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10 Wine Institute

11 BEFORE THE HEARING BOARD OF THE SANTA BARBARA COUNTY

12 AIR POLLUTION CONTROL DISTRICT

13 IN RE: PETITION OF WINE  
14 INSTITUTE FOR REVIEW OF ATC  
15 ISSUED TO CENTRAL COAST WINE  
16 SERVICES

17 FINAL AUTHORITY TO CONSTRUCT  
18 15044; FID 11042; SSID 10834.

19 IN RE: PETITION OF WINE  
20 INSTITUTE FOR REVIEW OF ATC  
21 ISSUED TO CENTRAL COAST WINE  
22 SERVICES

23 FINAL AUTHORITY TO CONSTRUCT  
24 MODIFICATION 15044-01; FID 11042;  
25 SSID 10834.

H.B. Case No. 2017-21-AP;  
H.B. Case No. 2017-24-AP

**PETITIONER WINE INSTITUTE'S REPLY  
BRIEF**

Date: May 2, 2018  
Time: 9:30 a.m.  
Place: Board of Supervisors Hearing Rm.  
105 E. Anapamu Street  
Santa Barbara, CA

1 **I. Introduction**

2 The District’s opposition primarily addresses issues that the Hearing Board is not required  
3 to decide. The District makes the case that the emissions controls in use at CCWS *probably will*  
4 *work* as BACT, that they have worked when used for *part* of a fermentation cycle and on certain  
5 wines, and that “[t]here is no technical or engineering reason why these will not be successful over  
6 each entire fermentation cycle.”<sup>1</sup> But the Hearing Board is not required to decide whether the  
7 emissions controls will likely work, or even whether there is a very high probability that they will  
8 work. The Hearing Board is required to decide whether the controls have been “achieved in  
9 practice.” The District’s opposition *admits* that the emissions controls have not been used in the  
10 same manner as would be required under the permit. Therefore, those controls are not “achieved  
11 in practice.”

12 The District’s opposition identifies a host of factual disputes that are mostly irrelevant to  
13 the issues before the Board. The District quibbles with Wine Institute’s statements regarding  
14 whether the permitted tanks are among the “larger” tanks, argues that CCWS produces its own  
15 wine through a separate company, and asserts that Wine Institute cannot rely on statements in a  
16 letter that was revoked by CCWS, among many other immaterial factual arguments.

17 But none of these arguments goes to the heart of the matter before the Board. With respect  
18 to the key issue—whether the emissions controls have been “achieved in practice” (AIP)—the  
19 District’s opposition implicitly concedes that they have *not* been achieved in practice:

- 20 • ***“This was the first time in California that any district required air pollution***  
21 ***control technologies as BACT on a winery.”***<sup>2</sup> The controls were neither required  
22 as BACT nor used in the same manner as BACT at CCWS; thus, they are not AIP.  
23 • “Since the controls were voluntary, they could be operated ‘as needed’ to stay  
24 below the offset threshold. ***This is in distinction to emission controls required as***  
25 ***BACT*** as the District’s Policy and Procedure for implementing BACT requires it

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27 <sup>1</sup> District Response at 11, lines 4-5.

28 <sup>2</sup> District Response at 8, lines 3-5 (emphasis added). *See also* District Response at 2, lines 1-3.

1 must be in place at all times of operation during the life of the project.”<sup>3</sup> This  
2 statement admits that the controls were not used in the same manner as BACT.

3 • ***“There is no technical or engineering reason why these will not be successful***  
4 ***over each entire fermentation cycle.”***<sup>4</sup> This statement shows that the District is  
5 inferring from past experience that the controls will likely work as BACT, not  
6 relying on a proven track record of evidence that they have indeed worked.

7 The key facts before the Board are undisputed, and they compel a finding that the emissions  
8 controls have not been “achieved in practice.”

