

**BEFORE THE ADMINISTRATIVE HEARING OFFICER
FOR
THE CITY OF SAN JOSE
LOCAL ENFORCEMENT AGENCY
(LEA)**

<p>CITY OF MILPITAS, Petitioner</p> <p>vs.</p> <p>CITY OF SAN JOSE LOCAL ENFORCEMENT AGENCY, Respondent</p> <p>and</p> <p>INTERNATIONAL DISPOSAL CORP. OF CALIFORNIA AND BROWING-FERRIS INDUSTRIES OF CALIFORNIA, INC., Intervenors</p>	<p>ADMINISTRATIVE HEARING DECISION</p>
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The City of Milpitas (Milpitas) was represented by Kelly T. Smith. The City of San Jose LEA (LEA) was represented by Richard Doyle, Nora Frimann, Ardell Johnson and Margo Laskowska. The Intervenors, International Disposal Corp. of California and Browning-Ferris Industries of California, Inc., were represented by Thomas Bruen and Erik Reintson.

ADMINISTRATIVE HEARING RECORD

The administrative hearing record for this case is kept by:

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The administrative hearing record consists of the following documents:

1. Petition for Administrative Hearing dated March 2, 2015.
2. City of San Jose LEA Denial of the Hearing Request, dated March 11, 2015.

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3. Decision of the Department of Resources Recycling and Recovery (CalRecycle) on the City of San Jose LEA's Denial of the Hearing Request, dated June 9, 2015.
4. Administrative Conference Order # 1, dated July 1, 2015.
5. Application of Real Parties in Interest International Disposal Corp. of California and Browning-Ferris Industries of California, Inc. to Intervene Pursuant to Government Code § 11440.50, dated July 7, 2015.
6. City of San Jose's Statement of No Opposition to Real Parties' Application to Intervene, dated July 7, 2015.
7. Email from Hearing Officer to Parties dated July 16, 2015 at 7:35 AM.
8. Email from Thomas Bruen to parties dated July 16, 2015 at 10:55 AM re Milpitas on Intervention.
9. Email from Kelly Smith dated July 16, 2015 at 10:59 AM re Milpitas on Intervention.
10. City of Milpitas Brief on Public Comment, dated July 15, 2015.
11. San Jose LEA's Brief Re Public Comments, dated July 15, 2015.
12. Joinder of Real Parties in Interest in San Jose LEA's Brief on Public Comment Issue, dated July 15, 2015.
13. Order # 2, dated July 22, 2015.
14. City of Milpitas Detailed Statement of Claims, dated July 15, 2015.
15. San Jose LEA's Detailed Statement of Defenses and Counterclaims to the City of Milpitas' Petition and response to Detailed Statement of Claims, dated July 27, 2015.
16. Milpitas Witness Disclosure, dated July 29, 2015.
17. City Of San Jose's Witness List, Dated August 3, 2015.
18. August 3, 2015 email from Leslie Donahue to Kelly Smith et als sending the 17. City Of San Jose's Witness List.
19. Intervenors' Final Witness List, dated August 3, 2015.

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20. Email from Thomas Bruen to Suzanne Nusbaum et als dated August 3, 2015 sending Intervenors' Final Witness List.
21. August 4, 2015 email from Kelly T. Smith to Ardell Johnson, et als sending the Milpitas Witness Disclosure.
22. August 5, 2015 at 1:00 PM email from Kelly T. Smith to Ardell Johnson et als re Milpitas LEA; bate stamps.
23. Intervenors' Motion to Dismiss dated August 7, 2015.
24. City of Milpitas' Hearing Brief and Opposition to Motion to Dismiss, dated August 10, 2015.
25. City of San Jose LEA's Statement of Issues to Be Decided, dated August 10, 2015.
26. City of San Jose LEA's Pre-hearing Brief, dated August 10, 2015.
27. Intervenors' Reply to Petition and to Statement of Issues of City of Milpitas, and Statement of Intervenors' Defenses, dated July 27, 2015.
28. City of Milpitas Exhibits 1 to 110.
29. Respondent's And Intervenors' Joint Objections to Petitioner's Proposed Exhibits, dated August 3, 2015.
30. Respondent and Intervenors' Exhibits 200 to 245.
31. List of Persons Making Public Comment on August 14, 2015
32. Transcripts of hearings on August 12, 13 and 14, 2015 by Debbie Acevedo-Ramirez, Atkinson Baker, 1426 Fillmore Street, Suite 315, San Francisco, CA 94115-4164. Phone: 415-421-3021. Email: abi@depo.com. Website: www.depo.com.
33. Email from Suzanne Nusbaum to the parties, issuing the tentative decision, dated August 20, 2015 at 6:36 PM
34. Email from the LEA to Suzanne Nusbaum et als, dated August 24, 2015 at 12:28 PM re the Tentative Decision
35. Email from Suzanne Nusbaum to the parties re proposed findings of fact and conclusions of law to be added to the decision, dated August 24, 2015 at 12:37 PM

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36. Email from Kelly Smith to Suzanne Nusbaum et als, dated August 24, 2015 at 12:46 PM re the Tentative Decision
37. August 26, 2015 letter from the LEA re the Tentative Decision.
38. August 27, 2015 Milpitas Response to the Tentative Decision.

