

FILED

APR 28 2004

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

In the Matter of the Application of)
)
OX MOUNTAIN LANDFILL,)
HALF MOON BAY, CALIFORNIA)
)
For a Variance from Regulation 2,)
Rule 1, Section 307 and Regulation 8, Rule)
34, Sections 114, 301 and 303)
_____)

No. 3463

ORDER DENYING INTERIM VARIANCE

The above-entitled matter is an Application for a Short Term and Interim Variance from the provisions of Regulation 2, Rule 1, Section 307 and Regulation 8, Rule 34, Sections 114, 301 and 303, filed on April 1, 2004.

Patrick Sullivan of SCS Engineers and Lochlin Caffey of BFI Industries of California, Inc., appeared on behalf of Ox Mountain Landfill, Half Moon bay, California ("Applicant").

Adan Schwartz, Esq. appeared as counsel for the Air Pollution Control Officer ("APCO").

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

The Variance application requested Interim and Short Term relief for the period March 31, 2004 through June 28, 2004. The Hearing Board heard the request for Interim Variance on April 8, 2004. The hearing upon the Short Term Variance has been set for 9:35 A.M., Thursday, May 20, 2004.

ALB

1 to address these criteria in its oral testimony in addition to addressing Good Cause. The Hearing
2 Board also advised Applicant that it should consider the Hearing Board's deliberations regarding
3 these six criteria in preparing for the related Short Term Variance hearing that is pending.

4 Though the six regular variance criteria are relevant to an Application for an Interim
5 Variance, satisfaction of these criteria is not sufficient for finding cause to grant an Interim
6 Variance. As noted above, a finding of Good Cause is requisite to the granting of an Interim
7 Variance. An Application for an Interim Variance will typically be set for hearing on an expedited
8 schedule, one consequence of which is the preclusion of a more considered review of the
9 Application by both the District and interested members of the public. Because of this, the
10 granting of an Interim Variance, the period for which could extend up to 90 days, based upon such
11 a truncated procedure, should occur only when Applicant can demonstrate both 1) that there is a
12 likelihood that the six regular variance criteria will be met, and 2) that significant adverse
13 consequences will result if the granting of variance relief is delayed until a hearing on a regular
14 variance Application occurs.

15 In this instance, no such showing has been made with regard to the second criterion above,
16 regarding adverse consequences from delayed consideration by the Hearing Board. Applicant
17 began proceeding with the flare replacement project simultaneously with the filing of its
18 Application for an Interim and Short Term Variance. The Application asserts that the adverse
19 consequence that will follow if a variance is not granted is that the Applicant will be subject to
20 additional penalties for noncompliance. However, Applicant gave no indication in the Application
21 or at the hearing that it intended to halt work on the flare replacement if the Interim Variance is not
22 granted. Indeed, such an assertion might have been received with skepticism. Landfill gas
23 emissions will continue to be generated at a given rate without human intervention. If, as
24 Applicant asserts, its current flare equipment is ineffective and in need of replacement, then it
25 would seem to follow that the most effective strategy for both minimizing excess emissions and
26 limiting Applicant's liability from non-compliance would be to complete the project expeditiously

1 regardless of whether an Interim Variance has been granted.

2 It is not uncommon that a portion of the period of time, for which an Applicant seeks
3 variance relief, occurs prior to the hearing on the variance. It is also not uncommon that the
4 adverse consequence of not receiving a variance is the liability for noncompliance and the
5 potential for assessment of penalties. These circumstances do not, in and of themselves, constitute
6 Good Cause. Though an Applicant may experience some uncertainty over whether its Application
7 for a regular variance will be granted, the granting of variance relief through the truncated
8 procedure of an Interim Variance hearing must be based upon a more compelling cause.

9 SPECIFIC FINDING

10 The Hearing Board finds pursuant to Health and Safety Code Section 42351 that Good
11 Cause does not exist to issue this Interim Variance.

12 THEREFORE, THE HEARING BOARD ORDERS:

13 The Application for Interim Variance is denied.

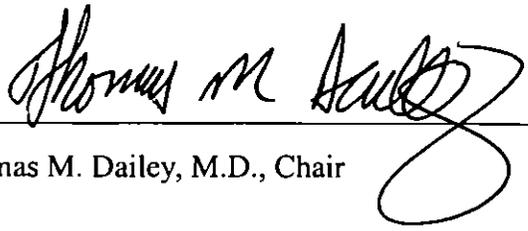
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15 Moved by: Terry A. Trumbull, Esq.

16 Seconded by: Allan R. Saxe, Esq.

17 AYES: Allan R. Saxe, Esq., Terry A. Trumbull, Esq., and Thomas M. Dailey, M.D.

18 NOES: Julio Magalhães, Ph.D.

19 NON-PARTICIPATING: Christian Colline, P.E.

20
21 
22 _____
23 Thomas M. Dailey, M.D., Chair

24 4-23-04
25 Date
26