

FILED

APR 10 2014

HEARING BOARD  
BAY AREA AIR QUALITY  
MANAGEMENT DISTRICT

Sean Gallagher  
Clerk of the Boards  
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 )  
)  
**Guadalupe Rubbish Disposal Company** ) No. 3658  
)  
For Variance from Regulation 8, Rule 34, ) ORDER DENYING VARIANCE  
Section 301, and Permit to Operate )  
Condition #61882 )

The above-entitled matter is an Application for Variance from the provisions of Regulation 8, Rule 34, Section 301.1 of the Rules and Regulations of the Bay Area Air Quality Management District (herein, "the District"), under which Guadalupe Rubbish Disposal Company, Inc. (herein, "Guadalupe"), must abate landfill gas through an enclosed flare at 15999 Guadalupe Mines Rd, San Jose, California, District Plant No. A3294; Variance Application No. 3658.<sup>1</sup> The Application for Variance was filed on January 28, 2014 and requested relief for the period from December 31, 2013 to October 31, 2014. Guadalupe later amended the requested period for relief to one year.

Patrick Sullivan of SCS Engineers, appears on behalf of Guadalupe. Michael Winter, District Engineer for Waste Management, Inc., (herein, "WMI") testified on behalf of Guadalupe, a WMI subsidiary.

<sup>1</sup> The Application also requests relief from the landfill methane rule adopted by the State Air Resources Board under 17 Code of California Regulations Section 95464(b)(2)(A). As the Hearing Board does not have authority to grant relief from a state regulation, the landfill methane rule will not be addressed here.

Simran Mahal, Legal Intern, and Adan Schwartz, Senior Assistant Counsel, appeared on behalf of the Air Pollution Control Officer (herein, "APCO"). Tamiko Endow, Air Quality Engineer, testified on behalf of the District.

The Clerk of the Hearing Board provided notice of the hearing on the Application for Variance in accordance with the requirements of the California Health and Safety Code. The Hearing Board heard the request for variance on March 13, 2014.

The Hearing Board provided the public with an opportunity to testify at the hearing, as required by the Health and Safety Code. No members of the public testified. The Hearing Board heard evidence, testimony, and argument from Guadalupe and the District. The District opposed the granting of the variance.

The Hearing Board declared the hearing closed after receiving evidence, testimony, and argument, and took the matter under submission for decision. After consideration of the evidence, the Hearing Board voted to deny the request for variance, as set forth in detail below:

### **BACKGROUND**

Guadalupe operates a landfill in the City of San Jose (herein, "Facility") which is classified as a Major Facility under District regulations. The Application for Variance relates to capturing landfill gases being generated beyond the existing capacity of the enclosed flare at the Facility. The Facility was at one point equipped with both an enclosed flare and several gas-to-energy engines. The engines, operated by a different corporate entity, were fueled by landfill gas to produce energy. Sometime after Regulation 9, Rule 8 (herein, "Regulation 9-8"), which limits emissions from the type of engines at the Facility, was adopted in July of 2007, these engines were deemed to be noncompliant. The engines subsequently operated out of compliance for

almost two years after the compliance deadline of January 2012, pursuant to an agreement with the District.

Between 2007 and 2013, Guadalupe was aware that the gas-to-energy engines would not comply with Regulation 9-8 and that the landfill capacity was increasing, and thus submitted an application for another enclosed flare. The Authority to Construct the new enclosed flare was issued by the District in August 2012. In order to capture and abate the landfill gases being generated at the facility, the District also provided the operator of the gas-to-energy operation with regulatory relief by allowing them to operate the noncompliant gas-to-energy engines until December 2013. Guadalupe submitted an application for an Authority to Construct/Permit to Operate for a candlestick flare in December of 2013, and submitted an Application for Variance for the candlestick flare in January 2014.

Guadalupe testified that it had made all reasonable efforts to obtain approval from the City of San Jose to proceed with installation of a new enclosed flare and gas-to-energy operation at a different location at the Facility. Guadalupe asserted that, had approvals from San Jose been obtained on something close to the expected schedule, it would now be in a position to operate the new enclosed flare and/or engines. Guadalupe thus argued that compliance with Regulation 8, Rule 34 was beyond its reasonable control. Guadalupe also noted that it did not have approval either from the District or the City of San Jose to install a new enclosed flare at the location of the existing flare. Guadalupe estimated the cost of purchasing and installing a new enclosed flare at approximately \$1,000,000 and then later moving it to a new location at an additional cost of approximately \$250,000, with an additional \$50,000 to \$100,000 expected if the flare were damaged during relocation.

The District testified to having had communications with the City of San Jose to the effect that permitting for a new enclosed flare at the site of the existing flare, as either a replacement or supplement to the existing flare, could proceed in a relatively expeditious manner. The District thus argued that Guadalupe, had it submitted the appropriate applications, could have achieved compliance in this manner, and that compliance was therefore not beyond its reasonable control.

For the requested one year variance period, Guadalupe testified that the operation of the candlestick flare would result in excess emissions of 741 pounds of nitrogen oxides (NO<sub>x</sub>) and 15,841 pounds of carbon monoxide (CO) if the candlestick flare operated full time at its capacity. Guadalupe noted that this was a “worst case” scenario for excess emissions, and that it was likely full time operation would not be necessary.

