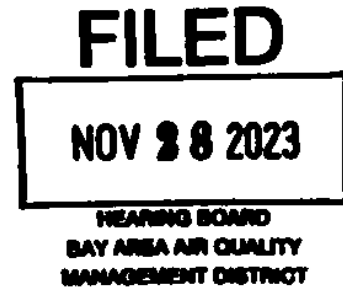


Farimah Faiz Brown, City Attorney (State Bar No. 201227)
Marc Shapp, Deputy City Attorney (State Bar No. 266805)
BERKELEY CITY ATTORNEY'S OFFICE
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704
Telephone: (510) 981-6998
Facsimile: (510) 981-6960
Email: MShapp@berkeleyca.gov

Attorneys for City of Berkeley



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

In the Matter of the)	Docket No. 3747
)	
AIR POLLUTION CONTROL OFFICER)	NOTICE OF DEFENSE
of the BAY AREA AIR QUALITY)	
MANAGEMENT DISTRICT)	
Complainant,)	
vs.)	
BERKELEY LANDFILL)	
Respondent.)	

TO THE HEARING BOARD OF THE BAY AREA AIR QUALITY MANAGEMENT
DISTRICT:

The City of Berkeley (Berkeley), a respondent in the above-entitled proceeding, through the undersigned counsel, hereby specifically denies all, or parts, of the Accusation not expressly admitted. (Health & Safety Code, § 11506; Hearing Board Rules, § 4.5.b]

Berkeley requests a hearing in said proceeding, to be held no sooner than 30 days from the date of this Notice of Defense, to permit Berkeley to present its defenses to the allegations in the Accusation filed in this proceeding.

Additionally, Berkeley objects to hearing this matter on December 5, 2023, as requested by the Air Pollution Control Officer of the Bay Area Air Quality Management District (Air

1 District) in the Accusation filed in this proceeding, and as recently noticed by the Clerk of the
2 Boards. Berkeley makes this objection on three grounds.

3 First, the November 27, 2023 Notice of Hearing filed and served by the Clerk of the
4 Boards does not provide sufficient notice as a matter of law. Orders for abatement may only
5 issue after notice and a hearing “pursuant to Chapter 8 (commencing with Section 40800) of Part
6 3” of Division 26 of the Health and Safety Code. (Health & Safety Code, § 42450.) No hearing
7 may proceed unless it is preceded by notice “not less than 10 days prior to such hearing.”
8 (Health & Safety Code, § 40823, subd. (a).) November 27, 2023 is only 8 days prior to the
9 noticed hearing date of December 5, 2023. To the extent the Hearing Board Rules purport to
10 allow a shorter notice period via Cross-Applications (see Hearing Board Rules, § 4.9), they
11 cannot supersede a statutory requirement to the contrary. Because the November 27, 2023
12 Notice of Hearing provides inadequate notice as a matter of statute, no hearing may be held on
13 December 5, 2023 regarding the Accusation.

14 Second, Cross-Application under Hearing Board Rules, rule 4.9, does not apply in any
15 event because Berkeley’s pending variance request, Hearing Board Docket No. 3741, and the
16 instant proceeding are not “both filed on the same subject matter.” (Hearing Board Rules, § 4.9.)
17 Although both cases relate to the same permitted facility, the issues are distinct. Berkeley’s
18 variance request is to allow for additional downtime beyond the 240 hours provided under Air
19 District Regulation 8-34-113.2 or to approve Berkeley’s application for less than continuous
20 operation of its landfill gas flare. Less than continuous operation of a landfill gas flare may be
21 granted when “a landfill is not generating enough landfill gas to operate the emission control
22 system continuously.” (Air District Regulation 8-34-404.) Meanwhile, the Accusation is based
23 on insinuations that Berkeley’s system is not collecting landfill gas due to maintenance issues
24 (Accusation, ¶ 12), and speculation that there is offsite migration of landfill gas (*id.*, ¶ 22). In
25 other words, the Accusation *assumes* that the landfill is generating enough landfill gas for
26 Berkeley to operate its flare. Moreover, the Accusation expressly states that the requested Order
27 of Abatement is not intended to act as a variance. (*Id.*, ¶ 27.) Because the facts and issues are
28

1 distinct between Berkeley's pending variance application and the instant Accusation, Cross-
2 Application under Hearing Board Rules, § 4.9, is not appropriate.

