase the daily fuel usage.

Commander Dickison provided a video presentation of the facility and operations.

Mr. Hartwig requested clarification on operations explaining the engines are removed and brought to the facility for repairs where emissions are caused by testing the engines for functionality. Commander Dickison responded the explanation is correct.

Dr. Goodwin asked how long the workforce had been performing the job. Commander Dickison explained personnel are trained for eighteen months before allowed to work on equipment. Dr. Goodwin asked where the personnel go after leaving the facility's employment. Commander Dickison explained servicemen deploy to aircraft carriers around the world with the same capabilities to assemble and disassemble modules with a test cell.

Public Comments: None

Having decided the petition has met the required findings, on motion of Mr. Mulligan and seconded by Dr. Goodwin, unanimously passed, the petitioner was granted an extension of the regular variance.

<u>Docket No.</u>	<u>Type</u>	<u>Company Name</u>
B. C-13-15A	Appeal	Concerned Citizens of West Fresno through their counsel Leadership Counsel for Justice and Accountability 2115 Kern Street, Suite 320 Fresno, CA 93721

Petitioners: Ashley Werner and Phoebe Seaton

Counsel for Darling International, Inc: Christopher Hall and Jeff Reid

Mr. Boren stated the discussion, as agreed by all parties, will first consider whether the Hearing Board has appropriate jurisdiction to consider Concerned Citizens of West Fresno (CCWF)'s petition. He added the decision to rule on the matter raised by the petition on its merits will be discussed at a later date.

Mr. Phillip Jay, Counsel for the Hearing Board, explained the order of presentations as District staff, Darling and then the Petitioners.

Annette Williamson presented the Staff Report with a Power Point presentation.

CCWF filed a petition pursuant to Health and Safety code § 42302.1, requesting the Hearing Board revoke Darling International, Inc.'s (Darling) Permit to Operate (PTO). PTOs were first issued for an existing rendering operation at this location in 1973 by the Fresno County Air Pollution Control District. The current PTO was most recently renewed on August 29, 2013.

Mr. Boren requested clarification on the location of residences in proximity to the facility. Ms. Williamson presented a photo within the presentation and indicated the residential locations.

Ms. Williamson explained the District advocates for the Hearing Board to deny the Petition on the basis that § 42302.1 applies only to decisions or actions “pertaining to the *issuance* of a permit by a district,” and limits the Hearing Board’s decision to “whether the permit was properly issued.” She added the Health & Safety Code draws a clear distinction between “issuing a permit” and “renewing a permit”. She stated the challenged action taken by the District was to extend the expiration date on a permit (i.e., to “renew” the permit), not to “issue” a permit in the first instance. Ms. Williamson said the action is not subject to review by the Hearing Board pursuant to § 42302.1.

Ms. Williamson added § 42302.1 implies a public notice requirement for the obvious need to give public opportunity to challenge a potential new development before it’s constructed and operating. She noted there is no public notice required for permit renewal of existing operation that does not involve emissions increases.

Mr. Hartwig asked what options do members of the public have should a concern arise. Ms. Williamson explained the District has a mechanism for members of the public to request to receive notice of different actions the District may engage in respective to a particular facility.

Ms. Williamson added members of the public may call the District and convey their complaint regarding a facility. She explained the District has the discretion of taking enforcement action against that facility. Mr. Boren expressed his concern regarding complaints made against the facility in question and although the District inspected the facility no enforcement action was taken. He added there is no process for the members of the public to present their input when a permit is issued or renewed. Ms. Williamson explained an increase in emissions will result in a process for the members of the public to voice their feedback. Ms. Williamson deferred the issue until the Permit Services Director could join the meeting.

Ms. Williamson stated there would be an unreasonable level of economic uncertainty should the 30-day deadline of requesting the hearing board to hold a public hearing be circumvented and applied to permit renewals. She added the unreasonable extension of power to an informal tribunal with relaxed rules of evidence would occur and lead to an “annual bite at the apple.” Ms. Williamson made the distinction of variances that are brought before the Hearing Board are made by current permit holders requesting to vary from the conditions set forth in the permits and the District’s rules. She noted providing the public an annual right to essentially shut down a facility would hold businesses hostages indefinitely.

Mr. Hartwig asked for an explanation of the District’s permitting process including the amount of review at the issuance and renewal of the permits.

Mr. Boren swore in David Warner, Permits Services Director.