PROCEDURAL HISTORY

Pursuant to California Public Resources Code § 44307, Milpitas filed a Petition for Hearing with the LEA on March 2, 2015. It requested a hearing

to correct actions and/or failures to act by the City of San Jose Local Enforcement Agency (LEA) regarding the solid waste facility permits for the Newby Island Sanitary Landfill ("Landfill"), Newby Island Recyclery Facility ("Recyclery") and the Newby Island Composting Facility ("Composting Facility"), (hereinafter sometimes collectively referred to as the "Newby Island Facilities"). *Petition ¶ 1.*

It alleged that

the solid waste facility permits, including that for the Landfill concurred in by the California Department of Resources Recycling and Recovery ("CalRecycle") on February 5, 2015, as proposed by the LEA, constitute a failure by those agencies to require the appropriate design, operation and feedstock revisions to control the severe public odor nuisance caused by the Newby Island Facilities. *Petition ¶ 2.*

Milpitas pled that "[t]he administrative record contains substantial and undisputed evidence of odors emanating from and creating nuisance conditions caused by the Newby Island Facilities." *Petition ¶ 3.*

Milpitas further alleged that:

The LEA also failed to require revisions to the solid waste facility permits to address interrelated impacts associated with the Landfill and the proximate Recyclery and Compost Facility, both of which are integral to the Landfill operations and each other. The LEA has failed to require monitoring, reporting and abatement of odors emanating from those joint operations and consequent nuisance to the residents of the City of Milpitas. *Petition ¶ 3.*

Finally, Milpitas claimed that:

The LEA acted arbitrarily and abused its discretion when its failed to apply Public Resources Code §44306(a) to revoke the solid waste facility permits for the Newby

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Island Facilities after it failed to disclose information relevant to the significant health and safety impacts caused by those operations, which the LEA has ignored repeatedly during inspections there. *Petition ¶ 4.*

In its Petition, Milpitas prayed:

- a. To address the misstatements and omissions of the 2015 Landfill permit, the LEA shall be ordered to rescind the approval of the revised Landfill permit and require the revision of the Newby Island Sanitary Landfill solid waste facility permit, specifically requiring that the application and any Joint Technical Documents that support it describe sufficient operations, designs and facilities to reduce odor below nuisance levels.
- b. Pursuant to PRC § 44305, the LEA should suspend or revoke, as necessary, the solid waste facility permits for the Newby Island Landfill, the Recyclery and the Newby Composting Facility, due to the imminent and substantial impact to the environment and public health from facilities' odors upon the residents of the City of Milpitas until the permits and their Joint Technical Documents (JTDs) are revised to assure control of the nuisance;
- c. Pursuant to PRC § 44306, the LEA should be required to revoke the permits for the Landfill, the Composting Facility and the Recyclery for failure reasonably to correct the odor problem.
- d. To assure proper reporting and follow-up with the Bay Area Air Quality Management District, the LEA should be required to retain an independent third-party air quality monitor, with all costs of the monitor and monitoring activities charged to the Landfill through the LEA.
- e. That the hearing officer or hearing panel apply any other remedy provided under law or regulation to address the issues raised herewith.

Petition, p. 10.

By letter dated March 11, 2015, the LEA denied the hearing request.

Milpitas then appealed to the California Department of Resources Recycling and Recovery (CalRecycle), pursuant to Public Resources Code § 45030.

By decision dated June 9, 2015, CalRecycle ordered a limited hearing. The requests for a hearing on odor nuisance at the Landfill, odor nuisance at the Recyclery, allegations related to CEQA and deficiencies in the JTD with regard to odor were denied. *CalRecycle Decision, p. 17.*

Cal Recycle ordered the LEA to schedule an administrative hearing on

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1. allegations of failure to act by the LEA as required by applicable laws and regulations with regard to the issuance of the revised permit for the Landfill,
2. failure to act by the LEA as required applicable laws and regulations with regard to the Recyclery, other than odor allegations, and
3. failure to act by the LEA as required applicable laws and regulations with regard to the Compost Facility.

CalRecycle Decision, p. 18.

The case was then returned to the LEA for hearing on those issues.

Suzanne K. Nusbaum was appointed by the LEA as the Hearing Officer. On June 30, 2015, she held an Administrative Conference by telephone with the parties. Present on the call were the Hearing Officer, Suzanne K. Nusbaum, and the attorneys, Ardell Johnson for the City of San Jose, Kelly Smith for the City of Milpitas, and Thomas M. Bruen for International Disposal Corporation of California and Browning-Ferris Industries of California, Inc. By agreement of the parties, on July 1, 2015, the Hearing Officer issued Administrative Conference Order # 1, governing the procedures to be followed for the hearing.