9 Since the Wine Institute submitted its opening brief, EPA has conceded, with respect to  
10 four projects in the Central Valley, that the emissions controls at issue here were not AIP BACT  
11 when this District issued the CCWS permit. In each of those cases, the San Joaquin Valley APCD  
12 issued a permit before August 2017 that did not require emissions controls. The EPA initially  
13 opposed the issuance of those permits, but in a letter dated January 25, 2018 that the District has  
14 submitted, EPA has now withdrawn its opposition.<sup>5</sup> EPA’s letter is in effect an acknowledgement  
15 that the emissions controls were not AIP BACT when those permits were issued. Thus, while the  
16 District attempts to defend its AIP determination with EPA pronouncements, EPA’s decision not  
17 to require emissions controls at four projects demonstrates that EPA does not consider those  
18 controls AIP BACT.

19 It is important to emphasize that Wine Institute has *not requested* that the District impose  
20 lesser controls at CCWS or allow the emission of more contaminants from CCWS. Rather, Wine  
21 Institute has requested that the Board direct the District to modify CCWS’s permit by removing  
22 the AIP determination. There is no dispute that the District may require the same controls, and  
23 impose the same emissions limits, as under the challenged permit—without the AIP determination.

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26 <sup>3</sup> District Response at 8, lines 22-25 (emphasis added).

27 <sup>4</sup> District Response at 11, lines 4-5 (emphasis added).

28 <sup>5</sup> See District Exhibit 38, HB 0515.

1 **II. The Emissions Controls Have Not Been Used in the Same Manner As BACT**

2 The key question before the Board is whether the emissions controls have a sufficient  
3 “track record” of use to demonstrate that they are “achieved in practice.” To make that  
4 demonstration, the emissions controls must have been used in the same manner as BACT;  
5 otherwise, the words “achieved” and “in practice” would be robbed of their ordinary meaning.  
6 Something cannot be “achieved in practice” that has never been done before. It is undisputed that  
7 CCWS’s previous permit *did not* require the use of the emissions controls at all times in the same  
8 manner as BACT and that CCWS *did not* use the controls throughout the fermentation process.  
9 (“Since the controls were voluntary, they could be operated ‘as needed’ to stay below the offset  
10 threshold. This is in distinction to emission controls required as BACT [which] ... must be in  
11 place at all times of operation during the life of the project”.)<sup>6</sup> Thus, the use of the emissions  
12 controls as they will be used under the permit has not been “achieved in practice.”

13 At the time it made its AIP determination, the District had no evidence that the emissions  
14 controls had been used throughout a full fermentation cycle. In its opening brief, the Wine  
15 Institute noted the absence of such evidence and cited the testimony of CCWS’s consultant  
16 Marianne Strange: “These controls have not been used continuously by CCWS throughout a  
17 complete fermentation cycle on any tanks.”<sup>7</sup>

18 In response to that evidence, the District has created new hearsay evidence that did not  
19 exist when it made its AIP determination. *See* District’s Exhibits 3 and 4. But that evidence does  
20 not rebut Ms. Strange’s declaration. First, the District cites an email from NohBell stating simply  
21 “The NoMoVo system has been used on single tanks during a full cycle of fermentation for  
22 multiple times at the following wineries,” including CCWS.<sup>8</sup> But NohBell provides absolutely no  
23 evidence to back up that unsworn statement, and it is inherently incredible. CCWS’s use records  
24 show only that the NoMoVo system was used on various days and that it removed a certain

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26 <sup>6</sup> District Response at 8, lines 22-25.

27 <sup>7</sup> Exhibit 45, Declaration of Marianne Strange, ¶ 22, at WI 1037.

28 <sup>8</sup> District Exhibit 3, HB 0153

1 amount of ethanol.<sup>9</sup> They do not show that the NoMoVo (or EcoPAS) system was used on a  
2 specific tank throughout a fermentation cycle. If NohBell is relying on some other source of  
3 information, it makes no reference to such information in its email.

