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9 Attorneys for Respondent
10 EXIDE TECHNOLOGIES

11 BEFORE THE HEARING BOARD OF THE
12 SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

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SOUTH COAST AIR QUALITY
CLERK OF THE DISTRICT

14 EXECUTIVE OFFICER OF THE SOUTH
15 COAST AIR QUALITY MANAGEMENT
16 DISTRICT,
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18 Petitioner,
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20 v.
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22 EXIDE TECHNOLOGIES, INC., a Delaware
23 corporation,
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25 Respondent.
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Case No. 3151-29

**EXIDE TECHNOLOGIES'
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS FOR LACK OF
PROOF [Hearing Board Rule 5(a)(3)]**

I.

INTRODUCTION

The District has failed to present evidence that Exide is currently violating an existing rule, regulation, or permit condition. The Hearing Board should therefore dismiss the District's Petition for Order of Abatement for lack of proof.

The District's case centers around two claims, neither of which is supported by evidence. First, the District asserts that Exide is in ongoing violation of two administrative conditions in its Title V Permit (E.2 and E.4) because—according to the District—Exide's air pollution control system (APCS) is not properly venting emissions and is not in "full use." The District has focused on Exide's alleged failure to operate its furnaces under negative pressure. However, the District has admitted that:

- (1) There is presently no rule, regulation, or permit condition requiring Exide to operate its furnace under negative pressure; and
- (2) Exide is operating its furnaces and the APCS as designed, and Exide is adhering to a Permit issued by the District.

The District attempts to escape these admissions by claiming that, while no Rule or Permit condition *explicitly* requires negative pressure, negative pressure is an *implicit* requirement and negative pressure would result if Exide were properly operating its furnaces and APCS. However, this argument is circular: the District is attempting to impose a "negative pressure" standard through the backdoor despite admitting that no such requirement exists, and despite admitting that Exide is operating its APCS as designed and permitted. The evidence does not support the District's confusing logic. Indeed, the District recently: (a) adopted an explicit negative pressure standard for furnaces under amended Rule 1420.1(f)(3), which the District would not have done if such a requirement already existed; and (b) recommended that Exide completely change the design and the construction of its APCS to increase capacity, which the District would not have done if it believed that the currently permitted APCS were sufficient.

As part of its effort to show an "implicit" requirement, the District claims that the Industrial Ventilation Manual requires negative pressure in the furnaces. However, the undisputed

1 evidence is that the Industrial Ventilation Manual establishes conditions on exhaust systems and
2 downstream control devices, but the Manual does not require negative pressure in the furnaces
3 themselves. Going beyond the Manual, the District fails to show that Exide is violating any
4 permit condition applicable to either the furnaces themselves or the APCS. Thus, the District has
5 no basis to assert that the APCS is not in "full use." The District should not be able to shut Exide
6 down based on "implicit" (*i.e.*, non-existent) rules and permit conditions and vague, inapplicable
7 references to a book (the Industrial Ventilation Manual) that applies to control equipment, but not
8 to furnaces.

9 The District's second claim is that Exide is violating Rule 1407(d)(5) by failing to use
10 "good operating practices" in regards to its furnaces. The District treats "good operating
11 practices" as some undefined, vague standard it can "interpret" 20 years after-the-fact to shut
12 down Exide without any actual violation of a Rule or permit condition. However, under
13 Rule 1407(d)(5), "good operating practices" are defined to be mean two things: (a) the facility
14 submits a maintenance plan that the District approves (*i.e.*, "demonstrated through a maintenance
15 program") and (b) the facility installs measuring devices on the control equipment (*i.e.*, "the use
16 of measuring devices, or other procedures approved by the District, to maintain air movement and
17 emission collection efficiency by the system consistent with the design criteria for the system").

18 The record demonstrates that:

- 19 (1) The District approved the "design criteria" for the APCS system;
- 20 (2) Exide submitted a Rule 1407 Maintenance Program;
- 21 (3) The District (after 16 years) approved Exide's Maintenance Program and found that
22 it satisfied Rule 1407;
- 23 (4) The District presented no evidence of any failure by Exide to follow the approved
24 Program; and
- 25 (5) The District presented no evidence that Exide failed to install or operate any
26 required measuring devices or gauges.

27 In sum, the District failed to present evidence of a current and ongoing violation of Rule
28 1407(d)(5).

1 Finally, the District has presented no evidence of any kind regarding Exide's reverb
2 furnace or any supposed violation as to it, and its claims should be dismissed to the extent they
3 apply to the reverb furnace.