The District testified that it recognized the likelihood that gas generated at the landfill would exceed the capacity of the existing enclosed flare at some point in the future. The District stated that if it became apparent that landfill gas generation was exceeding the capacity of the existing enclosed flare, it would work with Guadalupe in the enforcement context to allow temporary operation of a candlestick flare as necessary to control gas generation beyond the capacity of the existing enclosed flare.

### **DISCUSSION**

As a preliminary matter, Guadalupe is not now out of compliance, but expects noncompliance to occur at some future point. Such a factual situation would normally raise a question regarding whether noncompliance is sufficiently imminent to be the subject of a variance. However, since, as explained below, Guadalupe has not shown that the variance criteria would otherwise be met, the Hearing Board need not decide this question.

The Hearing Board may grant a variance upon finding that the six criteria set forth in Health and Safety Code section 42352(a) are met. The burden is on the Guadalupe to establish the basis for making each of the six findings. In this matter, Guadalupe has not provided sufficient evidence to demonstrate that, due to circumstances beyond the reasonable control of Guadalupe, denying the Application for Variance from Regulation 8, Rule 34, Section 301.1, would result in an arbitrary or unreasonable taking of property.

The evidence establishes that Guadalupe could have predicted well in advance that the Engines would likely not meet the January 1, 2012, date for compliance with Regulation 9-8. It was likewise evident that due to the expected increasing capacity of the landfill, the Guadalupe would have to find a way to control these additional gases by January of 2012. This raises the question of whether Guadalupe took all reasonable steps to achieve compliance.

The answer to this question rests, to a significant extent, on the details of Guadalupe's interaction with the City of San Jose to obtain needed building permits and other regulatory approvals. As the City of San Jose was not a party to or otherwise present in this proceeding, and as the District and Guadalupe presented somewhat conflicting testimony on this point, most of all of which is hearsay, it is difficult for the Hearing Board to reach any conclusion in this regard. It is clear, however, that Guadalupe does not presently have approvals necessary to install a new enclosed flare at the location of the existing flare – the approach that the District contends was within Guadalupe's reasonable control to achieve.

Even if it is accepted that the need for a Variance was due to circumstances beyond Guadalupe's reasonable control, Guadalupe has not demonstrated that non-compliance would result in an arbitrary or unreasonable taking of property. Guadalupe's testimony that it would cost \$1,000,000 to install a new enclosed flare at the location of the existing flare and an

additional \$250,000 to later move it to a new location was lacking in supporting documentation. Moreover, whether this cost would constitute an arbitrary or unreasonable taking of property would depend in part on the amount of time the new enclosed flare would be expected to operate at the site of the existing flare. However, it is the sense of the Hearing Board that both the beginning and ending of this time period are, at present, indeterminate.

It is noteworthy that the District stated repeatedly at the hearing that it was prepared to work with Guadalupe to allow the use of a candlestick flare if that should become necessary to control landfill gases. This should provide assurance that, despite a denial of the Application for Variance, the parties will work together to avoid excess emissions.

**SPECIFIC FINDINGS**

The Hearing Board finds pursuant to Health and Safety Code section 42352 that:

The circumstances leading to the Guadalupe's noncompliance with District Regulation 8, Rule 34, Section 301.1, if it occurred, would not result in an arbitrary or unreasonable taking of property for reasons that are beyond the Guadalupe's reasonable control, and that a finding pursuant to Section 42352(a)(2) cannot be made to support the issuance of a variance.

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THEREFORE, THE HEARING BOARD ORDERS:

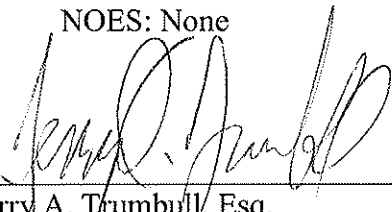
Variance from Regulation 8, Rule 34, Section 301 of the Bay Area Air Quality Management District Rules and Regulations is hereby denied.

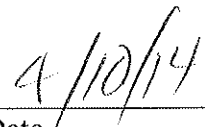
Moved by: Valerie J. Armento, Esq.

Seconded by: Peter Chiu, M.D.

AYES: Terry A. Trumbull, Esq., Julio Magalhães, Ph.D., Gilbert Bendix, P.E., Peter Chiu, M.D., and Valerie J. Armento, Esq.

NOES: None

  
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Terry A. Trumbull, Esq.

  
\_\_\_\_\_  
Date

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

In the Matter of the Application of

GUADALUPE RUBBISH DISPOSAL  
COMPANY, INC.,

For Regular Variance from Regulation 8, Rule  
34, Section 301.1, and CARB Landfill  
Methane Rule, Section 95464(b)(2)(A) (Plant  
#A3294).

NO. 3658

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA

City and County of San Francisco

ss.

I, Sean Gallagher, do hereby certify under penalty of perjury as follows:

That I am a citizen of the United States, over the age of eighteen years and not a party to the  
above entitled action; that I served a true copy of the attached Order Denying Variance on:

**Mike Rivera**  
**Guadalupe Rubbish Disposal Company, Inc.**  
**P.O. Box 20957**  
**San Jose, CA 95160**

by depositing same in the United States certified mail, return receipt requested, on April 17, 2014; and  
on

**Adan Schwartz**  
**Bay Area Air Quality Management District**  
**939 Ellis Street, 7<sup>th</sup> Floor**  
**San Francisco, CA 94109**

by hand-delivery deposit of same in the in-box of the District Counsel's office, on April 17, 2014.

DATED: April 17, 2014

  
Sean Gallagher  
Clerk of the Boards