4 As we have previously noted, NohBell and EcoPAS have a substantial financial interest in  
5 obtaining an AIP determination. NohBell's bald and unsworn statement that "yes, it's been done,"  
6 with no evidence or details to support that statement, does not rebut the sworn testimony cited by  
7 Wine Institute. Under the Hearing Board's rules, NohBell's hearsay statement is not sufficient by  
8 itself to support a finding in the District's favor.<sup>10</sup>

9 Second, the District cites a similar email from EcoPAS stating that "the PAS control  
10 system was *connected via manifold* to multiple tanks for the entire crush...."<sup>11</sup> This statement  
11 suffers from the same weaknesses as the NohBell statement, but more importantly it does not  
12 prove that the EcoPAS system was *used to control emissions* from a tank throughout an entire  
13 fermentation cycle. The EcoPAS system is not portable, and is connected via manifold to multiple  
14 tanks at once, but not all of those tanks are controlled by the system at any one time. EcoPAS's  
15 email just states the obvious—that, once the manifold and piping were installed, they were not  
16 removed except for extraordinary circumstances. EcoPAS's statement provides no evidence that  
17 the system was used to control emissions from any given tank at any given time.

18 The fact that the District had to create evidence in an attempt to justify its AIP  
19 determination—after the fact—simply highlights the absence of evidence to support the AIP  
20 determination when it was made. And even the new evidence that the District has created does not  
21 support its AIP determination.

### 22 **III. The Emissions Controls Have Not Been Used for a Sufficient Time to Be AIP**

23 Even if the emissions controls had been used at CCWS over a full fermentation cycle, in  
24 the same manner as BACT, it is plain from the District's opposition that the controls were not used  
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26 <sup>9</sup> See District's Exhibit 2, HB 0094-0096, and Exhibit 21, HB 0327-0331.

27 <sup>10</sup> Hearing Board Policies & Procedures at III.B.3.c. (Nov. 1, 2006).

27 <sup>11</sup> District Exhibit 4, HB 0154 (emphasis added).

1 for a sufficient period to support an AIP determination. The District's emails from NohBell and  
2 EcoPAS do not state how long, if at all, any tanks may have been used to control emissions from  
3 any tanks over a full fermentation cycle. They therefore cannot support an AIP determination,  
4 even using the District's shortened 80-day test period.

5 In its AIP determination memorandum, the District cited an EPA requirement that a control  
6 technology must be used for six months to be considered AIP: "[T]he US EPA established a  
7 position that the successful operation of a new control technology for six months constitutes  
8 achieved in practice."<sup>12</sup> As noted in the Wine Institute's opening brief, the SCAQMD uses the  
9 same six-month test period. The District's opposition make clear that the emissions controls have  
10 not met that standard, even if they were used through an entire fermentation cycle. Thus, on that  
11 ground alone, the District's AIP determination should be reversed.

12 The District cites an EPA letter and suggests that it establishes a shorter period to  
13 demonstrate AIP. But the District has selectively quoted the EPA letter and omitted a key  
14 sentence:

15 For the purposes of evaluating whether the use of this control equipment can be  
16 considered AIP, the evaluation criteria is whether a source was able to achieve a  
17 certain level of control over a reasonable operating period. The District and EPA  
18 have already agreed that the reasonable operating period is a complete crush  
19 season. *The facility has been able to achieve a minimum control efficiency of at  
20 least 47.6% over the seven seasons it has been in use.*

21 As noted in Wine Institute's opening brief, EPA's opinions on AIP BACT for non-federal permits  
22 are not binding on the District, but EPA's letter does not appear to address the minimum time that  
23 emissions controls must be used to demonstrate AIP. Instead, it appears to address whether there  
24 was sufficient use at the Terravant facility to support a specific control efficiency. At Terravant,  
25 the emissions controls had been in use for seven years. EPA was not asked to determine whether a  
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27 <sup>12</sup> District Exhibit 1, Achieved in Practice Determination, at HB 0002.

1 single season was sufficient to demonstrate AIP.

2 **IV. The Performance Standard Is Speculative and Not Based on Data**

3 The District’s opposition demonstrates conclusively that the performance standard that the  
4 District has chosen is essentially an arbitrary guess at the likely efficiency of the emissions  
5 controls. The standard was not derived from a data set; it is instead based on the manufacturers’  
6 guarantees. The District cites several data points, in addition to the manufacturers’ guarantees,  
7 none of which suggests a 67 percent performance standard. First, the District cites half-hour tests  
8 from the BAAQMD that are not representative of an entire fermentation cycle, and that report  
9 short-term emissions reductions of over 90 percent.<sup>13</sup> Next, the District cites EPA’s statement that  
10 the emissions controls have achieved 76 percent reductions, a statement that neither CCWS nor the  
11 District is able to support with any data.<sup>14</sup> Finally, the District cites its own calculations that the  
12 controls have achieved 50-59 percent emissions reductions averaged over an entire fermentation  
13 season. The District says these figures demonstrate that the controls will meet the 67 performance  
14 standard because the controls were connected to less than half the tanks at CCWS—but at the  
15 same time the District says that it has not required CCWS to connect the emissions controls to all  
16 tanks, but only to the 400-Series tanks (as further discussed below).

