

**FILED**

**JUL 28 2006**

HEARING BOARD  
BAY AREA AIR QUALITY  
MANAGEMENT DISTRICT

**MARY ROMAIDIS**  
CLERK  
HEARING BOARD  
BAY AREA AIR QUALITY  
MANAGEMENT DISTRICT

BEFORE THE HEARING BOARD  
OF THE  
BAY AREA AIR QUALITY MANAGEMENT DISTRICT  
STATE OF CALIFORNIA

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9 In the Matter of the Application of )  
10 **SINGLETON ROAD LANDFILL** ) No. 3515  
11 )  
12 For a Variance from Regulation 8, Rule 34, ) ORDER DENYING VARIANCE  
13 Sections 113.2, 301 (Parts 2 & 3), 303; )  
14 Regulation 2, Rule 1, Section 307 )  
15 [Condition ID # 17547 (1), (2a), (2b), (2c)]; )  
16 Regulation 2, Rule 2, Section 112 )  
17 \_\_\_\_\_ )

16 The above-entitled matter is an Application for a Variance from the provisions of  
17 Regulation 8, Rule 34, Sections 113.2, 301 (Parts 2 & 3), 303; Regulation 2, Rule 1, Section 307  
18 [Condition ID # 17547 (1), (2a), (2b), (2c)]; Regulation 2, Rule 2, Section 112, filed on  
19 May 19, 2006 ("Application"). An amendment to the Application was also filed on May 19, 2006.  
20 Applicant further supplemented the Application by a letter dated June 28, 2006.

21 Mollie Dent, Senior Deputy City Attorney, San Jose City Attorney's Office, appeared on  
22 behalf of the City of San Jose, California ("Applicant").

23 Adan Schwartz, Senior Assistant Counsel, appeared as counsel for the Air Pollution  
24 Control Officer ("APCO" or "the District").

25 The Clerk of the Hearing Board provided notice of this hearing on the Application for  
26 Variance in accordance with the requirements of the California Health and Safety Code Section

ARB

1 40823.

2 The Variance application requested relief for the period May 19, 2006 through  
3 December 19, 2006. The Hearing Board heard the request for Variance on July 6, 2006.

4 The Hearing Board provided the public an opportunity to testify at the hearing, as required  
5 by the California Health and Safety Code. No member of the public offered testimony. The  
6 Hearing Board heard evidence and argument from the Applicant. The APCO opposed the granting  
7 of the Variance.

8 After the Applicant presented its case, the Hearing Board voted to deny the Variance, as set  
9 forth in detail below:

10 BACKGROUND

11 Applicant operates an inactive solid waste landfill located at 885 Singleton Road, San Jose,  
12 California (hereinafter "Facility"). Applicant is not considered a small business as described by  
13 California Health and Safety Code Section 42352.5(b)(2) and emits more than 10 tons per year of  
14 air contaminants.

15 Since 1989, Applicant has operated an enclosed ground flare to abate landfill gas  
16 emissions. The flare operates pursuant to a permit issued by the District. A routine inspection of  
17 the flare on May 17, 2006, discovered "several large holes in the flare stack and molten . . . metal  
18 coming out of flare [sic] stack, rendering the flare inoperable and creating a safety hazard."  
19 (Application, p. 7). Applicant responded to this malfunction by taking the flare offline. Attempts  
20 to repair and return the flare to operating condition were unsuccessful.

21 By letters dated October 26, 2005 and November 29, 2005, the Applicant's landfill  
22 operations and maintenance contractor, SCS Engineers (hereinafter "SCS") advised the Applicant  
23 that the flare was in need of repair and that, due to the age of the flare, repair may not be possible.  
24 In a subsequent letter dated December 15, 2005, SCS noted that the flare was "age deteriorated,"  
25 and advised replacement. Additional letters from SCS to Applicant sent in January, March and  
26 May, 2006, respectively, offered the same observation and advice.

1           At the July 6, 2006 hearing, Patrick Sullivan of SCS testified that, subsequent to the  
2 determination that age-deterioration of the flare stack had reached an unacceptable point, efforts  
3 were made to find a contractor who could make repairs. Technical consultants familiar with the  
4 flare system advised that repair of the failing flare stack was an economically unacceptable  
5 alternative due to the age of the entire flare system and the high probability that other aged system  
6 components would fail or require significant maintenance in the near future. At this point, SCS  
7 changed its written recommendation from "repair or replace" to simple replacement.

