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Attorneys for Respondents
BROWNING-FERRIS INDUSTRIES
OF CALIFORNIA, INC. and REPUBLIC
SERVICES, INC.

BEFORE THE HEARING BOARD OF THE

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

In the Matter of SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *Petitioner,* *vs.* BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC., a California Corporation and wholly-owned subsidiary of REPUBLIC SERVICES, INC., a California Corporation, dba SUNSHINE CANYON LANDFILL, [Facility ID No. 49111] *Respondents.*	CASE NO. 3448-14 RESPONDENTS' ANSWER TO PETITION FOR ORDER OF ABATEMENT Health and Safety Code § 41700 and District Rule 402

Respondents Browning-Ferris Industries of California, Inc. ("BFIC") and Republic Services, Inc. ("Republic") hereby Answer the Petition for Order of Abatement of Petitioner South Coast Air Quality Management District ("SCAQMD" or "District").

Response to Allegations of Petition

Answering each paragraph of the Petition, Respondents admit, allege and deny as follows:

1. Answering paragraph 1, Respondents admit Petitioner SCAQMD is a governmental entity established pursuant to the California Health and Safety Code. Except as so expressly admitted, Respondents deny each and every remaining allegation of paragraph 1.

2. Answering paragraph 2, Respondents admit that Respondent BFIC owns and operates the Sunshine Canyon Landfill, which is located at 14747 San Fernando Road, Sylmar, California 91342. Except as so expressly admitted, Respondents deny each and every remaining allegation of paragraph 2.

3. Answering paragraph 3, Respondents allege that District Rule 402 is a verbatim copy of the subsection (a) of Health and Safety Code §41700. Except as so expressly admitted, Respondents deny each and every remaining allegation of paragraph 3.

4. Answering paragraph 4, Respondents admit that the Sunshine Canyon Landfill is operated by Respondent BFIC under a Solid Waste Facilities Permit issued by the California Integrated Waste Management Board, which was the predecessor agency to the California Department of Resources Recycling and Recovery. Respondents admit that the Landfill performs a vital public service to the residents, businesses and institutions of the City of Los Angeles and the residents, businesses, institutions and numerous municipalities in Los Angeles County. The Landfill currently receives approximately 9,000 tons of non-hazardous municipal solid waste for sanitary disposal in accordance with its vested permits each weekday, and also receives waste on Saturdays. Except as so expressly alleged and admitted, Respondents deny each and every remaining allegation of paragraph 4.

5. Answering paragraph 5, Respondents admit that landfill gas is generated in the Landfill and that such gas contains methane and carbon dioxide among its components. Except as

so expressly alleged and admitted, Respondents deny each and every remaining allegation of paragraph 5.

6. Answering paragraph 6, Respondents admit that landfill gas is collected in a state-of-the-art landfill gas collection system at the Landfill. This gas is flared at multiple flares located at the Landfill, and these flares destroy the landfill gas so that it is no longer odorous. Furthermore, the Landfill's gas collection system also delivers landfill gas to a renewable energy (electric generation) plant at the site, which also destroys landfill gas and thus renders it odorless. Except as so expressly alleged and admitted, Respondents deny each and every remaining allegation of paragraph 6.

7. Answering paragraph 7, Respondents deny each and every allegation of this paragraph. Further, Respondents allege that the Landfill's surface emissions monitoring results demonstrate the Landfill is in compliance with federal New Source Performance Standards (NSPS) requirements as well as SCAQMD Rule 1150.1 for the control of odorous emissions from landfills.

8. Answering paragraph 8, Respondents deny each and every allegation of this paragraph. Furthermore, Respondents allege that the large majority of the complaints received by the District on its telephone hotline and through other means are from a relatively small group of individuals, many of whom are organized via a "Google Group" email alert chain and other means, which were formed for the purpose of generating high complaint numbers for goals unrelated to perceived landfill odors, and that any odors that have been detected have been faint and fleeting, which would not qualify as "nuisance odors" under published SCAQMD criteria.

9. Answering paragraph 9, Respondents deny each and every allegation of this paragraph.

10. Answering paragraph 10, Respondents deny each and every allegation of this paragraph.

11. Answering paragraph 11, Respondents deny each and every allegation of this paragraph.

12. Answering paragraph 12, Respondents admit that the District has purported to issue "Notices of Violation" ("NOVs") to Respondent BFIC, but denies that these NOVs were properly

issued and alleges these NOVs were issued contrary to law and regulation, including the District's own published guidelines. Except as so expressly alleged and admitted, Respondents deny each and every remaining allegation of paragraph 12.

13. Answering paragraph 13, Respondents admit that BFIC has implemented numerous odor control measures through several previous Stipulated Orders for Abatement and further allege Respondent BFIC is continuing to implement odor control measures on its own initiative and also in cooperation with the SCL-LEA, which is the Local Enforcement Agency with jurisdiction over Sunshine Canyon.

14. Answering paragraph 14, Respondents admit the allegations of this paragraph.

15. Answering paragraph 15, the allegations of this paragraph are vague and ambiguous, and on that basis Respondents deny each and every allegation of this paragraph.

16. Answering paragraph 16, Respondents admit that there are multiple governmental agencies with jurisdiction over the Landfill and its permits and admit that *force majeure* events such as those described in this paragraph may interfere with Respondent BFIC's performance of any abatement order the Hearing Board might issue; however, Respondents deny that any grounds exist for an abatement order to be issued in this proceeding.

17. Answering paragraph 17, Respondents admit the allegations of this paragraph.

18. Answering paragraph 18, Respondents admit the SCL-LEA report was prepared and is available online, but do not admit the conclusions or findings in the report, and on that basis deny each and every remaining allegation of this paragraph.

19. Answering paragraph 19, Respondents deny each and every allegation of this paragraph.

20. Answering paragraph 20, Respondents deny each and every allegation of this paragraph.

21. Answering paragraph 21, Respondents deny each and every allegation of this paragraph.

22. Answering paragraph 22, Respondents deny each and every allegation of this paragraph.

23. Answering paragraph 23, Respondents deny each and every allegation of this paragraph.

24. Answering paragraph 24, Respondents deny each and every allegation of this paragraph.

25. Answering paragraph 25, Respondents lack information as to the District's intentions, and on that basis deny each and every allegation of this paragraph.