On July 7, 2015, International Disposal Corp. of California and Browning-Ferris Industries of California, Inc. to filed a Motion Intervene Pursuant to Government Code § 11440.50. The Hearing Officer granted the Motion. *Administrative Conference Order # 2, dated July 22, 2015.*

On July 15, 2015, Milpitas filed a Detailed Statement of Claims. It alleged that:

- A. The LEA Failed to Enforce Permit Compliance at All Three Newby Island Facilities.
 1. The composting facility has created odors requiring permit revision.
 2. The Landfill permit must be revised to provide demonstrations of any alternative daily Landfill cover (ADC).
 3. The Recyclery permit must be revised to handle mixed waste materials within 48 hours.
- B. The LEA Concealed Significant Violations.
 1. The acceptance of unauthorized materials at Newby Island.
 2. The use of the facilities to transfer waste among themselves.

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3. LEA failed to inspect the composting facility odor violations, despite complaints.
4. The extensive period concealing the violations.

The Detailed Statement of Claims prayed that:

- A. The Hearing Officer should recommend revocation of LEA certification and placement on the CalRecycle list of LEAs out of compliance with certification.
- B. The Hearing Officer should order permit revisions.

Milpitas submitted Exhibits 1 to 106 in advance of the hearing. However, it failed to comply with Conference Order # 1 and did not organize all the parties' exhibits in chronological order, preceded by any specific objections. Objections were submitted to many of its exhibits. *Respondent's And Intervenors' Joint Objections To Petitioner's Proposed Exhibits, dated August 3, 2015.*

There were no objections to Milpitas Exhibits 5, 6, 7, 8, 9, 10, 11, 14 and 25. These exhibits were admitted by the Hearing Officer upon receipt.

The Hearing Officer deferred ruling on the remainder of Milpitas's Exhibits (those to which there were objections) until they were actually offered at hearing. Most were not. Many of them duplicated the exhibits offered by the LEA and admitted.

Exhibit 37 contained a superseded and withdrawn January 6, 2015 letter to Paul Tavares at the LEA from CalRecycle. The report was withdrawn by CalRecycle, *Ex. 35*, and therefore does not qualify as an official record exception to the hearsay rule. The objection to *Ex. 37* was sustained and the declaration was excluded. Even if I reversed the exclusion ruling and admitted the letter dated January 6, 2015, I would give it scant weight because it was withdrawn by CalRecycle.

Exhibit 37 also contained an email to and from individuals at CalRecycle dated January 9, 2015 at 12:16 PM. This email added no information relevant to the issues in dispute in this case.

Exhibit 37 also contained emails from CalRecycle to LEA officials forwarding the January 6, 2015 letter. Those emails specified that the issue of nuisance control (odor) at the Recyclery was referred by CalRecycle to the Bay Area Air Quality Management District (BAAQMD). The issue of nuisance control (odor) at the Recyclery was excluded from the scope of this hearing by the CalRecycle decision dated June 9, 2015. Therefore these emails offered no relevant evidence.

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At the hearing, the City of San Jose withdrew its authenticity objections. The other objections to the specific Exhibit numbers listed below as “not offered at hearing.” were not withdrawn by the City of San Jose and the Intervenors.

CalRecycle sent the Hearing Examiner a large packet of documents. At the hearing, the Hearing officer informed the parties of her receipt and informed them that she had not reviewed them. She gave the set of documents to the attorney for the City of Milpitas. The attorney for the City of Milpitas then separated CalRecycle’s custodian’s declaration from the other documents in this packet and offered the declaration into evidence. The declaration was excluded as irrelevant, because the City of San Jose had withdrawn its authenticity objection. The attorney for the City of Milpitas did not offer at the hearing the remainder of the documents in this packet

The Intervenors filed a Motion to Dismiss dated August 7, 2015. Briefing was submitted and additional argument on the Motion was made at the commencement of the hearing on August 12, 2015. The Motion to Dismiss was denied and the case proceeded with testimony.

Hearings were held on the above Detailed Statement of Claims, pursuant to the California Public Resources Code § 44307 on August 12, 13 and 14.

LEA and Intervenors waived all their authenticity objections to the Milpitas exhibits.

Milpitas Exhibits were dealt with as follows:

Number	Description of Document	Date of Creation	Status
1	Birds eye view of facilities from (CalRecycle Bing)		not offered at hearing
2	Comprehensive Compost Odor Response Project-Report to CIWMB 2007	3/07	not offered at hearing
3	Report of Composting Site Information and Amendment	1/15/02	not offered at hearing
4	Odor Impact Minimization Plan	3/08	not offered at hearing
5	Disposal Facility Inspection Report (DFIR) (52), NISL, 1/23/15 inspection	1/23/15	admitted