4 The District has not satisfied its burden of proof to shut Exide down. Accordingly, this
5 Hearing Board should dismiss the District's Petition.

6
7 **II.**
RELEVANT BACKGROUND,

8 The South Coast Air Quality Management District ("District") issued a Notice of Violation
9 ("NOV") to Exide on October 8, 2013. After several revisions, the NOV eventually alleged an
10 "ongoing" violation of Administrative Conditions 2 and 4 resulting from what the District alleges
11 is failure to maintain the blast furnace and associated air pollution control equipment in a manner
12 that ensures proper operation and failure to ensure that the air pollution control equipment was in
13 full use and collecting emissions. Shortly after issuing the NOV, the District filed a Petition for
14 Order of Abatement ("Petition") alleging violations of District Rule 1407(d)(5) and various
15 conditions in Exide's permit because Exide failed to operate its furnaces under negative pressure.¹
16 Specifically, the District alleges in its Petition that Exide is in violation of District Rules because
17 Exide "has operated its Cupola Furnace [Device D128], its Reverbatory Furnace [Device D119],
18 and/or its process related air pollution control systems [Device Nos. C40, C41, C42, C43, C44,
19 C45, C46] without sufficient and consistent negative air pressure to properly and adequately
20 collect and control gaseous emissions, including but not limited to arsenic." (Petition for Order of
21 Abatement ("Petition"), ¶ 7). Additionally, the District alleges that, by failing to maintain
22 negative pressure, Exide has violated various conditions in its permit. (Petition, ¶ 12).

23 The District commenced its case-in-chief on January 21, 2014, and rested its case
24 March 18. The District called three witnesses: Jason Aspell, Michael Garibay, and Mohsen
25 Nazemi. The District's witnesses and documents do not support a finding in favor of the Petition.

26
27 ¹ On December 4, 2013, well after it filed its Petition, the District issued Exide an NOV for
28 allegedly violating Rule 1407(d)(5).

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III.
THE PETITION FOR ORDER OF ABATEMENT SHOULD
BE DISMISSED FOR LACK OF PROOF

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A. Legal Standard.

Rule 5(a)(3) of the Rules and Procedures of the South Coast Air Quality Management District Hearing Board (hereinafter the "Rules") states that "[a]ny party may make a motion to dismiss for lack of proof after the petitioner has completed his or her presentation of evidence." Rule 5(a)(3).

A motion to dismiss for lack of proof is similar to a motion for nonsuit. *See* Cal. Civ. Proc. Code § 581c, subd. (a). Thus, the legal standards relating to nonsuit motions provide useful guidance. A nonsuit should be granted "when no evidence of sufficient substantiality exists to support an element of the plaintiff's case or where the plaintiff's evidence establishes an affirmative defense which defeats the cause of action." *Castaneda v. Bornstein*, 36 Cal. App. 4th 1818, 1824-25 (1995) (disapproved on another point in *Bonds v. Roy*, 20 Cal. 4th 140, 149 n.4 (1999)). To survive a nonsuit, "the plaintiff must [] produce evidence which supports a logical inference in his favor and which does more than merely permit speculation or conjecture." *Alvarez v. Jacmar Pacific Pizza Corp.*, 100 Cal. App. 4th 1190, 1209 (2002) (internal citations omitted).

Even if an entire case is not dismissed, a partial nonsuit may be granted as to some issues. *See* Cal. Civ. Proc. Code § 581c, subd. (b) ("If it appears that the evidence presented, or to be presented, supports the granting of the motion as to some but not all of the issues involved in the action, the court shall grant the motion as to those issues and the action shall proceed as to the issues remaining").

B. The District Cannot Meet the Elements For An Order Of Abatement

Under Rule 806(a), "no order for abatement shall be granted unless the Hearing Board makes all of the following findings: (1) That the respondent is in violation of...any rule or regulation of the South Coast Air Quality Management District Board; (2) That the order of abatement will not constitute a taking of property without due process of law; [and] (3) That if the order of abatement results in the closing or elimination of an otherwise lawful business, such

1 closing would not be without a corresponding benefit in reducing air contaminants.” Thus, where
2 the District fails to establish any one of the three elements of Rule 806(a), an order for abatement
3 cannot issue.

4 The District has failed to provide sufficient evidence to establish an ongoing violation of
5 any Rule, regulation, or permit condition. Therefore, the Hearing Board cannot grant the District’s
6 Petition for Order of Abatement and dismissal for lack of proof should be granted.