Defenses

26. Respondent Republic Services, Inc. does not own or operate the Sunshine Canyon Landfill. It is therefore not a proper respondent in this proceeding and should be dismissed.

27. The alleged odors from the Sunshine Canyon Landfill, if they do occur off site at all, which Respondents deny, do not qualify as a "nuisance" under §41700 of the California Health and Safety Code or under Rule 402 of the SCAQMD.

28. The alleged odors from the Sunshine Canyon Landfill, if they do occur off site at all, which Respondents deny, do not constitute a "nuisance" under California law and do not establish grounds for the taking or reduction of Respondent BFIC's vested property rights in the Sunshine Canyon Landfill, including the Landfill's permitted hours of operation and allowed daily tonnage receipts.

29. The alleged odors from the Sunshine Canyon Landfill, if they do occur off-site at all, which Respondents deny, do not qualify as a "nuisance" under the Odor Chart published by the SCAQMD, which is the only rule, regulation, procedure, guidance or other document published by the SCAQMD that indicates what intensity of odor is required for an odor to potentially be deemed a nuisance.

30. The SCAQMD has failed to adopt rules, regulations, procedures, guidelines or other publically available rules for objectively determining when and under what circumstances odors from a source may be considered a nuisance and/or warrant the imposition of an abatement order.

31. The SCAQMD has confirmed odor complaints regarding the Landfill in a manner that is not in compliance with the SCAQMD's established rules, regulations, guidelines and procedures.

32. The SCAQMD has issued Notices of Violation to Respondent BFIC in a manner that is not in compliance with the SCAQMD's established rules, regulations, guidelines and procedures.

33. The District's allegations of odor nuisance are based entirely on subjective and unreliable individual reporting and perceptions of odors.

34. The District's detection and "measurement " of odors is based solely on the perception of individual odor inspectors who: (1) are not tested for odor sensitivity and who thus may have a far keener sense of smell than the average person and who among themselves may have very different sensitivities to odors, making the confirmation of odors and the issuance of NOVs by different inspectors non-uniform and arbitrary; (2) are subject to the development of subjective bias and influence due to their prolonged multi-year acquaintance with certain individuals who repeatedly complain about landfill odors, leading such inspectors to form personal friendships and bonds with odor complainants; and (3) the District's compensation structure for individual inspectors at Sunshine Canyon creates a financial incentive for inspectors to confirm odor nuisances and issue Notices of Violation to Sunshine Canyon.

35. There is no way for the District to determine if its Rule 402 is being applied uniformly among its inspectors and to different facilities that are inspected by different inspectors, because the District refuses to test its inspectors for their odor sensitivity and District inspectors are not using any objective or scientific instrumentation to measure the intensity of odors.

36. All scientific and objective evidence regarding the alleged odors caused by the Landfill does not show that the Landfill is a source of nuisance level odors.

37. All scientific and objective evidence regarding potential air emissions from the Landfill does not show that the Landfill represents a cancer risk, or is causing any measurable air contamination, or is a threat to human health, or causes any injury or detriment to individuals living in the vicinity of the Landfill.

38. There are numerous alternate sources of odor in the vicinity of the Landfill, which cause odors that are attributed to the Landfill.

39. Respondent BFIC has vested property rights in its Landfill permits, including its right to operate during the hours specified in its permits and to receive the maximum tonnage

allowed in its permits. These permits were issued after full environmental review and analysis and were approved by the City Council of the City of Los Angeles, the Los Angeles County Board of Supervisors and the California Integrated Waste Management Board. Respondent BFIC has been operating the Landfill in substantial compliance with its permits. The Landfill performs a vital public service to the residents, businesses, institutions and municipalities in Los Angeles County, including the sanitary disposal of the majority of the solid waste generated in the City of Los Angeles. Respondent BFIC operates the Landfill in accordance with standard practices in the solid waste industry.

40. The proposed reduction on tonnage receipts at the Landfill will have no beneficial effect on the potential for the Landfill to emit odors and is arbitrary and capricious, and punitive.

41. It is not within the jurisdiction of the SCAQMD or the Hearing Board to order a reduction in the daily tonnage receipts at the Landfill, or the manner in which a reduction in daily tonnage receipts at the Landfill would be accomplished, if any.

42. Respondents have been denied full and timely access to the un-redacted complaint records and Notice of Violation records of the SCAQMD and therefore Respondents have been denied the ability to properly prepare a defense to the Petition, thus denying Respondents due process of law. The un-redacted records contain exculpatory evidence that would be valuable in cross-examining members of the public and SCAQMD and third party witnesses at the Hearing Board hearing

43. The alleged odors from the Sunshine Canyon Landfill, if they do occur off site at all, which Respondents deny, are primarily due to the effects of the County's ill-advised requirement that the Landfill use nine inches of cover soil each day to cover the working face (the disposal area) of the Landfill and not scrape back the soil the next day when disposal operations start in the same area. This creates relatively impermeable compacted soil lenses within the Landfill waste mass that interfere with the leachate and gas collection systems of the Landfill, and which has caused the watering in of some gas collection wells at the Landfill, which reduces their efficiency.

44. The proposed Abatement Order would deny Respondents due process if adopted by the Hearing Board, as the proposed order would delegate to staff (and not the Hearing Board) the power to impose further abatement measures on Respondent BFIC.

45. The confirmation of odors by District inspectors and the issuance of Notices of Violation to Respondent BFIC has been done in an arbitrary and capricious manner, and not in accordance with any uniform rule or regulation of the SCAQMD and, in fact, in a manner contrary to the SCAQMD's one published guideline on what constitutes an odor nuisance for SCAQMD purposes. The confirmation of odors by District inspectors and the issuance of Notices of Violation to Respondent have been performed in a *ad hoc* and discriminatory manner, using procedures handed down verbally by SCAQMD management to District inspectors that were made up exclusively for Sunshine Canyon, and applied in a discriminatory, unequal basis to the Landfill due to political pressures. As a result, Respondents have been denied equal protection and procedural and substantive due process of law.