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Number	Description of Document	Date of Creation	Status
6	Compostable Materials Handling Operation and Facility Inspection Report (93), 4/23/15 inspection	4/23/15	admitted
7	Compostable Materials Handling Operation and Facility Inspection Report (93), 2/18/15 inspection	2/18/15	admitted
8	Compostable Materials Handling Operation and Facility Inspection Report (93) 1/23/15	1/23/15	admitted
9	Transfer/Processing Facility Inspection Report (53) 2/26/15	2/26/15	admitted
10	Transfer/Processing Facility Inspection Report (53), 1/26/15 inspection	1/26/15	admitted
11	Disposal Facility Inspection Report (52) 11/13/14	11/13/14	admitted
12	BAAQMD complaint report (#218184)	3/30/15	admitted
13	Email, 5/9/13, Clute-Tavares, Ochoa, Schreiner	5/9/13	not offered at hearing
14	Composting facility Solid Waste Facility Permit 7/11/02	7/11/02	admitted
15	Letter 12/24/01, CIWMB to LEA re "Transmittal of State Inspection Report for Newby Island Compost Facility"	12/24/01	not offered at hearing
16	Composting Operation and Facility Inspection Report 11/28/01	11/28/01	not offered at hearing
17	Letter , 1/22/07, LEA to GeoFirm, re "Newby Island Compost Facility: 5 Year Permit Review"	1/22/07	not offered at hearing

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Number	Description of Document	Date of Creation	Status
18	Letter, 11/22/06, LEA to Newby Island Compost Facility, re “Five-Year Review”	11/22/06	not offered at hearing
19	CIWMB State Inspection Report, 11/28/01, Composting Facility	11/28/01	not offered at hearing
20	Letter, 07/10/06, LEA to BFI Recyclery, re: “Compost Research Project”	7/10/06	not offered at hearing
21	Letter, 2/1/01 LEA to BFI, re: “Food Waste Composting Demonstration Project”	2/1/01	not offered at hearing
22	Letter, 1/30/01, LEA to BFI, re: “Food Waste Composting Demonstration Project”	1/30/01	not offered at hearing
23	Letter, 4/6/95 CIWMB to LEA, re: “Completion of ADC Demonstration Project”	4/6/95	not offered at hearing
24	Letter, 12/12/01, LEA to CIWMB, re: “Proposed Solid Waste Facility Permit for the Newby Island Composting Facility”	12/13/01	not offered at hearing
25	Compost facility solid waste facility permit	12/13/01	admitted
26	CalRecycle organization chart, 2 pages	4/20/15	not offered at hearing
27	AQMD odor complaint regulations, 4 pages	3/17/82	not offered at hearing
28	Odor complaints for Newby Island by month, January-May 2015	?	not offered at hearing
29	CalRecycle SWIS, Jurisdiction Disposal by Facility, NISL, 2014-2015	2014	not offered at hearing
30	Newby Island Composting, Operation Report of Materials Management, Inputs and	12/31/14	not offered at hearing

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Number	Description of Document	Date of Creation	Status
	Destinations, by month 2014		
31	CalRecycle Permitting and Assistance Branch Staff Report, NISL Revised SWFP, 1/30/15	1/30/15	not offered at hearing
32	Letter, 1/17/14, Recycle to LEA, re: "Final Evaluation Results"	1/17/14	objection sustained; excluded
33	Notes: LEA Program Corrective Action (from CalRecycle website)	?	not offered at hearing
34	FW: Rescission of inspection report for BFI Recyclery (BFIRescission 1-12-15pdf)	1/12/15	not offered at hearing
35	Rescission of inspection report for BFI Recyclery (BFIRescission 1-12-15pdf)	1/12/15	admitted
36	FW: Newby Island Landfill Inspection Report (NewbyCL12-14.pdf; NewbyLFRpt12-14.pdf)	1/9/15	admitted
37	FW: BFI/ Newby Recyclery Inspection Report (BFINewbyCL12-14.pdf; BFIRpt12-14.pdf) Photo log 12-9-14.doc)	1/9/15	objection sustained; excluded
38	FW: Pictures of the Recyclery on Thursday, January 8 (IMG_0368.jpg; IMP_0380.jpg; IMG_0362.jpg)	1/9/15	objection sustained; excluded
39	RE: Bay Area AQMD Contact	1/6/15	not offered at hearing
40	RE: BFI Recycler inspection Status	1/5/15	not offered at hearing
41	RE Rescission of inspection for BFI Recyclery	1/13/15	not offered at hearing