7
8 C. The District Has Failed To Provide Sufficient Evidence To Establish An Ongoing
9 Violation of Any Rule, Regulation, Or Permit Condition

10 1. No District Rule or Permit Condition Presently Requires Negative Pressure

11 The District has admitted that no District Rule or existing Exide permit condition presently
12 requires Exide to operate its furnaces at negative pressure. For example, Mohsen Nazemi, the
13 District’s Deputy Executive Officer, testified as follows:

14 Q: Okay. Now, does Rule 1407, and, most specifically,
15 Rule 1407(d)(5), specifically require that metal-melting facilities
16 maintain negative pressure in the furnaces?

17 A: No.

18 (Mohsen Nazemi (“Nazemi”) testimony, 2/18/14 transcript at p. 1112/ln. 17-21).

19 Q: Sure. I asked: “Where does it say anywhere in Rule 1407 or the
20 staff report that reveratory furnaces are expected to operate at a
21 negative pressure?”

22 A: I [am] not aware of any place that it says that.

23 Q: And similarly, you’re not aware of anyplace where it says that
24 they should operate at a negative pressure, correct?

25 A: For the reveratory furnaces, that’s correct.

26 (Nazemi testimony, 3/12/14 rough transcript at p. 24/ln. 23 – p. 25/ln. 8).

27 Mr. Nazemi testified that Administrative Conditions 2 and 4 do not explicitly require
28 negative pressure:

Q: And, again, I’m going to ask you, does condition number 2
explicitly require that Exide maintain negative pressure in its blast
furnace?

1 A: No, it does not.

2 (Nazemi testimony, 2/18/14 transcript at p. 1132/ ln. 3-6).

3 Q: Okay. Does condition number 4 explicitly require that Exide
4 maintain negative pressure in its blast furnace?

5 A: No, it doesn't.

6 (Nazemi Testimony, 2/18/14 transcript at p. 1136/ ln. 4-7).

7
8 Mr. Nazemi also testified that no existing permit condition specifically requires negative
9 pressure:

10 Q: Was there any permit condition—actually, strike that. You've
11 already said that there is no permit condition that required negative
12 pressure within the blast furnace chamber; is that right?

13 A: No direct requirement, that is correct.

14 (Nazemi testimony, 3/12/14 rough transcript at p. 63/ ln. 20-25).

15 In sum, the District admits that there is no currently enforceable explicit requirement for
16 negative pressure in the furnaces.

17 2. The District Failed to Present Sufficient Evidence of an Implicit Negative Pressure
18 Requirement Related to Furnace Operation

19 The District attempts to overcome the weakness in its argument by asserting that, while
20 there is no *explicit* negative pressure requirement, negative pressure is an *implicit* requirement and
21 a consequence of proper furnace operation. See 2/5/14 transcript at p. 832/ ln. 20-22
22 (acknowledging that there is no specific negative pressure requirement in Rule 1407; Ms. Barrera
23 continued by stating that “whether Exide complied with certain permit conditions, which the
24 District contends do reflect certain negative pressure requirements implicitly....”). Thus, the
25 District seeks to shut Exide down based on its assertion that Exide should have followed an
26 “implicit” standard that is not set forth in its Permit or any District rule. The District relies
27 primarily on the Industrial Ventilation Manual, claiming that the Manual establishes an implicit
28 negative pressure standard. However, the District’s position is belied by its own witness’

1 testimony.

2 Mr. Nazemi and Mr. Aspell admitted that, although *certain* Permit conditions refer to the
3 Industrial Ventilation Manual, those conditions do not apply to furnace operations:

4 Q: So does this condition H116.1 or condition H116.3, which is just
5 down two conditions below it, do either of those conditions impose
6 a negative pressure requirement on the cupola furnace, equipment
7 D128?

8 A: They do not specifically mention anything about negative
9 pressure here.

10 Q: That wasn't my question. Do you read into that something that
11 actually imposes a condition of negative pressure within the blast
12 furnace?

13 A: The language does not require negative pressure, but it does
14 require conformance to Industrial Ventilation guidelines. And
15 through that guideline there may be a negative pressure requirement.
16 That's one way to comply with those guidelines.

17 Q: The exhaust system is not the furnace itself, it's the equipment
18 connected downstream to the furnace; is that right?

19 A: That's correct.

20 Q: Okay. Where this condition says it imposes conditions on the
21 exhaust system, it's imposing those conditions on equipment other
22 than the blast furnace, meaning the pieces that are downstream of it,
23 right?

24 A: That's correct.

25 (Nazemi testimony, 2/19/14 transcript at p. 1259/ ln. 22 – p. 1260/ ln. 22; *see also* 1/22/14
26 transcript at p. 320/ ln. 19-24).