17 The data that the District cites demonstrate that the emissions controls will reduce  
18 emissions by some amount. But they also demonstrate that the amount by which they will reduce  
19 emissions is speculative, and that the controls have not “achieved” a 67 percent reduction “in  
20 practice.” The District may require the use of the emissions controls at CCWS and determine a  
21 performance standard based on data, but it has not done that yet. And without actual data  
22 demonstrating that the emissions controls can and do meet the established performance standard,  
23 the emissions controls cannot be said to have been “achieved in practice.”

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26 <sup>13</sup> District Exhibit 19 at HB 0318-20.

27 <sup>14</sup> District Exhibit 20 at HB 0323. See also Exhibit 45, Declaration of M. Strange ¶ 12, at WI 1035 (noting that, when  
28 pressed to substantiate EPA’s 76% figure, the District instead asked CCWS to propose a control efficiency).

1 **V. The District Underestimates The Costs of the Emissions Controls**

2 In its AIP Determination, the District did not evaluate the cost of the emissions control  
3 systems.<sup>15</sup> It noted that BACT controls had been evaluated in connection with a 2009 permit, but  
4 had been found to be not cost effective: “Potential emissions from the winery triggered BACT  
5 requirements for the project, however the District determined that BACT, while technically  
6 feasible for the new facility, was not cost effective.”<sup>16</sup>

7 Now, the District contends that emissions controls for the current project are cost effective,  
8 but it reaches this conclusion by unrealistically limiting the project. It is undisputed that CCWS  
9 intends to use the emissions controls on all of its tanks.<sup>17</sup> (If CCWS did not use the controls on all  
10 tanks, it would have to follow two different permit regimes for its tanks, employ two different  
11 operating procedures, and follow two different sets of recordkeeping requirements, among many  
12 other complications.) But the District does not evaluate the cost of the entire project. Instead, it  
13 evaluates only the cost of applying the emissions controls to the 400-Series tanks. That is a  
14 “project” that no one intends to undertake, and whether it would be cost effective or not is  
15 irrelevant.

16 The District’s analysis, limited to just the 400-Series tanks, is inconsistent with the terms  
17 of the permit. The permit requires *all* fermentation tanks to be controlled by the emissions control  
18 systems: “All fermentation tanks at this facility are required to be controlled by one of these two  
19 systems during wine fermentation.”<sup>18</sup> The “permitted equipment list” in the permit also lists all of  
20 the fermentation tanks at the facility, not just the 400-Series tanks.<sup>19</sup>

21 The District’s cost analysis also erroneously underestimates costs in other respects. For  
22 example, the District argues that source testing costs should not be included because “source  
23 testing is not required by the permit.”<sup>20</sup> But the permit requires testing of the captured

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25 <sup>15</sup> District Exhibit 1, Achieved in Practice Determination, at HB 0003.

26 <sup>16</sup> District Exhibit 1, HB 0004.

27 <sup>17</sup> Exhibit 3, ATC 15044, at WI 0163.

28 <sup>18</sup> Exhibit 3, ATC 15044, at WI 0127.

<sup>19</sup> Exhibit 3, ATC 15044, at WI 0143-57.

<sup>20</sup> District Analysis at 37 and 38

1 ethanol/slurry from each control device every 24 hours.<sup>21</sup> The District may prefer not to refer to  
2 this testing as “source testing,” but sampling every device every day during the fermentation  
3 season, whether in the on-site lab or an off-site lab, will result in significant costs in time, labor  
4 and materials that cannot simply be ignored. The \$10,000-per-year estimate used in Petitioner’s  
5 estimated BACT costs is a very conservative estimate of these costs, especially because the permit  
6 will require controls, and therefore testing, on all fermentation tanks, not just the 400-series tanks.