46. Health and Safety Code §41700 and District Rule 402 on their face and as interpreted and applied to Respondents by the SCAQMD are unconstitutionally vague.

47. Any decisions regarding potentially conflicting land uses should be made by the County of Los Angeles and the City of Los Angeles, who have land use authority over the Landfill and surrounding areas.

48. The proposed Abatement Order will result in the diversion of large amounts of waste to the Simi Valley, Chiquita Canyon and El Sobrante landfills each weekday. If the diversion required is 3,000 tons a day, for example, most of the waste will be sent in approximately 175 transfer vans to the Chiquita Canyon and El Sobrante landfills, which would result in longer haul distances for trucks, over congested freeways farther from the Los Angeles centroid than Sunshine Canyon. Some direct haul collection trucks that currently go directly to Sunshine Canyon for disposal would be redirected to more remote transfer stations, where these collection trucks would unload their waste, and this waste would then have to be transloaded into a transfer van to travel to a landfill, creating more traffic miles and traffic congestion for these collection vehicles, and even more transfer van trips. More trucks would need to be purchased and maintained to haul waste

greater distances and for much longer time periods. More diesel fuel would be consumed. The Abatement Order's proposed reduction in operating hours and the restriction of tonnage coming into the Landfill will have many foreseeable environmental consequences that have not been analyzed or disclosed to the public. The diversion of waste from Sunshine Canyon will create significant environmental impacts, including substantial additional air emissions, greenhouse gas emissions, and traffic impacts associated with the required delivery of waste to more distant landfills and transfer stations. Further, waste kept longer in collection vehicles, transloaded at transfer stations and hauled more distances in transfer vans and for longer haul times will become more odorous, creating odor impacts at more distant transfer stations and landfills. Conversely, the diversion of waste from Sunshine Canyon will have no significant effect on the short or long term generation of landfill gas at the Landfill. These actual and potential impacts are of such magnitude that the consideration of the proposed Abatement Order would require the preparation of an Environmental Impact Report analyzing the environmental impacts of the proposed order, before the Hearing Board considers the proposed Abatement Order. Adoption of the proposed Abatement Order without compliance with the California Environmental Quality Act would violate that Act.

49. The District never provided a substantive response to the letter from Respondent BFIC's counsel dated January 9, 2013, attached hereto as Exhibit A. Therefore, the District has elected to continue its illegal procedures and practices with respect to Sunshine Canyon after having received due notice and objection by Respondent BFIC,

50. The SCAQMD and the Hearing Board do not have jurisdiction over mobile sources.

51. Respondents have not been allowed adequate time to prepare their defense, and have therefore been denied procedural due process.

52. All hearings in this matter should be held at the Diamond Bar offices of the SCAQMD, in accordance with District Rule 509.

53. On information and belief, SCAQMD Hearing Board members have not been appointed in compliance with Health and Safety Code section 40501.1.

54. Respondents reserve the right during the hearing on the proposed Abatement Order to object to any and all proposed measures in the order, and any additional measures proposed

during the hearing. Respondents reserve all defenses and request that this Answer and the defenses herein be amended as necessary to include any additional facts or legal arguments made by Respondents in defense of the proposed Abatement Order, and to conform to the evidence, at the conclusion of the hearing.

August 25, 2016

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January 9, 2013

VIA FEDERAL EXPRESS AND EMAIL

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RE: Sunshine Canyon Landfill (Public Records Act Request Included)

Dear Nick:

I am writing to request a meeting between representatives of Sunshine Canyon (Browning-Ferris Industries of California, Inc.) and the District at your earliest convenience. This letter is organized with an introduction that lays out the developments that we believe warrant a meeting, followed by a summary of the issues we would like to discuss.

I. Introduction.

SCAQMD Hotline Call Numbers and NOVs are at Issue in a Class Action Lawsuit.

As you know, recently a purported class action lawsuit was filed by six individual plaintiffs against our client, Browning-Ferris Industries of California, Inc. (BFI), the owner and operator of the Sunshine Canyon Landfill. These individuals claim to represent a class of plaintiffs residing within a three mile radius of the landfill. The complaint seeks damages for alleged air pollutants, air contaminants and odors which plaintiffs allege are caused by the landfill. You will note in the copy of the complaint we previously provided you, in paragraphs 19 and 20, the plaintiffs make allegations regarding the total number of complaints (1-800-CUT-SMOG hotline calls) that have been received by the SCAQMD regarding landfill odors, as well as allegations regarding the District's notices of violation to BFI.

There is Likely an Organized Effort to Increase SCAQMD Hotline Calls.

The list of class representatives in the complaint caption starts with Mr. Yeshayahu Michaely (aka "Skye Michaels") and his brother Dean Michaels, a lawyer. You may recall that it was Mr. Skye Michaels who circulated a flyer in 2011 and again this year, urging his neighbors

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to call the SCAQMD's 1-800-CUT-SMOG hotline (and not BFI's hotline) every time the outdoor air is less than "clean and fresh smelling." That letter was admitted in evidence before the Hearing Board in November, 2011. To quote from the letter:

> The AQMD Inspector assigned to investigate the Sunshine Canyon Landfill, Larry Israel, will call you back to verify your complaint. If the AQMD gets enough complaints in one day, it has legal authority to issue the company running the dump a legal citation. After enough citations are issued, the AQMD can issue orders of abatement and even institute legal proceedings to shut down the dump. That is what we want!!!
>
> Mr. Michael's letter goes on to say:
>
> So watch out for odors at night or during the early morning hours, and if you smell them call the AQMD as indicated …above. You will quickly develop sensitivity for noticing when the outdoor air is less than clean-and-fresh smelling.

[See attached Exhibit A.]

