

FILED

JAN 05 2009

HEARING BOARD
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

Lisa Harper
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 Applications of)
)
5 **CITY OF SAN JOSE MUNICIPAL**) No. 3561
6 **WATER SYSTEM.**)
) ORDER DENYING VARIANCE
7 For Variance from Regulation 2, Rule 1,)
8 Section 307, and Permits to Operate)
Condition 22820, Parts 1 and 2)

The above-entitled matter is an Application for Variance from the provisions of Regulation 2, Rule 1, Section 307 of the Rules and Regulations of the Bay Area Air Quality Management District (the "District"), and from the provisions of Condition 22820, Parts 1 and 2, of the Permits to Operate under which the City of San Jose Municipal Water System operates diesel engines at its emergency water supply pumping stations at 185 Nortech Parkway in San Jose, California, District Plant No. 18917; Variance Application No. 3561 ("Nortech Facility"), and at 491 West Trimble Road in San Jose, California, District Plant No. 18923; Variance Application No. 3560 ("Trimble Facility"): The Applications for Variances were filed on October 6, 2008, and requested relief for the period from October 6, 2008, through October 5, 2009.

Mollie Dent, Senior Deputy City Attorney, appeared on behalf of the City of San Jose Municipal Water System ("Applicant"). Mansour Nasser and Jeffrey Provenzano of the City of San Jose Municipal Water System testified on behalf of Applicant.

Randi Wallach, Assistant Counsel, appeared on behalf of the Air Pollution Control Officer ("APCO"). Brenda Cabral, Supervising Air Quality Engineer, testified on behalf of the District.

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

1 Hearing Board heard the request for variances on December 18, 2008. At the outset of the hearing,
2 the Hearing Board proposed hearing the two matters, Docket Nos. 3560 (Trimble Facility) and
3 3561 (Nortech Facility), in one consolidated hearing. Neither the Applicant nor the District
4 objected to consolidation. The two matters were heard concurrently.

5 The Hearing Board provided the public with an opportunity to testify at the hearing, as
6 required by the Health and Safety Code. No members of the public testified. The Hearing Board
7 heard evidence, testimony and argument from Applicant and the APCO. The APCO opposed the
8 granting of the variances.

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

12 BACKGROUND

13 Applicant operates a municipal water system in the City of San Jose. The Applications for
14 Variances relate to activities and equipment at two of the municipal water system's pumping stations,
15 the Nortech Facility and the Trimble Facility. With regard to the activities and equipment subject to
16 the Variance Applications, Applicant is a public agency, the City of San Jose, operating an essential
17 public service, water delivery, for the purposes of Health and Safety Code section 42352.

18 The Nortech and Trimble Facilities are each equipped with one 3-million gallon water storage
19 tank and three diesel-engine driven pumps (collectively, the "Diesel Engines"). The Diesel Engines
20 were installed and began operations at the Trimble Facility in 1979 and at the Nortech Facility in
21 1997. Until approximately April, 2006, Applicant testified that it operated the Diesel Engines as
22 emergency/standby engines, solely for testing and maintenance purposes and for pumping water in
23 emergency situations. Beginning in or about April, 2006, Applicant testified that it began operating
24 the Diesel Engines to circulate the water in the water storage tanks on a more regular basis, in order to
25 maintain water quality standards. Periodic circulation of the water became necessary to maintain
26 water quality because the water supply converted from using chlorine to chloramine for disinfection.

1 Applicant applied for Permits to Operate the Diesel Engines in January, 2008. In its permit
2 applications, Applicant designated the Diesel Engines as emergency/standby engines. There was
3 some correspondence between the Applicant and the District regarding whether the engines were
4 operated as prime or emergency/standby engines, how many hours they were operated, and for what
5 purposes. The District indicated that it could not permit the Diesel Engines as prime engines unless
6 particulate filters were installed and/or the engines were replaced with new engines meeting the
7 California Air Resources Board's Airborne Toxic Control Measure for Stationary Compression
8 Ignition Engines, title 17, California Code of Regulations section 93115 ("ATCM") emissions
9 standards. Among other requirements, the ATCM imposes emissions control standards on prime
10 diesel engines, and limits the operation of emergency/standby engines to operation for emergency
11 purposes plus up to 20 hours per year for reliability-related testing. The Applicant indicated it would
12 operate the engines as emergency/standby engines, and on April 15, 2008 and May 14, 2008, the
13 District issued Permits to Operate. To incorporate the requirements of the ATCM for
14 emergency/standby diesel engines, Condition 22820, Parts 1 and 2, of the Permits to Operate limits
15 the operation of the Diesel Engines to 20 hours per year per engine for reliability-related testing and
16 unlimited operations to mitigate emergency conditions or to conduct emission testing to show
17 compliance with District, State, or Federal emissions limits.

18 Subsequent to receipt of the Permits to Operate, Applicant determined it would need to
19 operate the Diesel Engines as prime engines, for purposes of pumping water to maintain water
20 quality, and thus could not comply with Condition 22820, Parts 1 and 2 of the Permits to Operate.
21 Applicant thereafter applied for the subject Variances, requesting relief from Condition 22820, Parts
22 1 and 2 of its Permits to Operate and District Regulation 2, Rule 1, Section 307¹ for twelve months,
23

24
25 ¹ Regulation 2, Rule 1, Section 307 of the District Rules and Regulations provides that a person shall not operate
26 any article, machine, equipment or other contrivance, for which an authority to construct or permit to operate has been
issued, in violation of any permit condition imposed pursuant to Section 2-1-403.