Mr. Warner explained prior to issuing a permit for modifications that will increase emissions there is a 30-day public notice process that provides members of the public to provide comments. He added the process is outlined in both state law and the District's rules and regulations that guide the permitting program. Mr. Warner noted there is no public process for permit renewals for non-major sources of air pollution. He added state law provides specific guidance to determine the issuance of an extension of a permit expiration date. He explained District staff performs an analysis and reviews the permit conditions and ensures the facility is complying with those conditions. He added District staff inspects permitted facilities on a regular basis and responds to any complaints received. Mr. Warner said state law states says if the facility pays their renewal fees, the facility is in compliance with their permit conditions, and the permit has not been revoked then the District's findings are concurrent with renewing the permit.

Dr. Goodwin stated part of the permit's conditions is not to be a nuisance. She added there have numerous complaints documented. Ms. Williamson explained the issue regarding complaints and nuisance is more of a question on merit and that issue is not being heard today.

Ms. Williamson added another reason to deny the petition is, if jurisdiction may exist, because Darling satisfied the necessary criteria for extending the expiration date of its PTO, and thus the District had no discretion to deny doing so. She added that given the District's action was a ministerial one, the Hearing Board should agree the District's action was proper.

Mr. Boren noted there was no written legislation that stated renewals of permits do not have to go through a public process. He added the interpretation of issuance not meaning renewals is that of the District and Darling. Ms. Williamson reiterated the legislation does distinguish the language between issuance and renewals and only for the issuance of a permit does the hearing board have jurisdiction.

Mr. Jay asked how many times there has been a District renewal of a permit questioned by members of the public. Mr. Warner stated today is the first instance.

Mr. Hartwig asked for the number of permits on file with the District. Mr. Warner responded 14,000 permitted facilities with approximately 30,000 permits.

Mr. Hall expressed appreciation for the service provided by the hearing board members. He stated the powers of the hearing board are directly enumerated by statute. He added those powers are clear under the plain language of the statute and under the legal principles of statutory interpretations and canons of law.

Mr. Hall said there is a canon of law that states, "a statute will not be interpreted so as to result in an absurdity". He added an interpretation of issuance that includes issuance, renewal, and anything else would result in absurdity because there are statutes within the same section that would have no meaning or bearing.

Mr. Hall stated the ministerial nature of the issue at hand dictates why there is no public participation. He added the act of renewal is set forth in § 42333 of the Health and Safety Code and defines those circumstances when renewal is inappropriate.

He noted the complaints received from the public related to a facility's operations do not determine whether or not a facility is afforded a renewal which is the difference between enforcement and permitting. Mr. Hall noted there are several hurdles a facility goes through to obtain an issuance of a permit. He added once the facility receives the permit the facility is entitled to certainty and their investment will not be shut down the following year. Mr. Hall stated if the facility fails to comply with the conditions of the permit then the enforcement arm of the process manages the issue.

Mr. Hall explained the statutory scheme created by the legislature carefully weighed the benefits and burdens on the public to participate in the process and have a voice and the rights of the facility to operate once it has gone through that process. He added this implicates notions of vested rights and numerous legal theories that a court of law is more capable to deal with. He added the courts have trained judges that follow rules of law. He stated the hearing board tribunal does not follow the rules of evidence. Mr. Hall explained members of the public have the remedy to go to court and file a writ to compel the enforcement arm to do what the statutes require them to do.

Mr. Hall explained public and private nuisance was part of the legislation filed by CCWF but Darling raised objections and the court agreed to strike it from the suit. He stated he would not further discuss this issue because that is the not the issue before the Hearing Board. The sole issue for the hearing board's determination today is whether or not the petitioners have a right to file an appeal to the renewal of a permit.

Ms. Seaton clarified the issues of public and private nuisance were struck on procedural grounds and not on the merits.

Ms. Werner thanked the hearing board for the thorough consideration of the issue at hand. She explained CCWF filed a petition to revoke the Permit to Operate (PTO) that was issued by the District. She added the permit authorizes Darling to process approximately 850,000 lbs. of raw material a day. She summarized the statute § 42301(b) on which their petition is based on. She also summarized District Rule 2070.3.0 which is referenced in the petition. Ms. Werner explained the crux of the petition is that the District could not make the necessary findings to show compliance.