In July of this year, Mr. Michaels approached BFI with a proposal that BFI purchase his home for an amount more than he paid for it, and stated that he would organize his neighbors to sue the landfill if his demand was not met. BFI declined to meet Mr. Michael's demand.

On August 9, 2012, the Detroit, Michigan law firm of Macuga, Liddle and Dubin, P.C., sent an advertisement on the letterhead of a local Los Angeles law firm it teamed up with, asking residents living near the Sunshine Canyon Landfill to take part in a class action lawsuit against BFI relating to landfill odors. [See attached Exhibit B.] This attorney advertisement stated that residents may be entitled to compensation for odors. This advertisement is very similar to advertisements sent out by the Macuga law firm in recent years to residents living near other landfills in the United States. So the Sunshine Canyon lawsuit represents a national effort by the Macuga law firm to represent residents living around a large number of landfills throughout the country.

There is reason to believe that the total number of Sunshine Canyon odor complaints reported each month by the SCAQMD to public officials, other public agencies and the media is being purposefully influenced by an organized group of neighbors and litigants who may be acting on advice of their counsel—in an effort to exaggerate current landfill odor issues for use as a tool in this litigation.

An indicator of the effectiveness of this organized effort is shown by the extremely low numbers of calls that have been made by residents to the BFI odor complaint hotline in 2011 and 2012 and the Independent Monitor hotline in 2012, despite the efforts of BFI and the Independent Monitor to advertise and encourage calls to their hotlines. The exhortation of Skye

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Michaels in his letter to his neighbors to only call the Air District's 1-800-CUT-SMOG number reflects what is in fact happening.

If local residents truly wanted the landfill Corrective Action Manager and the Independent Environmental Monitor to promptly investigate and respond to odor complaints, and to take corrective action, one would think that residents would heed the request of the Hearing Board that odor complaint calls first be made to the Independent Environmental Monitor or BFI's odor complaint hotline. The fact that almost all odor complaint calls are made solely to the District's 1-800-CUT-SMOG hotline, suggests that the neighbors are playing the numbers game to keep complaint totals high (as Mr. Michael's letter urged).

The Hearing Board Order Requires the Landfill to Receive Prompt Notice of Odor Complaints but it is Being Disregarded.

The Hearing Board intended in its December 11, 2011 Stipulated Order for odor complaint calls to be made to the Independent Environmental Monitor's hotline so that they could be simultaneously transferred to both the landfill's Corrective Action Manager (CAM) and the Air District Inspector. This intent is being disregarded in practice by both residents and the District's Inspector assigned to the landfill, who does not promptly inform the landfill's CAM or the Independent Environmental Monitor when odor complaints are received. Instead, the District Inspector drives to the neighborhood and visits the complainants' homes without informing the landfill CAM or Independent Monitor of the calls until hours after they are received by the District. This makes it practically impossible for the landfill CAM to investigate odors complaints when they occur in the neighborhood or to determine possible contemporaneous causes at the landfill. Recently notice of many complaints in the middle of an afternoon (when complaints are typically extremely rare) was delayed for several hours and long after they had been confirmed by your inspector. This delay in notification makes it more difficult for the landfill or Independent Monitor to reconfirm or refute claims of odors in the neighborhood or to locate alternative sources for these odors through contemporaneous odor investigations at the locations in question.

BFI's Substantial Progress in Odor Control.

BFI has implemented all of the requirements in the Hearing Board's Stipulated Orders of Abatement, and has voluntarily adopted a number of additional odor control measures. BFI personnel have devoted substantial financial resources to odor abatement, and have retained the services of several respected outside engineering firms and gas and odor control consultants to assist the company in implementing additional odor control measures. BFI has voluntarily restricted intra-company transfer vans coming into the landfill before 9 am each day and has worked with third party customers bringing more odorous loads to reduce odors by prohibiting some loads and working to reduce odors in customers' delivery trucks and waste loads. BFI has spent more than $20 million on upgrades to its gas collection and destruction system in the last

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four years and the amount of landfill gas captured has increased from approximately 6,505 scfm in December of 2008 to approximately 15,040 scfm in December of 2012—an increase of 131%.

The objective evidence demonstrates that BFI has made substantial progress in eliminating the landfill as a source of potential off-site odors. This progress is confirmed by BFI's own neighborhood odor monitoring patrols and by the Independent Monitor, even though it has only been partially reflected in a lower number of total calls being made to the 1-800-CUT-SMOG hotline. As discussed below, an analysis of the hotline call data reveals a more positive picture than total call numbers may suggest.

Summary of Proposed Meeting Topics.

For these reasons, we would like to meet with the District at its earliest convenience to discuss: (1) BFI's progress in controlling landfill odors; (2) the data from BFI's odor patrols, as well as from the Independent Monitor, confirming the effectiveness of odor control efforts; (3) BFI's analysis of the complaint data and a discussion of the District's practices in recording and publically reporting on hotline complaints; and (4) the District's standards for issuing notices of violation for alleged odor nuisance.

Based on the background facts described above, we believe this is a good time for the District to evaluate what its practices and standards should be for responding to odor complaints at the Sunshine Canyon Landfill on a going forward basis.

The following discussion presents a summary of the issues we would like to discuss at our meeting.

II. BFI's Progress in Reducing Landfill Gas Odors.

Since our November and December 2011 hearings before the Hearing Board, BFI has implemented the landfill gas system improvements described in the Third Stipulated Abatement Order, which were based on the recommendations of BFI's landfill gas engineers working in concert with members of the District's staff. These improvements included the installation of the temporary flare and new permanent Flare 9, replacement of the perimeter landfill gas header pipeline, upgrading of interior landfill gas collection pipelines where warranted, installation of new blowers to add additional vacuum to the gas collection system, and the installation of 181 new vertical gas collection wells, 9,639 linear feet of horizontal collection wells and 3,823 linear feet of floor gas collection lines. These improvements have significantly increased the landfill's capture and destruction of landfill gas, which if allowed to escape the landfill can be a source of off-site odors.