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Number	Description of Document	Date of Creation	Status
42	RE Rescission of inspection report for BFI Recyclery	1/13/15	not offered at hearing
43	RE: Rescission of inspection report for BFI Recyclery	1/13/15	not offered at hearing
44	Re: Rescission of inspection report for BFI Recyclery	1/13/15	not offered at hearing
45	Rescission of inspection report for BFI Recyclery (BFIRescission1-12-15.pdf)	1/12/15	not offered at hearing
46	RE: BFI/Newby Recyclery Inspection Report	1/7/15	not offered at hearing
47	BFI/Newby Recyclery Inspection Report (BFINewbyCL12-14.pdf; BFIRpt12-14; Photolog12-9-14)	1/6/15	not offered at hearing
48	BFI Recyclery Revised inspection report, photo log and Draft Rescind Letter for review (BFI RecycleryV3.docx; Photolog12-9-14.doc; Rescission of BFI-Newby Island 01-06-2015 Inspection Report and Cover Letter.docx)	1/9/15	not offered at hearing
49	Draft Rescission letter for BFI/Newby Island Recyclery (Rescission of BFI/Newby Island 01-06-2015 Inspection Report and Cover Letter.docx)	1/9/15	not offered at hearing
50	FW: Newby Island Landfill Inspection Report (NewbyCL12-14.pdf; NewbyLFRpt12-14.pdf)	1/9/15	not offered at hearing
51	FW:BFI/Newby Recyclery Inspection Report (BFINewbyCL12-14.pdf; BFIRpt12-14.pdf; Photo log 12-9-14.doc)	1/9/15	not offered at hearing
52	(FYI—RE: Newby/BFI Recyclery) mtg with MDB tomorrow (BFINewbyCL12-14.pdf; BFIRpt12-14.pdf; Photolog12-9-14.doc)	1/8/15	not offered at hearing

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Number	Description of Document	Date of Creation	Status
53	BFI/Newby Recyclery Inspection Report (BFINewbyCL12-14.pdf; BFIRpt12-14.pdf; Photolog12-9-14.doc)	1/6/15	not offered at hearing
54	Newby Island Landfill Inspection Report (NewbyCL12-14.pdf; NewbyLFRpt12-14.pdf)	1/6/15	not offered at hearing
55	(as requested-please review)FW: Newby & BFI Rpts. (1monthcoverletter1-15.doc; NewbyIslandRpt.pdf; Focusedcoverletter1-15.doc; BFIRpt.pdf; Photolog12-9-q14.doc)	1/5/15	not offered at hearing
56	BFI Recyclery2-25-15GTReview.docx (BFI Recyclery2-25-15GTReview.docx)	2/25/15	not offered at hearing
57	FYI: FW: Rescission of inspection report for BI Recyclery	1/21/15	not offered at hearing
58	Draft BFI Recyclery Inspection Report for review (BFI Recyclery1-20-15(2).docx)	1/20/15	not offered at hearing
59	BFI Recyclery Rescission letter (Rescission of BFI-Newby Island 01-12-2015A Inspection Report and Cover Letter.docx)	1/12/15	not offered at hearing
60	Re: Rescission of BFI-Newby Island 01-06-2015 Inspection Report and Cover Letter edit	1/12/15	not offered at hearing
61	FW: BFI/Newby Recyclery Inspection Report (BFINewbyCL12-14.pdf; BFIRpt12-14.pdf; Photolog12-9-14)	1/12/15	not offered at hearing
62	RE: Rescission of BFI-Newby Island 01-06-2015 Inspection Report and Cover Letter edit (Rescission of BFI-Newby Island 01-12-2015 Inspection Report and Cover Letter edit.docx)	1/12/15	not offered at hearing
63	Re Rescission of BFI-Newby Island 01-06-2015 Inspection Report and Cover Letter edit	1/12/15	not offered at hearing

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Number	Description of Document	Date of Creation	Status
64	Re Rescission of FI-Newby Island 01-06-2015 Inspection Report and Cover Letter edit (Rescission of BFI-Newby Island 01-12-2015 Inspection Report and Cover Letter edit.docx; Rescission of BFI/Newby Island 01-12-2015 Inspection Report and Cover Letter edit.docx)	1/12/15	not offered at hearing
65	Rescission of BFI-Newby Island 01-06-2015 Inspection Report and Cover Letter edit (Rescission of BFI_Newby Island 01-06-2015 Inspection Report and Cover Letter edit.docx)	1/12/15	not offered at hearing
66	RE; Newby Island LF and BFI Recyclery inspection touch base	1/9/15	not offered at hearing
67	FW: BFI/Newby Recyclery Inspection Report (BFINewbyCL12-14.pdf; BFIRpt12-14.pdf; Photolog12-9-14)	1/7/15	not offered at hearing
68	FW: BFI/Newby Recyclery Inspection Report (BFINewbyCL12-14.pdf; BFIRpt12-14.pdf; Photolog12-9-14)	1/6/15	not offered at hearing
69	BFI Recyclery (43-AN-0014)	4/13/15	not offered at hearing
70	BFI Recyclery draft inspection (BFI RecycleryV5.docx)	1/14/15	not offered at hearing
71	BFI Recyclery Inspection report review (BFI Recyclery2-25-15GTReview.docx)	2/25/15	not offered at hearing
72	BFI Recyclery Rescission letter (Rescission of BFI-Newby Island 01-12-2015A Inspection Report and Cover Letter.docx)	1/12/15	not offered at hearing
73	BFI Recyclery (BFI Recyclery2-20-15GTReview.docx)	2/23/15	not offered at hearing
74	BFI REcyclery1-21-15(3).docx (BFI Recyclery1-21-15(3).docx)	1/20/15	not offered at hearing