Ms. Werner stated legislation's interpretation of the word issuance also denotes renewals. She stated CCWF believes the District issued a permit that authorizes this facility to conduct meat rendering operations for the next five years and emit contaminants into the air. She read relevant legislation from § 42300(c) including "the annual extension of a permit's expiration date pursuant to subdivision (b) does not constitute permit issuance...subject to the requirements specified in Title V." She noted this is not an annual extension that is subject to that provision. She added this permit has been issued for a five year period. She read from § 42301(e) relating to renewals, "...require upon annual renewal that each permit be reviewed to determine that the permit conditions are adequate to ensure compliance." She reiterated the permit is not an annual renewal. Ms. Werner noted CCWF has been waiting five years to have their feedback heard.

Ms. Werner explained an absurdity would result if a permit issued by the District in 1973 means the public is forever precluded from intervening. She added the District should consider the continuing nuisance claims when issuing a permit. Ms. Werner also stated if there were appeals for renewals the Hearing Board could use discretion on when to dismiss them.

Mr. Hartwig asked why the issue is being heard when there is an existing lawsuit filed. Ms. Werner explained the suit is against Darling and the City of Fresno. She added the District has authority and the duty to be acting according to the Health and Safety Code and counsel for CCWF sees this as an appropriate forum to address the recent action. She added this forum is more efficient and less resource intensive than a law suit against the District.

Dr. Goodwin asked if the complaint is against the city council. Ms. Werner explained the issue today is regarding the District.

Ms. Williamson stated the sections noted by the counsel for CCWF supports the District's argument that the legislature knows the difference between issuance and renewal of a permit. She noted the code section cited by the counsel for CCWF that a facility must apply for a permit issuance but not for a renewal. Ms. Williamson explained the District follows state laws with which it must comply including the ministerial function to extend the permit issuance date if the conditions are met and no discretion to deny extending a permit expiration date. Ms. Williamson noted the District is authorized to implement a five year permit time frame by §42300(b). She added most air districts have annual permit expiration dates and if the hearing board were to decide that § 42302.1 applies to permit renewal decisions then the public would have the right to challenge permit renewals. Ms. Williamson noted § 42300(c) is applicable for Title V facilities of which Darling is not.

Mr. Warner noted the legislature would not have allowed the District to have authorization to issue a permit for five years if they intended there to be an annual ability to appeal annual renewals.

Mr. Jay asked if § 42300(c) can be interpreted as legislation setting an annual extension does not constitute a permit issuance for Title V facilities meaning for other purposes maybe it could be. Ms. Williamson stated the language supports her stance. Mr. Warner noted the legislature found it important to add sections for Title V facilities because there is an application process for renewals of permits.

Mr. Hall noted the City of Fresno is no longer part of the law suit. He added the Hearing Board could not use discretion in deciding to dismiss an appeal of annual renewal of a permit because the action is ministerial and the hearing board has no jurisdiction. Mr. Hall noted there is recourse for members of the public after an issuance of a permit when modifications are made; new equipment is installed or any other event that triggers the issuance of a new permit.

Mr. Boren asked if the hearing board decides they do not have jurisdiction can the suit be amended to include the question of jurisdiction. Ms. Werner stated it would be difficult to add the District to the law suit.

Ms. Werner stated a clear reading of the statute and exercising the principle of interpretation according to its plain meaning grants the hearing board authority to review this petition.

Mr. Mulligan asked if there have been any modifications to the plant since the original permit was issued. Mr. Warner stated a significant change to the facility was made in the mid-2000's where the facility installed state of the art air pollution and odor nuisance control equipment. Mr. Boren asked if those modifications were publicly noticed. Mr. Warner noted there is no public noticing when there is a significant decrease in emissions.

Mr. Boren asked if the hearing board decides they do have jurisdiction, what recourse does Darling have. Ms. Williamson responded any party not agreeing with the hearing board's decision can appeal that decision to the superior court.

Mr. Hartwig asked if there was any precedent by another air district hearing board in this matter. Mr. Jay responded he was not aware of any. Ms. Williamson stated San Diego Air Pollution Control District has a local rule that prohibits renewal appeals except when there has been a modification to the conditions.

Public Comments: None

Having decided the Hearing Board does not have jurisdiction, on motion of Mr. Hartwig and seconded by Mr. Mulligan, unanimously passed, the petitioner was denied the petition.

5. Emergency Variance

The Central Region Hearing Board has not heard nor granted any emergency variances since the October 16, 2013, Hearing.

6. Public Comments

None

7. Hearing Board Member Comments

None.

8. New Business

None.

9. Next Scheduled Meeting

The next scheduled meeting is December 18, 2013. The meeting will be held in the Central Region Office (Fresno) in the Governing Board room.

10. Adjourn

The Chair adjourned the meeting at 12:09 p.m.