The total flow rate and thermal value of landfill gas captured by the gas collection and destruction system each day is a good measure of the effect of these improvements. You may recall that the Hearing Board's Stipulated Order of July 11, 2012 required that BFI operate the

landfill gas flares with a combined flow rate of 13,000 scfm by August 10, 2012 and 14,000 scfm by January 1, 2013. While the Order recognized these goals were estimates only, the Order provided that if these goals could not be met, BFI would submit a corrective action plan to the District justifying a different total flow rate. [Amended Stipulated Order for Abatement, signed July 11, 2012, Findings para. 21 at p. 5, Order paras. 2 and 3 at pp. 6-7.] In fact, BFI's gas system improvements have exceeded these goals.

On December 23, 2012, the landfill captured and destroyed 15,446 scfm of landfill gas with a thermal value of 360 MMBTU/hour. The 14 day rolling averages for December 23rd were 15,236 scfm and 363 MMBTU/hour. This equates in rough percentages to a thirty percent increase in combined flow through the landfill gas flares in this four month period (July 23rd to December 23rd).

Similar substantial improvements have been shown in instantaneous and integrated monitoring of emissions from the landfill surface over the past year, although surface monitoring has identified some areas that require additional gas extraction capacity—which have been targeted in the most recent installation of 97 additional vertical extraction wells and work on a dedicated header line for a portion of the County side of the landfill.

BFI also identified that the County requirement that the landfill place, *and not remove*, the nine inches of cover soil at the disposal area or working face every day is reducing the effectiveness of the gas collection system in some areas where surface migration of landfill gas has remained an issue. This is because it acts as an impenetrable lens, causes the gas collection wells to fill up with water, preventing them from collecting landfill gas. BFI has provided the County with the reports of five respected independent experts and engineering firms which all conclude that the County's requirement for the permanent placement of nine inches of soil cover at the landfill working face every day is reducing the effectiveness of the landfill's gas collection system, and have asked that we be allowed to remove this cover soil each morning when beginning disposal operations the next day. Unfortunately, to date, the County has not granted the request and recently informed BFI that the County needed to hire its own expert to evaluate it. We are told the County will take several months to obtain the services of such an expert consultant due to the delays associated with its procurement processes. In the meantime, BFI implemented a program to dewater these existing watered-in wells so they will operate more effectively.

Logic suggests these improvements in the landfill gas collection system should have a corresponding effect on the potential for landfill odors to be noticed off site. As discussed in the next section of this letter, this is in fact what BFI's neighborhood odors patrols, the monitoring by the Independent Environmental Monitor and anecdotal evidence from many residents in the Granada Hills neighborhood have confirmed—landfill odors are only infrequently noticed in the Granada Hills neighborhood, and when they are noticeable, they are almost always faint and fleeting.

III. Community Odor Monitoring Data from BFI's Odor Patrols and the Independent Environmental Monitor.

BFI has an extensive odor monitoring program in the Granada Hills neighborhood where the plaintiffs live. It includes the daily monitoring at 16 fixed monitoring locations in the areas from which odor complaints have been received in the past. The monitoring hours are from 6 am to 10 am and from 8 pm to 11 pm because these are the times in which the vast majority of odor complaints have been received. BFI odor patrol participants have been trained in odor monitoring and the use of the Nasal Ranger and carry Vac-u-Tube bags. At each location on a daily basis BFI's odor monitors record whether any odors are noticeable, no matter how faint, and if odors are noticeable they record odor intensity, characteristics, wind speed and direction, sources of the odor if identified, and other comments. Odor patrol participants have available to them Nasal Rangers and Vac-U-Tube bags to take ambient air samples when odors are deemed strong enough to warrant an air sample being taken. (Although, as BFI has stated in BFI's monthly odor monitoring reports to the District, except for some non-landfill odor sources in the neighborhood, odors when they are detected are too faint to be measured using the Nasal Ranger, even using its lowest dilution threshold.) Odor patrol members electronically record data contemporaneously with their observations while on patrol.

Attached as Exhibit C is a print out of the log of BFI's odor patrol data for the month of November, 2012. Importantly, there were relatively few times that odors were detected by odor patrol members, and when odors were detected, oftentimes non-landfill sources were identified for these odors. This data strongly supports the conclusion that landfill odors are infrequently detected in the areas which have generated past odor complaints, and when odors are detected for which a local source is not identified and the odors could be from the landfill—the odors are faint and fleeting.

Attached as Exhibit D is a print out of the log of odor monitoring data from the Independent Environmental Monitor (Brown and Caldwell) for the month of November, 2012. The data from the Independent Monitor is very similar to the data obtained from BFI's odor patrols, and again supports the conclusion that potential landfill odors in the Granada Hills neighborhoods are very infrequent, and when they do occur they are faint and of short duration.

This conclusion is also consistent with what BFI's odor patrol members have heard from many local residents who often speak with BFI's odor patrol participants when they are doing their neighborhood rounds. With a few exceptions—mostly the plaintiffs in the lawsuit—residents have been complimentary of the efforts of the landfill to control odors and have commented that they have not smelled any landfill odors in quite some time or have noticed a marked reduction in neighborhood odors.

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IV. Analysis of the AQMD Hotline Complaint Data and the District's Ongoing Practices in Recording and Reporting on Hotline Complaints–Public Records Act Request

We previously requested that the District publically release the names and addresses of those individuals who have registered complaints on the District's hotline. Believing that it should keep the names and addresses of complainants confidential, the District has provided us and other agencies with the number of each block of a given street from which a complaint originates, but not the exact address. For example, the complaint information currently published by the District states that a complaint was registered from the 134XX block of Canyon Ridge Lane or the 134XX block of Mission Tierra Way, but not the exact home address.

For the reasons discussed in this letter, we believe the District should now release all hotline complaint data regarding Sunshine Canyon, including the AQMD Inspector's related complainant affidavits, complaint verification notes and records. This is to provide complete and accurate information to BFI, the public and other public agencies who may otherwise act on incomplete complaint information, which as mentioned above may be the result of intentional manipulation by individuals seeking money damages or who have other motivations besides reporting legitimate odor complaints. We make this request pursuant to the California Public Records Act.