7 The District also uses a 15-year equipment lifespan in its cost analysis, which is  
8 inconsistent with the District’s own rules. The District takes the 15-year lifespan from an example  
9 calculation in US EPA’s Guidance. If the 15-year lifespan were a required input, then one would  
10 assume that this variable would be identified in the body of the guidance document, not in an  
11 example calculation.

12 The District’s own Permitting Policy covering this topic (6100.064.2017) sets 10 years as  
13 the default lifespan for control equipment: “Control equipment life is 10 years by default;  
14 however, the District will evaluate any request for a different period if substantial backup  
15 documentation is provided to support the request.”<sup>22</sup> A reference in an example calculation is not  
16 “substantial backup documentation.”

## 17 VI. EPA Agreement

18 The District cites an agreement between EPA and the San Joaquin Valley APCD as  
19 evidence that the SJVAPCD “backed down” from its position that the emissions controls were not  
20 AIP.<sup>23</sup> But in fact that agreement has a much different significance: EPA agreed, as part of that  
21 agreement, *not to require emissions controls as AIP BACT* at four projects that were deemed  
22 complete before this District issued the CCWS permit on August 17, 2017. In other words,  
23 despite the EPA correspondence that the District has cited repeatedly in these proceedings, EPA in  
24 effect agreed that the emissions controls were *not AIP BACT*. This District’s erroneous decision  
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26 <sup>21</sup> Exhibit 3, ATC 15044, at WI 0130.

27 <sup>22</sup> Exhibit 36, Section 7.1, at WI 0956.

28 <sup>23</sup> District Exhibit 38; District Analysis at 23.

1 that the emissions controls are AIP will, if not corrected by this Hearing Board, be a “data point”  
2 in any future BACT determination by another district, as Wine Institute explained in its opening  
3 brief, and the SJVAPCD’s email simply acknowledges that fact. But the main significance of  
4 EPA’s letter is that EPA effectively concedes that the emissions controls were not required, and  
5 therefore not AIP BACT, as of the date that this District issued the CCWS permit.

6 **VII. Conclusion**

7 The Hearing Board should direct the District to modify CCWS’s permit by removing the  
8 AIP determination. The emissions controls have not previously been used in a manner similar to  
9 that required under the permit, and are not “achieved in practice.” EPA has withdrawn its  
10 opposition to four permits in the Central Valley in which the SJVAPCD found that the emissions  
11 controls were not required as AIP BACT, and this District should reach the same conclusion. The  
12 Hearing Board should direct the Air Pollution Control Officer to issue a modified permit to CCWS  
13 that does not contain an “achieved in practice” determination.

14  
15 Dated: March 13, 2018

Respectfully submitted,

16 BARG COFFIN LEWIS & TRAPP, LLP

17  
18 By:



19 R. MORGAN GILHULY

20 Attorneys for Wine Institute

**PROOF OF SERVICE**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Barg Coffin Lewis & Trapp, LLP, 600 Montgomery Street, Suite 525, San Francisco, California 94111. On March 13, 2018, I served the following document:

**PETITIONER WINE INSTITUTE’S REPLY BRIEF  
Case Nos. 2017-21-AP, 2017-24-AP**

- by transmitting via facsimile the document(s) listed above to the fax number set forth below on this date before 5:00 p.m.
- by causing personal delivery overnight delivery by Federal Express of the document(s) listed above to the person at the address set forth below.
- by dispatching a messenger from my place of business with instructions to hand-carry the above and make delivery to the following during normal business hours, by leaving a true copy thereof with the person whose name is shown or the person who was apparently in charge of that person's office or residence.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.
- by transmitting via email the document(s) listed above to the email address(es) set forth below on this date before 5 p.m.

Ms. Lyz Hoffman  
Clerk of the Hearing Board  
Santa Barbara County Air Pollution Control  
District  
260 North San Antonio Road, Suite A  
Santa Barbara, CA 93110

William Michael Dillon  
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105 E. Anapamu Street  
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 13, 2018, at San Francisco, California.

  
\_\_\_\_\_  
Carlotta Datanagan