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Number	Description of Document	Date of Creation	Status
75	BFI Recyclery2-25-15GTReview.docx (BFI Recyclery2-25-15GTReview.docx)	2/25/15	not offered at hearing
76	BFI RecycleryV61-16-15(2).docx (BFI RecycleryV61-16-15(2))	5/6/15	not offered at hearing
77	BFI Report Status	5/6/15	not offered at hearing
78	BFI/Newby Island Photo log 12-9-14(3).doc (Photolog12-9-14(3))	2/24/15	not offered at hearing
79	BFI/Newby Recyclery Report-Draft (BFI RecycleryV61-16-15)	1/20/15	not offered at hearing
80	BFI/Newby Recyclery Report Review (BFI RecycleryV61-16-15(3))	1/20/15	not offered at hearing
81	BFI/Newby Recyclery (BFI Recyclery 2-20-15GTReview.docx)	2/24/15	not offered at hearing
82	BFIRpt..docx (BFIRpt..docx.docx)	1/9/15	not offered at hearing
83	BFIRpt2 docx.docx (BFIRpt2 docx.docx)	1/9/15	not offered at hearing
84	FW:BRI Recyclery/Photo log/Photo log additions review	2/23/15	not offered at hearing
85	FW: BFI/Newby Recyclery Inspection Report (BFINewbyCL12-14.pdf; BFIRpt12-14.pdf; Photolog12-9-14.doc)	1/7/15	not offered at hearing
86	FW: BRI/Newby Recyclery Inspection Report (BFINewbyCL12-14.pdf; BFIRpt12-14.pdf; Photolog12-9-14.doc)	1/7/15	not offered at hearing

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Number	Description of Document	Date of Creation	Status
87	Fw: BFI/Newby Recyclery Inspection Report	1/7/15	not offered at hearing
88	RE: BFI Recyclery (43-AN0014)	4/14/15	not offered at hearing
89	RE: BFI Recyclery	12/11/14	not offered at hearing
90	RE: BFI Recyclery Inspection report review	2/25/15	not offered at hearing
91	RE: BFI Recyclery Notes	12/10/14	not offered at hearing
92	RE: BFI Recyclery Notes	12/10/14	not offered at hearing
93	RE: BFI Recyclery1-20-15(d).docx	1/21/15	not offered at hearing
94	RE: BFI Recyclery1-20-15docx	1/20/15	not offered at hearing
95	RE: BFI Recyclery1-21-15(3)	1/20/15	not offered at hearing
96	RE: BFI RecycleryV61-16-15(2).docx	1/16/15	not offered at hearing
97	RE: BFI/Newby Island Recyclery 43-AN-0014	1/8/15	not offered at hearing
98	Re: BFI/Newby Recyclery Inspection Report	1/7/15	not offered at hearing
99	RE: BFI/Newby Recyclery Inspection Report	1/7/15	not offered at hearing

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Number	Description of Document	Date of Creation	Status
100	RE: BFI/Newby Recyclery Inspection Report	1/12/15	not offered at hearing
101	RE: BFI/Newby Recyclery Inspection Report	1/7/15	not offered at hearing
102	RE: BFI/Newby Recyclery Inspection Report	1/8/15	not offered at hearing
103	RE: BFI/Newby Recyclery Report – Draft	1/16/15	not offered at hearing
104	RE: BFI/Newby Recyclery Rpt.	1/8/15	not offered at hearing
105	RE: BFIRpt.docx (BFIRpt..docx)	1/9/15	not offered at hearing
106	Newby & BFI Rpts. (18monthcoverletter1-15.doc; NewbyIslandRpt.pdf; Focusedcoverletter1-15.doc; BFIRpt.pdf; Photolog12-9.doc)	1/5/15	not offered at hearing
107	Complaint Report # 218184	3/19/15	admitted
108	Resolution of Milpitas City Council	4/9/15?	not offered at hearing
109	CalRecycle Public Documents	various	objection sustained; excluded
110	Dona Sturgess Declaration	8/10/15	objection sustained; excluded

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LEA and the Intervenors submitted exhibits in advance of the hearing and then withdrew their exhibit set and substituted a new set at the August 12, 2015 hearing. The new exhibit set was not organized strictly in accordance with Conference Order # 1. However, Milpitas did not object to any of the LEA and Intervenors' new Joint Exhibit set. The LEA and Intervenors' exhibits were all admitted at the commencement of the hearing. Ex. 227 was withdrawn at August 13, 2015 hearing session.

The new LEA and Intervenors' Joint Exhibits were as follows:

VOLUME 1

EXH#	DOC#	DESCRIPTION	DATE
200	Binder	Joint Technical Document Permit No. 43-AN-0003. Prepared by Tetra Tech BAS	01/2014