In the meantime, using the complaint data that is available, it is possible to develop working hypotheses regarding how many individuals are calling the SCAQMD 1-800-CUT-SMOG hotline, and how often. Using these assumptions, it is also possible to surmise that the large majority of complaint calls, particularly of late, may be the result of calls from a relatively small number of individuals, some of whom call repeatedly within a few minutes of their previous call to the hotline.

By way of example, and recognizing that we are hampered in not having the exact addresses of the complainants, we believe the following conclusions represent reasonable inferences based on the complaint data made available by the District for the month of November 2012:

- Of the ninety two total complaints reported by the District for November, nine appear to represent multiple calls from the same location, often minutes apart, regarding the same alleged odor event. Therefore the total number of complaints for November 2012 may actually be eighty three and not ninety two if the District were to not add to its monthly total data multiple calls from the same address at the same approximate time regarding the same alleged odor event.

- Of the 92 odor complaint calls made to the District 1-800-CUT-SMOG hotline in November of 2012, 56 calls or sixty one percent may have come from only five individuals or households; 67 calls or seventy three percent may have come from no

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more than seven individuals or households; and 84 calls or ninety one percent may have come from no more than eleven individuals or households.

- The block Skye Michaels and his brother Dean share a home on, 133XX Canyon Ridge, accounts for the largest number of complaint calls from any single street in November, 2012—representing 19 complaint calls (21%) of the total of 92 complaints made to the District hotline in November, 2012. Of course, all of these complaints may be from just one person, living at one address.

Looking at the SCAQMD hotline call data for 2011 and 2012 through the end of October, the following data for the Mission Tierra neighborhood is informative:

Address	2011 Complaint Totals	2012 Complaint Totals (thru October)
133XX Canyon Ridge (Skye and Dean Michaels?)	286	264
134XX Mission Tierra Way	246	158
133XX Golden Valley (Andrea Provenzale?)	61	107
Subtotal	593	529

These complaints may be from no more than three addresses, two of which are the addresses of named plaintiffs in the lawsuit. Additionally, the Macuga firm's practice is to not identify most of its clients in its lawsuit complaints. Thus all of these complaints may be from litigants. The numbers of multiple complaints from potentially as few as three addresses can be compared with the total of all complaints from the Mission Tierra neighborhood, which comprises approximately 170 individual homes.

AQMD Complaint Location	2011 Complaints	2012 Complaints (thru October)
133XX Canyon Ridge, 134XX Mission Tierra Way and 133XX Golden Valley	593	529
Total Mission Tierra Neighborhood Hotline Calls	804	672
Percent of Total Neighborhood Calls From As Few As Three Locations	74%	79%

By comparison, the total complaints from the Van Gogh school (where the AQMD treats multiple individual complaints from teachers and others at the school as separate complaints) were 204 in 2011 and 88 through November 2012 —a 56% drop in one year. At the Van Gogh

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school, 56 complaints were made before June of 2012 and 32 complaints have been made from July through November. In short, while total complaints in the Mission Tierra neighborhood as a whole will likely hold steady between 2011 and 2012, complaints from the school are down significantly. One possible explanation for this difference in trends is that complainants at the school are less likely to be influenced by the potential for financial gain than a few individuals in the Mission Tierra neighborhood who may be participating in the litigation, and may also be acting on the advice of their counsel to keep hotline calls to the SCAQMD high.

If instead of only stating that the landfill received 93 complaints in November, 2012, it was disclosed by the AQMD to the public and other regulatory agencies that as much as sixty one percent of these calls were from three addresses and ninety one percent of these AQMD hotline calls in November came from no more than eleven individuals, we believe this would cast the nature and character of the complaints received by the Air District in an entirely different light. The public will likely understand that people in the Granada Hills neighborhood, upset with declining home values due to the economy, might have a financial motivation as litigants to keep complaining to the AQMD hotline even if landfill odors have abated. We believe BFI, other regulatory agencies, elected County and City of Los Angeles representatives and the public have a right to know how many complaints to the AQMD are being registered by each address and by each of the individuals actively participating in the litigation.

In this regard, we also want to point out that the District has not represented to complainants that their identity will be kept confidential under all circumstances. The District's website states that personal information such as name, address and telephone number will be kept confidential to the extent allowed by state and federal law and that such information may be released as required by the California Public Records Act or if requested under a subpoena or used in court proceedings. The District's video on making complaints states that personal information will be kept confidential unless it is needed for a legal hearing. So complainants know that their personal contact information will not be kept confidential if it becomes at issue in a hearing before the AQMD Hearing Board or in court proceedings or if requested under the Public Records Act or by subpoena. This is now the case.

We request that, at a minimum, the District begin reporting the total number of different addresses that have generated complaints during the month, and the total number of complaints from each address. This will avoid creating the misimpression we believe many public officials and members of the public hold, that when the District reports that there were, for example, 92 complaints in a month, this means that 92 separate addresses registered odor complaints during the month.

V. The District's Practices in Issuing Notices of Violation Under the District's Rule 402.

In view of the filing of the litigation, the evidence that total complaint numbers may be distorted by the efforts of a few individuals and their lawyers to obtain money damages, the

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substantial improvements in odor control measures at the landfill, and the confirmation of the success of these measures by BFI's odor monitors and by the Independent Environmental Monitor, BFI requests that the District evaluate its processes in responding to hotline calls, as well as its standards in issuing notices of violation to the landfill.

The District's Rule 402 states that

> *A person shall not discharge from any source whatsoever such quantities of air contaminants or other material which cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or which endanger the comfort, repose, health or safety of any such persons or the public, or which cause, or have a natural tendency to cause, injury or damage to business or property.*

This rule quotes the language of the first section of California Health and Safety Code section 41700. That code section also allows the District to adopt an implementing rule, but to our knowledge the District has not done so.