1 during which time Applicant would purchase and install new diesel engines or electric engines that
2 would comply with the ATCM and could be operated as prime engines.

3 In its Variance Applications, Applicant estimated that it would need to operate each Diesel
4 Engine approximately 208 hours per year to circulate the water to maintain water quality standards.
5 At the hearing Applicant testified that it may need to operate each Diesel Engines 333 hours per year
6 during the variance period, for a total of 1,000 hours of operations per facility per year to circulate the
7 water to maintain water quality standards and Applicant moved to amend its Variance applications
8 accordingly.

9 Air contaminants emitted by the Diesel Engines include diesel particulate matter, a known
10 carcinogen, nitrogen oxides (NOx), sulfur dioxide (SO2), volatile organic compounds, and carbon
11 monoxide (CO). At the hearing, Applicant introduced into evidence Exhibit 1, which documents
12 calculations of excess emissions from the Diesel Engines during the requested variance period, as
13 calculated by the District and stipulated to by the Applicant. The District did not object to Exhibit 1
14 being introduced into evidence, and the Hearing Board accepted the document into evidence.

15 DISCUSSION

16 The Hearing Board may grant a variance upon finding that the six criteria set forth in Health
17 and Safety Code section 42352 are met. The burden is on Applicant to establish the basis for making
18 each of the six findings. In this matter, Applicant has not provided sufficient evidence to demonstrate
19 that, due to circumstances beyond the reasonable control of Applicant, requiring immediate
20 compliance with Condition 22820, Parts 1 and 2 and District Regulation 2, Rule 1, Section 307,
21 would impose an unreasonable burden upon an essential public service, as is required by Health and
22 Safety Code section 42352(a)(2) prior to issuance of variances.

23 Applicant's operation of the Diesel Engines has been subject to District Regulations since
24 2001, and subject to the ATCM since it was promulgated in 2004. On September 1, 2001, the
25 District removed the exclusion from District permitting requirements for emergency/standby diesel
26

1 engines that previously existed at District Regulation 2, Rule 1, Section 114.2.3. After the exclusion
2 was removed, Applicant was required to obtain District Permits to Operate the Diesel Engines.

3 Although Applicant's operation of the Diesel Engines was subject to District permitting
4 requirements since 2001, Applicant did not apply with the District for Permits to Operate until
5 January, 2008. It obtained Permits to Operate in April and May, 2008, but now cannot comply with
6 Condition 22820, Parts 1 and 2 of the Permits to Operate because it needs to operate the Diesel
7 Engines as prime engines, for purposes of circulating water in its water storage tanks to maintain
8 water quality, and its Permits to Operate are for emergency/standby engines, only authorizing
9 operation of the Diesel Engines for use in emergencies and for reliability-related testing.

10 In addition, Applicant has been out of compliance with the ATCM since its inception.
11 Monitoring, recordkeeping and reporting obligations under the ATCM commenced for both
12 emergency/standby and prime engines in 2005, an hours limitation for emergency/standby engines
13 began on January 1, 2006, and an emissions limitation for prime engines phased in starting on
14 January 1, 2007. Applicant failed to meet these deadlines and continues to operate the Diesel Engines
15 in noncompliance with the ATCM.

16 At the hearing, Applicant explained that it did not know that it was required to have permits
17 for the Diesel Engines or comply with the ATCM until new management instituted a review of
18 environmental permitting requirements pursuant to an ISO 14001 environmental management system
19 in 2007. Applicant acknowledged that this was not an excuse for its delay in applying for Permits to
20 Operate the Diesel Engines to comply with District Regulations and the ATCM.

21 As a general rule, persons subject to District regulations are responsible for determining which
22 regulations apply to them and whether they are in compliance. The present Variance Applications
23 present no unusual circumstances that might support an exception to this rule.

24 Accordingly, Applicant has not shown that its need for Variances was due to circumstances
25 beyond Applicant's reasonable control.

26

1 SPECIFIC FINDINGS

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

3 The circumstances leading to the Applicant's noncompliance with District Regulation 2, Rule
4 1, Section 307 and with the provisions of Condition 22820, Parts 1 and 2, of the Permits to Operate
5 under which Applicant operates the Nortech Facility and Trimble Facility were not beyond the
6 Applicant's reasonable control, and that a finding pursuant to section 42352(2) cannot be made to
7 support the issuance of Variances.

8 THEREFORE, THE HEARING BOARD ORDERS:

9 Variances from Regulation 2, Rule 1, Section 307 of the Bay Area Air Quality
10 Management District Rules and Regulations and from the provisions of Condition 22820, Parts 1
11 and 2, of the Permits to Operate under which Applicant operates the Nortech Facility and Trimble
12 Facility are hereby denied.

13 Moved by: Terry A. Trumbull, Esq.

14 Seconded by: Rolf Lindenhayn, Esq.

15 AYES: Christian Colline, P.E., Rolf Lindenhayn, Esq., Julio Magalhães, Ph.D.,
16 Terry A. Trumbull, Esq., and Thomas M. Dailey, M.D.

17 NOES: None

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19
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21 _____
Thomas M. Dailey, M.D., Chair

1-5-09
22 _____
Date