VOLUME 2

Compost Facility SWIS #43-AN-0017			
EXH#	DOC#	DESCRIPTION	DATE
201	LEA 1-16	Solid Waste Facility Permit	1/23/2002
202	LEA_17-21	Solid Waste Facility Permit Review	3/26/2007
203	LEA_22-41	Odor Impact Minimization Plan, Revised March 2010	3/2010
204	LEA_42-64	Report of Composting Site Information Newby Island Compost Facility San Jose, California	1/24/2012
205	LEA_65-67	Errata Cover Sheet and 5 Year Permit Review Report	7/6/2012
206	LEA_68-72	CalRecycle Facility/Site Inspection Details; Compostable Materials Handling Operation and Facility Inspection Report (93)	12/18/2014
207	LEA_73-76	CalRecycle Facility/Site Inspection Details; Compostable Materials Handling Operation and Facility Inspection Report (93)	1/23/2015
208	LEA_77-80	CalRecycle Facility/Site Inspection Details; Compostable Materials Handling Operation and Facility Inspection Report (93)	2/18/2015
209	LEA_84-86	Compostable Materials Handling Operation and Facility Inspection Report (93)	3/23/2015
210	LEA_81-83	Compostable Materials Handling Operation and Facility Inspection Report (93)	4/23/2015
211	LEA_132-158	Revisions to the Odor Impact Minimization Plan for the Newby Island Composting Facility	4/24/2015

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212	LEA_87-89	Compostable Materials Handling Operation and Facility Inspection Report (93)	4/29/2015
213	LEA_90-92	Compostable Materials Handling Operation and Facility Inspection Report (93)	5/28/2015
214	LEA_159-161	Compostable Materials Handling Operation and Facility Inspection Report (93)	6/26/2015
215	LEA_93	45-Day Owner or Operator Transfer Notice	6/15/2015

Landfill Facility SWIS #43-AN-0003			
EXH#	DOC#	DESCRIPTION	DATE
216	LEA_94-96	Disposal Facility Inspection Report (52)	12/9/2014
217	LEA_97-99	Solid Waste Facility Permit Review	12/18/2014
218	LEA_100-101	CalRecycle Letter re Permit Concurrence for Revised Solid Waste Facilities Permit – Facility No. 43-AN-0003	12/19/2014
219	LEA_102-104	CalRecycle Disposal Facility Inspection Report (52)s	12/29/2014
220 P-54	LEA_105-107	CalRecycle Letter and attached inspection report (12/9/2014)	1/6/2015
221	LEA_162-164	Disposal Facility Inspection Report (52)	1/23/2015
222	LEA_108-112	Solid Waste Facility Permit Facility # 43-AN-0003	2/9/2015
223	LEA_113-115	Disposal Facility Inspection Report (52)	2/18/2015
224	LEA_116-118	Disposal Facility Inspection Report (52)	3/23/2015
225	LEA_119-121	Disposal Facility Inspection Report (52)	4/23/2015
226	LEA_122-124	Disposal Facility Inspection Report (52)	5/28/2015
227	LEA_329-331	Disposal Facility Inspection Report (52)	6/26/2015
228	LEA_128-129	CalRecycle LEA Permit Toolbox Form – Complete and Correct Finding for Application Information	3/10/2015 (printed)
229	LEA_130_131	CalRecycle Permit Toolbox Form – Basic Permit Process Flowchart	3/10/2015

Recyclery SWIS #43-AN-0014			
EXH#	DOC#	DESCRIPTION	DATE
230	LEA_334-338	Solid Waste Facility Permit (SWIS No. 43-AN-0014)	11/8/1999
231	LEA_310-311	5 Year Permit Review Report	10/16/2009
232	LEA_173-216	Transfer/Processing Facility Inspection Report (53) (without appendices)	May 2012
233	LEA_168-170	5 Year Permit Review Report	11/8/2014

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234	LEA_313-315	Transfer/Processing Facility Inspection Report (53)	12/9/2014
235	LEA_316	CalRecycle Letter re: Rescission of CalRecycle's December 9, 2014 Inspection Report	1/12/2015
236	LEA_317-319	Transfer/Processing Facility Inspection Report (53)	1/26/2015
237	LEA_320-322	Transfer/Processing Facility Inspection Report (53)	2/26/2015
238	LEA_323-324	Transfer/Processing Facility Inspection Report (53)	3/23/2015
239	LEA_325-326	Transfer/Processing Facility Inspection Report (53)	4/30/2015
240	LEA_339-340	Transfer/Processing Facility Inspection Report (53)	5/28/2015
241	LEA_332-333	Aerial photos of the Newby Island facilities	
242	LEA_329-331	Transfer/Processing Facility Inspection Report (53)	6/26/2015

Additional Exhibits:

No.	Description	Date	Status
243	Email from Johnny Lee re Santa Clara County Superior Court Case	8/11/15	Objection overruled; admitted
244	Complaint Chart Jan. 2014 to March 2015		Objection overruled; admitted
245	email from LEA inspector Bob Bates to Marilyn Nickel, Milpitas City Gov.	12/30/14	admitted without objection

The following persons testified under oath:

Name	Position
Edward Schreiner	Environmental Inspector for the LEA
Arnold Argao	Air Quality Inspector for the Bay Area Air Quality Management District
Troy Weber	Environmental Scientist and Solid Waste Facility Inspector for CalRecycle
Jennifer Strohfus	Milpitas resident
Steven Machida	Director of Engineering for the City of Milpitas
George Savage	Principal and President of Cal Recovery, Inc.
Bob Bates	Environmental Inspector for the LEA
Tom Williams	Milpitas City Manager
Don Litchfield	Republic Services Northern California Environmental Manager

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Public comment was taken at the conclusion of sworn testimony. Each individual was permitted to speak for three minutes. 26 people presented comments. In addition, a Newbry Fact Sheet was submitted and accepted as public comment.