The District may file a civil suit to impose civil penalties for violations of its Rule 402 and Health and Safety Code section 41700. There is a substantial body of law governing the imposition of civil penalties by governmental agencies. A hallmark of these cases is the requirement that rules or regulations, the violation of which may result in civil penalties, shall not be vague or ambiguous. Reasonable interpretations of such rules and regulations must be made in favor of the regulated party who may be subject to civil penalties. The violation of such rules and regulations should be determinable by an objective standard made known to the regulated party, so that the regulated party will be on notice of what specific conduct may subject that party to civil penalties.

The Ninth Circuit Court of Appeals in U.S. v. Trident Seafoods Corp. (9th Cir. 1996) 60 Fd.3rd 556, 559, in ruling on the federal government's interpretation of what constitutes a continuing violation for the imposition of multiple daily penalties under the Clean Air Act, stated:

> We have reasoned that when "violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Comm'n,* 681 F.2d 1189, 1193 (9th Cir.1982) (internal quotation omitted). Thus, "[t]he responsibility to promulgate clear and unambiguous standards is on the [agency]. The test is not what [the agency] might possibly have intended, but what [was] said. If the language is faulty, the [agency] had the means and obligation to amend." *Marshall v. Anaconda Co.,* 596 F.2d 370, 377 n. 6 (9th Cir.1979) (internal quotation omitted). Thus, reliance on policies underlying a statute cannot be treated as a substitute for the agency's duty

to promulgate clear and definitive regulations. *Id.*

> We are persuaded by this line of reasoning, and we conclude that Trident should not be subject to a "continuous violation" penalty that is not clearly applicable either by statute or by regulation to Trident's conduct. Our conclusion is not inconsistent with the proposition that deference is ordinarily owed to an agency's interpretation of its own regulations. *See Providence Hosp. of Toppenish v. Shalala,* 52 F.3d 213, 216 (9th Cir.1995). No deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position. *See Idaho Dep't of Health & Welfare v. United States Dep't of Energy,* 959 F.2d 149, 153 (9th Cir.1992).

While we recognize that in 1980 the California District Court of Appeal in People v. General Motors (116 Cal. App. 3rd Supp. 6) upheld Health and Safety Code section 41700 against a challenge that the phrase "annoyance to any considerable number of persons" was unconstitutionally void for vagueness, the current issue is different. It concerns what the standard is for determining that an odor of sufficient intensity and duration to be a nuisance exists in the first place, putting aside the number of people that may be affected.

In ruling on the imposition of civil penalties under the California Business and Profession Code provisions prohibiting unfair competition (B&P Code sections 17000 et seq.), the California Supreme Court has stated that trial courts may not employ "purely subjective notions of unfairness" and may not use vague notions of public policy to find given conduct to be unfair competition under the statute. The conduct, rather, must be in violation of a specific statute or regulation. People ex rel. Bill Lockyer v. Fremont Life Ins.Co. (2002) 104 Cal.App.4th 508, 515-516. Accord, Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal. 4th 163, 184-5.

Taking the precedents together and reasoning by analogy, BFI believes the District's current processes for responding to hotline calls and its standards for determining when an odor of sufficient intensity and duration exists may constitute a public nuisance fall short of these minimum legal requirements. Also, as a matter of public policy, the District's current subjective approach to odor complaint verification will not result in the uniform enforcement of the District's Rule 402 or Health and Safety Code section 41700.

Since October of 2008, BFI has received a total of 72 notices of violation (NOVs) from the District for odor nuisances. All but a few of these NOVs were issued by a single District Inspector, Larry Israel. Mr. Israel testified before the Hearing Board in 2011 that he does not use the Nasal Ranger or any similar device for measuring the intensity of odors that may be considered as coming from the landfill, because he considers his nose to be a more sensitive measure of odor intensity. He also testified that he will confirm an odor complaint if he smells an odor even when it is faint and/or of short duration. Therefore, at least as far as the District's

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one inspector is concerned, it appears that there is no minimum threshold in terms of odor intensity or duration to warrant confirmation of an odor complaint involving the landfill, or the issuance of an NOV.

The Hearing Board's Third Order of Abatement signed December 11, 2011, requires that BFI's odor patrol participants be trained in the use of Nasal Rangers and have such instruments available to them, to record the intensity of potential landfill odors when appropriate. Yet, as of the date of Mr. Israel's testimony before the Hearing Board in 2011, he had not been trained in the use of a Nasal Ranger and had never used one in confirming odor complaints at Sunshine Canyon.

Why would the District ask the Hearing Board to require the landfill operator to employ Nasal Rangers in its odor monitoring program and have its odor patrol participants trained in the use of the Nasal Ranger, but not require its inspector to use or even be trained to use the Nasal Ranger in investigating odor complaints?

There is a substantial body of scientific literature published on the subject of odor monitoring and measurement. See, for example, "Developing a Credible Odor Monitoring Program" by McGinley and McGinley, Proceedings of American Society of Agricultural Engineers, (2004). The consensus of this literature and of odor science experts is that a credible odor monitoring program must contain several minimum elements, including:

- The use of instrumentation such as a Nasal Ranger to provide an objective standard for the measurement of odor intensity.
- The use of hand held instruments to measure wind speed and direction.
- The testing of the odor sensitivity of individuals involved in the odor monitoring program to determine if they are more or less sensitive to odors than the average person.
- The recording of this objective data at preset times and dates to provide background information on odors and odor sources in the neighborhood and the identification of alternative odor sources when they exist.[1]

The ASTM International (formerly the American Society for Testing and Materials) has published standards for measuring odor intensity and each is implemented by use of an objective odor intensity measurement device, such as the Nasal Ranger: E679-04 (2011—revised from

1 From our odor patrol observations and discussions with neighbors in the Granada Hills neighborhood, there are a number of sources of odors in the neighborhood that cause localized odors that residents routinely confuse as being from the landfill. For example: trash pickup day on Monday mornings, piles of horse manure on the property at 17061 Timber Ridge, skunks and dead animals, stagnant water due to a plugged sewer drain at the northwest corner of Boswell Place and Meadowlark, and trash and green waste bins at the Van Gogh School.