27 3. The District Presented No Evidence that Any Part of Exide's APCS Was Not in
28 "Full Use"

29 The District's case rests on Mr. Nazemi's definition of "full use" under the Permit.
30 Mr. Nazemi testified that "full use, to me, means that it [the APCS] is in use in such a manner that
31 it was designed and intended to operate, not that it is just turned on and operating." [2/18/14
32 transcript at p. 1137/lines 5-8]. Unable to prove that any furnace condition is being violated, the
33 District resorts to arguing that, even if a Permit condition does not specifically apply to furnace
34 operation, if that Permit condition applies to some downstream device, and that downstream

1 device is out of compliance (*i.e.*, not in “full use”), then the furnace itself is out of compliance:

2 Q: Okay. Now, your testimony is that because that piece of
3 equipment is out of compliance, then the main source, the furnace,
4 would be out of compliance under condition 4 because it would be
5 connected to something that wasn't in full use and compliance with
6 that piece – downstream piece of equipment expressed conditions; is
7 that right?

8 A: That's correct.

9 (Nazemi Testimony, 3/12/14 rough transcript at p. 19/ ln. 4-11).

10 However, the District failed to present any evidence that there is a current or ongoing
11 violation of any conditions governing the air pollution control system equipment connected to the
12 furnace. Mr. Nazemi testified that, to his knowledge, Exide is not currently in violation of any
13 permit conditions related to any of the air pollution control devices. Thus, there is no evidence
14 that any part of the APCS was not in “full use.”

15 Mr. Nazemi testified that he had no evidence that Exide's afterburner, North Torit
16 baghouse, or South Torit baghouse—all of which are pollution control devices attached to the
17 blast furnace—were out of compliance or otherwise not in “full use.” [Nazemi Testimony,
18 3/12/14 rough transcript at p. 88/ ln. 8 – p. 91/ ln. 3].

19 Mr. Nazemi looked at all the Permit conditions associated with the blast furnace or
20 downstream pollution control devices, but could not identify one single violation of any specific
21 Permit condition. Specifically, he testified:

22 Q: Mr. Nazemi, on page 1369 point 005 I see condition A63.2.
23 That's the first listed device specific condition applicable to the blast
24 furnace. Can you look at that and tell me are you
25 aware of any facts that demonstrate Exide is currently
26 in violation of that condition?

27 A: I don't have any facts to assume that.

28 (Nazemi testimony, 3/12/14 rough transcript at p. 137/ ln. 11-17).

Q: Okay. Please look at B163.2. Do you know of any facts that
demonstrate that Exide is currently in violation of that condition?

A: No.

Q: The bottom of page 1369.005 there is condition C1.2. Please
look at that and tell me if you know of any facts that you know of

1 that Exide is currently in violation of that condition?

2 A: No.

3 (Nazemi testimony, 3/12/14 rough transcript at p. 138/ln. 23 – p. 139/ln. 9).

4 Q: Okay. Okay. Now, with respect to devices C38 and C39, the
5 two Torits, since you obviously identified those as being left off of
6 exhibit 1369, have you identified any conditions in the permit
related to those two devices for which you are aware Exide is in
violation currently?

7 A: And the answer is no with the same caveat, that we are in the
8 process of evaluating Exide's operation. And if we find something,
we will pursue the appropriate enforcement action accordingly.

9
10 (Nazemi testimony, 3/12/14 rough transcript at p. 148/ln. 15-24).

11 In summary, although Mr. Nazemi testifies that some violation may be found in the future,
12 he could not identify a single specific permit condition that Exide is currently violating. The
13 District has presented no evidence that either the blast furnace or its associated APCS is currently
14 out of compliance and not in “full use.”

15

16 4. Exide Operates its APCS as Designed And Permitted by the District

17 Mr. Nazemi claims that “full use” means that the APCS is operating as designed and
18 permitted. [2/18/14 transcript at p. 1137/ln. 5-8]. The District’s testimony demonstrates that
19 Exide is operating the APCS in the manner in which it was designed and permitted by the District.

20 Q: Let me see if I can clarify that one or ask a better question. The
21 situation or the equipment that was in place is currently in place at
22 Exide that would be modified or added to by these changes as
proposed by the District. The current equipment is all permitted
equipment, correct?

23 A: The existing equipment, yes, it is permitted.

24 Q: And those permitted designs were all approved by the District in
25 order to get the permits, rights?

26 A: Yes.

27 Q: So these changes, if made, would all be changes – design
28 changes, right?

A: Most of them, yes.