3 Third, hearing both matters on December 5, 2023 "would impose an undue hardship" on
4 Berkeley. (Hearing Board Rules, § 4.9.) As demonstrated above, the Clerk of the Boards noticed
5 the hearing in the instant matter with only 8 days' prior notice. Even if such notice were legally
6 sufficient (which it is not), Berkeley should be allowed sufficient time prepare its defense of the
7 Accusation. Concurrent with the Accusation, the Air District provided Berkeley with a
8 "Statement to Respondent" that, among other things, advises Berkeley of its right "to inspect and
9 copy the items mentioned in Section 11507.6 of the Government Code in the possession,
10 custody or control of the Bay Area Air Quality Management District." Under section 11507.6,
11 Berkeley has up to 30 days to inspect and copy documents, including "[a]ll writings, including,
12 but not limited to, reports of mental, physical, and blood examinations and things which the
13 party [*i.e.*, the Air District] then proposes to offer in evidence," and "[a]ny other writing or thing
14 which is relevant and which would be admissible in evidence." (Gov. Code, § 11507.6, subd. (d)
15 and (e).) A hearing on December 5, 2023, deprives Berkeley of the time allotted by statute to
16 exercise its right to inspect the Air District's records related to the Accusation, rendering
17 Berkeley's statutory discovery rights illusory. Preventing Berkeley from obtaining information
18 relevant to the case, and to which Berkeley is entitled as a matter of law, imposes an undue
19 burden.

20 For the foregoing reasons, Berkeley requests a hearing in the above-captioned
21 proceeding, to be held no sooner than 30 days from the date of this Notice of Defense.

22 Dated: November 28, 2023

23 Respectfully submitted,

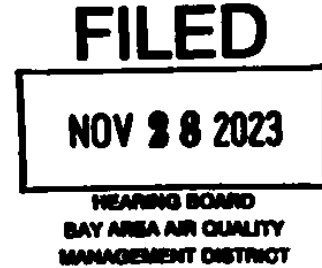
24 BERKELEY CITY ATTORNEY'S OFFICE

25
26
27 By: _____

Marc Shapp
Attorney for the City of Berkeley

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BAY AREA AIR QUALITY MANAGEMENT DISTRICT
STATE OF CALIFORNIA

In the Matter of the)	Docket No. 3747
)	
AIR POLLUTION CONTROL OFFICER)	CERTIFICATE OF SERVICE
of the BAY AREA AIR QUALITY)	
MANAGEMENT DISTRICT)	
Complainant,)	
vs.)	
BERKELEY LANDFILL)	
Respondent.)	

I, the undersigned, certify that I am employed in the City of Berkeley, County of Alameda, California; that I am over the age of eighteen years and not a party to the within action; that my address is 2180 Milvia Street, 4th Floor, Berkeley, California 94704. On this date, I served the following document(s):

▪ **NOTICE OF DEFENSE**

on the party(ies) listed below, through their attorneys of record, by placing a true copy thereof in a sealed envelope addressed as shown below by the following means of service:

1 Joel Freid
2 Assistant Counsel II
3 Legal Division
4 Bay Area Air Quality Management District
5 375 Beale Street, Suite 600
6 San Francisco, CA 94105
7 Tel: (415) 749-4971 / Fax: (415) 749-5103
8 Email: JFreid@baaqmd.gov.

9
10 **X** **By First Class Mail** - I am readily familiar with the firms' practice for collection and
11 processing of correspondence for mailing. Under that practice, the correspondence is
12 deposited with the U.S. Postal Service on the same day as collected, with first-class
13 postage thereon fully prepaid, in Berkeley, California for mailing to the office of the
14 addressee following ordinary business practices.

15
16 I declare under penalty of perjury under the laws of the State of California that the
17 foregoing is true and correct. Executed November 28, 2023, at Berkeley, California.

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Celestine Seals