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1997 version of E-679-91) titled "Standard Practice for Determination of Odor and Taste Threshold By a Forced-Choice Ascending Concentration Series Method of Limits" (e.g., a Nasal Ranger type device); E-544-10 titled "Standard Practices for Referencing Suprathreshold Odor Intensity;" and E1542-94(2011) titled "Standard Practice for Defining and Calculating Individual and Group Sensory Thresholds from Forced-Choice Data Sets of Intermediate Size."

While odors do have a subjective component, such as whether they are perceived to be pleasant or unpleasant, there are well known, published standards generally recognized by experts in the odor science field for measuring odor intensity. Yet they are not employed by the District or its inspector.

The difficulty with not using an objective standard for confirming odor complaints and in issuing NOVs without using objective measurements and standards recognized in the field of odor science, is that there is no way for BFI or any other party regulated by the District to know when it has caused odors that would rise to the level of an odor nuisance—because the District's standard for confirming a nuisance is not capable of measurement or replication. It is the exact opposite of the rule of law. Rather, it is the subjective opinion of one person which cannot be replicated through any objective means.

If a group of five individuals embarked on a campaign to shut down a major public facility such as an airport, bus station, solid waste facility or water treatment plant and started calling the District hotline every time they smelled an odor they considered objectionable, whether it be jet plane exhaust, diesel fumes, waste or sewage odor, would the District consistently issue an NOV if its inspector smelled that same odor, no matter how faint or temporary? It seems this would be a difficult standard for any public facility to meet. This process is so subjective, that different facilities and operators may be held to widely different standards depending on the economic motivations of complainants and the subjective sensitivities of the particular inspector used by the District to respond to complaints.

We have no idea how sensitive Mr. Israel's sense of smell is. There are scientific studies indicating that individuals can have widely varying sensitivity to odors in general, and to different odors. Individuals can also become more or less sensitized to odors over time. Engen, "Effect of Practice and Instruction on Olfactory Thresholds," Perceptual and Motor Skills (1960). There are also well defined tests to measure an individual's odor sensitivity and to compare it to group averages. See, for example, McGinley, "Developing a Credible Odor Monitoring Program," at p. 3. Does the District test its odor investigation personnel for odor sensitivity and maintain records to determine if their sensitivity has changed over time? Is Mr. Israel's nose of average sensitivity, or is he at the high end of human odor sensitivity due to repeated exposure or self-training—a possibility recognized and explored in the Engen article cited above, which found that practice could appreciably improve a person's ability to detect odors.

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While we do not know the answers to these questions, we do know that frequently, when odor complaints are verified by the District's inspector, BFI's odor patrol participants and the Independent Environmental Monitor do not detect any landfill odors in the neighborhood at the same time. We also know that both BFI's odor patrols and the Independent Environmental Monitor have reported to the Air District that *even when* potential landfill odors are detected in the Granada Hills neighborhood, they are too faint to be measured by the lowest dilution threshold in the Nasal Ranger.

By relying on a single individual over a four plus year period to confirm odor complaints at Sunshine Canyon, by not requiring the use of any of the well-recognized objective measures of odor intensity such as the Nasal Ranger or having any minimum objective standards for odor intensity or duration, and perhaps not even testing the odor sensitivity of the District's inspector or investigating the potential training effects for this individual over time, and then basing the entire nuisance determination program on responses to the complaints of persons with ulterior motives to call in complaints which cannot be promptly investigated by the landfill or the Independent Monitor because they do not receive timely notice of these complaints, the District's current practice for the issuance of NOVs is arbitrary and subjective. There is no instrumentation, protocol, test or other objective process used by the District to confirm odor complaints, despite the fact that such instrumentation, protocols, tests and objective processes have existed for some time.

Consistent with state law and the current state of odor science, we request that the District reevaluate its odor response program and rely on the industry-standard, state-of-the-art instrumentation available to determine odor intensity, such as the Nasal Ranger. If odors are so faint they cannot be measured by the Nasal Ranger, then odor complaints should not be verified. Similarly, NOVs should not be issued when odors are too faint to be objectively measured.

VI. Conclusion.

BFI appreciates that there are a number of issues raised in this letter, however, they are inter-related and will now be under increased scrutiny with the filing of purported class action litigation. BFI raises the issues in this letter in part because the District should take credit for its response to the odor issues at Sunshine Canyon, and appreciate that substantial results have been achieved by BFI.

To prevent its odor complaint reporting procedures from being abused as a tool in litigation and misconstrued by the public and other agencies, the District should now publically release its odor complaint data and also reconsider how it reports odor complaints to the public.

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Finally, the District should adopt and employ objective measures to determine and record the intensity and duration of odors that may be nuisance odors, and publish clearly understood and reproducible minimum thresholds for confirming odor complaints and issuing notices of violation for District Rule 402.

Sincerely,

Thomas M. Bruen

Cc. Client

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PROOF OF SERVICE

I am employed in the City of Walnut Creek, Contra Costa County, California. I am over the age of 18 years and not a party to the within cause; my business address is 1990 N. California Boulevard, Suite 608, Walnut Creek, California 94596. On August 25, 2016, I served the following document(s):

RESPONDENTS' ANSWER TO PETITION FOR ORDER OF ABATEMENT

X by depositing a true copy thereof in a box or other facility regularly maintained by Federal Express located at 1990 N. California Boulevard, Walnut Creek, California, in an envelope or package designated by Federal Express for Priority Overnight delivery with delivery fees paid or provided for and addressed as set forth below.

X by transmitting via email the above listed document(s) to the email addresses set forth below on this date before 5:00 p.m.

Nicholas Sanchez, Esq.
Karen Manwaring, Esq.
South Coast Air Quality Management District
21865 Copley Dr.
Diamond Bar, CA 91765
nsanchez@aqmd.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 25th day of August, 2016 at Walnut Creek, California.

Kelly S. Swenson

Kelly Swenson