8           In its June 28, 2006, letter to the Hearing Board, Applicant states that prior to the time  
9 Applicant was advised of the deteriorating condition of the flare, Applicant had been considering  
10 possible re-use of the landfill site in a manner that would have entailed a complete restructuring of  
11 the landfill gas collection and abatement system. Consideration of flare replacement was thus  
12 balanced against the possibility that a replacement flare might be obsolete under some re-use  
13 scenarios, and Applicant was reluctant to commit public funds for a new flare until re-use options  
14 were fully explored and a determination made.

15           At the hearing, Napp Fukuda of the City of San Jose Environmental Services Department,  
16 testified that, upon learning that the flare would need to be replaced, the decisionmaking process  
17 for site re-use was accelerated. Pursuant to this accelerated process, a decision was made that site  
18 re-use would not be immediately feasible. According to both the testimony of Mr. Fukuda and  
19 Applicant's letter dated June 28, 2006, prior to the flare stack failure in May, 2006, Applicant had  
20 begun to take steps towards replacement of the flare system.

21           Following failure of the flare stack, Applicant installed and began operating an activated  
22 carbon system to abate the landfill gas that continues to be generated. Mr. Fukuda testified at the  
23 hearing that consideration was given to use of a candlestick flare as a temporary measure, but that  
24 this option was rejected due to potential fire hazards and the close proximity of local area  
25 residences. Applicant has filed an application with the District to permit the activated carbon  
26 system. At the hearing, Applicant submitted source tests results dated June 27, 2006 that

1 Applicant claimed indicated the carbon system was compliant with destruction efficiency standard  
2 of District Regulation 8-34-303. According to the District, evaluation of the source tests results  
3 and of the permit application are still pending.

#### 4 DISCUSSION

5 Pursuant to Health and Safety Code Section 42352, the Hearing Board may grant a  
6 Variance upon a finding that the criteria of that Section are met. In this case, Applicant has not  
7 carried its burden of proving that the violations for which the Variance was sought were beyond its  
8 reasonable control, as required by Health & Safety Code Section 42352(a)(2).

9 Applicant's June 28, 2006, letter and the testimony presented at the hearing show that there  
10 was concern regarding the deteriorating condition of the flare, and that steps were being taken to  
11 replace it. However, this flare had been in operation for 17 years. At that age, failure due to  
12 system deterioration is not an unexpected or unforeseeable event, although the precise timing of  
13 failure cannot be predicted.

14 The record in this matter clearly shows that the Applicant had notice of flare system  
15 deterioration and the need for system repair or replacement prior to flare stack failure on  
16 May 17, 2006. Although the Applicant immediately requested a variance, Health & Safety Code  
17 Section 42353(a)(2) requires that such a Variance be supported by a finding that the associated  
18 violation is due to conditions beyond the reasonable control of the operator. The Applicant had  
19 adequate opportunity to repair or replace the flare prior to its failure. The conditions leading to  
20 flare system failure were not beyond the Applicant's reasonable control.

21 It is not the role of the Hearing Board to review the economic and policy considerations  
22 that apparently caused the City of San Jose to operate the flare to the point of failure. A  
23 municipality may be acting reasonably when balancing the interests of its taxpayers, but it cannot  
24 avoid the consequences of operating air pollution control equipment to the point of failure where  
25 such circumstances could have been avoided. Granting Variance relief under these circumstances  
26 would lessen the regulatory incentive to plan for the replacement of an air pollution control device

1 before it irreparably fails.

2 SPECIFIC FINDING

3 The Hearing Board finds pursuant to Health and Safety Code Section 42352(a)(2) that the  
4 conditions leading to noncompliance with District Regulation 8, Rule 34, Sections 113.2, 301  
5 (Parts 2 & 3), 303; Regulation 2, Rule 1, Section 307 [Condition ID # 17547 (1), (2a), (2b), (2c)];  
6 Regulation 2, Rule 2, Section 112 were not beyond Applicant's reasonable control, and that a  
7 finding pursuant to this section cannot be made to support the issuance of a Variance.

8  
9 THEREFORE, THE HEARING BOARD ORDERS:

10 The Application for Variance from District Regulation 8, Rule 34, Sections 113.2, 301 (Parts 2  
11 & 3), 303; Regulation 2, Rule 1, Section 307 [Condition ID # 17547 (1), (2a), (2b), (2c)];  
12 Regulation 2, Rule 2, Section 112 is hereby denied.

13  
14 Moved by: Terry A. Trumbull, Esq.

15 Seconded by: Rolf Lindenhayn, Esq.

16 AYES: Rolf Lindenhayn, Esq., Julio Magalhães, Ph.D., Jeffery R. Raines, P.E.,  
17 Terry A. Trumbull, Esq., and Thomas M. Dailey, M.D.

18 NOES: None.

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Thomas M. Dailey, M.D., Chair

  
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Date