1 Q: Okay. And they would be subject to, you know, getting new or
2 revising a permit, correct?

3 A: That's correct.

4 (Nazemi testimony, 3/12/14 rough transcript at p. 174/ln. 7- 23).

5 In rejecting an early version of Exide's Risk Reduction Plan, the District made specific
6 recommendations that Exide completely modify its existing APCS, requesting that Exide
7 "increase the capacity or add new equipment" to the APCS. [Nazemi Testimony, 3/12/14 rough
8 transcript at p. 171/ln. 18-20; Exhibit 14]. Mr. Nazemi testified: "If you look at the reasons for
9 rejecting the risk reduction plan, yes, because we felt that the air pollution control system was not
10 sized properly and needed additional capacity, which were not proposed as part of the risk
11 reduction plan." [2/18/14 transcript at p. 1195/ln. 5-9]

12 The evidence makes clear that the District approved the design of the APCS and issued a
13 permit for its operation. The District has decided that Exide now needs to modify its APCS, but
14 that does not mean Exide is in violation of its existing permit so as to justify an abatement order.

15
16 D. The District Has Not Presented Evidence of an Ongoing Violation of Rule 1407(d)(5)

17 The District alleges that Exide is in violation of Rule 1407(d)(5) for failing to use "good
18 operating practices." Rule 1407(d)(5) states that "good operating practices" shall be
19 "demonstrated through a maintenance program and the use of measuring devices, or other
20 procedures approved by the District, to maintain air movement and emission collection efficiency
21 by the system consistent with the design criteria for the system." The undisputed evidence
22 demonstrates that Exide has complied with Rule 1407. Mr. Nazemi testified that Rule 1407(d)(5)
23 describes what good operating are, and Exide satisfied each condition:

24
25 1. Exide Submitted a Rule 1407 Maintenance Program

26 The first requirement for "good operating practices" is to submit a maintenance program.
27 Exide submitted its maintenance program in compliance with this rule requirement. [3/12/14
28 rough transcript at p. 25/ln. 9 – p. 26/ln. 20]. Although it took 16 years, the District approved

1 Exide's Rule 1407 maintenance program. [3/12/14 rough transcript at p.53/ln. 7 – p. 54/ln. 3].
2

3 2. Exide Installed Required Measuring Devices, Temperature Gauges and Pressure
4 Gauges

5 Mr. Nazemi testified that Exide did install all measuring devices, temperature gauges and
6 pressure gauges as required by Rule 1407(d)(5). [3/12/14 rough transcript at p. 28/ln. 17 – p. 30/ln.
7 20].

8 3. The District Presented No Evidence That Exide Did Not Install Flow Meters or
9 Broken Bag Detectors

10 While he was not “100% sure,” Mr. Nazemi had no evidence to suggest that Exide did not
11 install flow meters or broken bag detectors. The District has never issued an NOV for failure to
12 install such equipment (3/12/14 rough transcript at p. 28/ln. 17 – p. 30/ln. 20) and put on no
13 evidence of any such failure.
14

15 In summary, the District has not presented any evidence that Exide is in ongoing violation
16 of District Rule 1407(d)(5), and this claim should be dismissed.
17

18 E. The District Has Not Presented Evidence Related to the Reverb Furnace

19 The District alleges in its Petition that Exide has operated its reverb furnace in violation of
20 its Permit and District rules. However, the District has focused on the blast furnace and has
21 presented no specific evidence in this case to support an order for abatement as to the reverb
22 furnace. The District's claims with regard to the reverb furnace should be dismissed for lack of
23 proof.

24 IV.

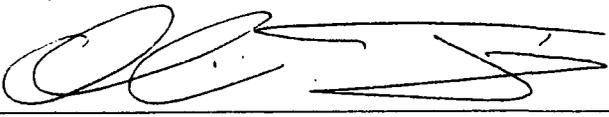
25 CONCLUSION

26 Based on the abundance of testimony by the District's own witness, the District has failed
27 to present sufficient evidence of an ongoing and current violation of any rules, regulations, or
28 permit conditions. The District's evidence does not support a logical inference in its favor.

1 Instead, the District's evidence lends itself to speculation and conjecture regarding whether a
2 violation actually exists, and whether it is ongoing, which is a basis for a nonsuit. Accordingly,
3 Exide respectfully requests that the Hearing Board dismiss the Petition for Order of Abatement for
4 lack of proof.

5 Dated: March 18, 2014

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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7 By 

OLIVIER F. THEARD

Attorneys for Respondent Exide Technologies

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