



City Attorney's Office

January 21, 2023

Via Email

Honorable Valerie Armento, Esq., Chair
Members of the Hearing Board
Bay Area Air Quality Management District Hearing Board
375 Beale Street, Suite 600
San Francisco, California 94105

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HEARING BOARD
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

RE: In Matter of the Application of Berkeley Landfill (Hearing Board Docket No. 3741)

Dear Chair Armento and Members of the Hearing Board,

By this letter, Applicant in the above-referenced matter, the City of Berkeley (Berkeley), **objects to and requests to strike from the record** the Opposition to Regular Variance – Berkeley Landfill Hearing Board Docket No. 3741 (Opposition), filed on January 20, 2024 on behalf of Variance Respondent Air Pollution Control Officer of the Bay Area Air Quality Management District (Air District). The Opposition is untimely under the Rules of the Bay Area Air Quality Management District Hearing Board (Hearing Board Rules) and must be disregarded as such.

The Opposition purports to respond to Berkeley's variance application, which was filed on May 30, 2023. Responses to an application for a variance "must be filed and served at least five (5) working days prior to the hearing." (Hearing Board Rules, § 7.1.b.) However, because the Opposition was filed on the Saturday evening prior to the upcoming hearing on Tuesday, January 23, 2024, the Air District has filed the Opposition only *one working day* prior to the hearing. The Opposition is therefore an untimely pleading filed contrary to the Hearing Board Rules.

To the extent the Opposition is construed as the Air District's Opening Brief (see Hearing Board Rules, § 7.5), it is also untimely. ["The respondent's opening brief shall be filed five (5) working days prior to the hearing."] Indeed, not only is the Opposition untimely, but as an Opening Brief it is also prejudicial to Berkeley, for at least two reasons.

First, because the Opposition was filed *one working day* prior to the hearing, it deprives Berkeley of the opportunity to prepare and file reply papers, as would otherwise be its right. (Hearing Board Rules, § 7.5.b ["[A]ll reply papers shall be filed at least two (2) working days before the time scheduled for the hearing."])

Second, there is simply no reason for the late filing of the Opposition. The Air District has had *two months* to prepare a response to Berkeley's Opening Brief, rather than the 5 days allowed under Hearing Board Rule 7.5.b. As the moving party, Berkeley's Opening Brief was due "at least 10 working dates prior to the hearing." (Hearing Board Rules, § 7.5.b.) On October 23, 2023, the

Clerk of the Boards filed and served a Notice of Continued Hearing, setting the hearing in this matter for December 5, 2023. Accordingly, on November 20, 2023, Berkeley timely filed its Opening Brief and Motion to Permit Amendment to Variance Application. Based on the December 5 hearing date, the Air District's Opening Brief should have been filed on November 28, 2023. (Hearing Board Rules, § 7.5b.) However, rather than file a responsive Opening Brief, the Air District instead attempted on November 27, 2023 to notice a hearing of its separately-filed Accusation (Hearing Board Docket No. 3741) for December 5, 2023 as well. The November 27, 2023 Notice of Hearing was untimely filed and served, depriving Berkeley of the legally mandated 10-day notice period under Health and Safety Code section 42450. Despite the Air District's failure to follow the law, Berkeley agreed to continue the hearing on its variance application to allow this matter to be heard on the same date as the Air District's Accusation, in order to make the most efficient use of the Hearing Board's time and resources. Allowing the Air District to file an Opening Brief at this late stage would effectively penalize Berkeley for the Air District's mistake.

In a November 29, 2023 email to the Clerk of Boards informing that the parties had agreed to continue the December 5, 2023 hearing date, attorney for the Air District, Joel Freid, invited the Hearing Board to request briefing from the Air District. (See also, Hearing Board Rules, § 2.4.) No such request was made. The Hearing Board should not now consider an untimely and unrequested filing to which the City of Berkeley has been denied any reasonable time to respond by the Air District's lack of diligence.

Sincerely,



Marc Shapp
Deputy City Attorney

Cc: Joel Freid (jfreid@baaqmd.gov)