The parties stipulated that on or before Friday August 21, 2015, the Hearing Officer would send the parties a tentative decision, upon which they could comment until the close of business on Thursday August 27, 2015. They agreed that the decision would timely issue on Friday August 28, 2015.

The tentative decision was issued on August 20, 2015.

Milpitas responded by email dated Mon 8/24/2015 at 12:47 PM that the Hearing Officer's conclusions were "quite clear." In that email, Milpitas did not suggest any changes to the tentative decision. By email dated August 27, 2015 at 11:29 AM, however, Milpitas submitted a 10 page detailed request for changes in the tentative decision.

FINDINGS OF FACT

Newbry Island Resource Recovery Park is composed of a Landfill, a Recyclery and a Compost Facility. *August 12, 2015 Testimony of Edward Schreiner*. It is located adjacent to the City of Milpitas in the northeast corner of the City of San Jose. *Ex. 241; Ex. 232, LEA_000214, 000216; Ex. 200, Figures*. Each facility has a separate solid waste facility permit. *Id., A.2-3*.

Since 2009, the Newbry Island Resource Recovery Park has been undergoing a comprehensive environmental review, due to the request to increase the vertical height of the Landfill. *Ex. 231; Ex. 205, LEA_000066-67*. The proposed design and operational changes to the Landfill are described in the Joint Technical Document (JTD) for Permit No. 43-AN-0003. *Ex. 200, A.2-1 to 2.2*.

Residents of Milpitas have made vociferous complaints about odors. I am persuaded that the odors they experienced were real and were noxious.

Residents of Milpitas vehemently object to increasing the vertical height of the Landfill because of odors that they have experienced. *Testimony of Arnold Argao, Jennifer Strohfus, Public Comment. See Ex. 243* (email soliciting public comment to oppose the Landfill expansion).

The LEA has cooperated with the Bay Area Air Quality Management District (BAAQMD), in investigating odor complaints. Since December 2014, the LEA has put a lot of pressure on the Newbry Island Resource Recovery Park to improve odor causing conditions. Cooperation of the Newbry Island Resource Recovery Park operators has been good. *Testimony of Arnold Argao*.

This area of the South Bay has many odor sources in addition to the Newbry Island Resource Recovery Park: the US Fish and Wildlife Service Ponds, the Cargill Salt Pond, the Zanker

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Composting Facility, the Zanker Organic Digester Facility (ZWED), the Zanker Construction and Demolition Facility, the San Jose Regional Wastewater Facility and Open Air Sewage Sludge Drying Beds. *Testimony of Arnold Argao, George Savage; Ex. 214.*

The Recyclery, a materials recovery facility (MRF), is located on leased property fronting the south side of the main access road, just inside the park entrance. The Recyclery has its own SWFP (43-AN-0014) and efficiently processes materials for recycling including: wood waste, glass, paper, metals, and plastic. *Ex. 200, B.3-3.*

The Compost Facility is operated with some activities located on the Recyclery parcel, and some on the Landfill parcel. Organic wastes are stockpiled, ground and processed in a paved area west of the Recyclery building, then transported to southern portions of the Landfill for composting, curing, and screening.

The Newby Island Composting Facility operates under a separate SWFP issued by the LEA (SWFP No. 43-AN-0017) and is fully described in the Report of Compost Site Information (GeoFirm; May 1, 2001, revised January 15, 2002). *Ex. 200, B.3-4.*

THE LANDFILL

The Newby Island Sanitary Landfill was permitted as a solid waste disposal site by Solid Waste Facility Permit (SWFP) No. 43-AN-0003. The site began operation as a Landfill in 1932. *Ex. 200, B.1-1.* The Landfill is currently the primary solid waste disposal site for the Cities of San Jose, Milpitas, Santa Clara, Cupertino, Los Altos, and Los Altos Hills. *Id., B.2-1.*

In January 2014, TetraTech BAS prepared Joint Technical Document (JTD) for Permit No. 43-AN-0003. *Ex. 200.* This document provides information on the latest design and operations for the site in accordance with the California Code of Regulations, Title 27 (27 CCR). *Id., A 1-1.*

The information presented in this JTD provided the LEA with updated information to support a revision to the existing SWFP and approval of a JTD amendment to reflect the vertical expansion of the NISL presented in the Environmental Impact Report (EIR) for the Newby Island Sanitary Landfill and The Recyclery Rezoning Project (File No. PDC07-071 (SCH No. 2007122011)). The information presented in this JTD is primarily based on the conceptual design and mitigation measures presented in the EIR. *Id., 1.1-2.*

In October, 2014, LEA Inspector Schreiner gave the operator verbal approval for food waste to be stored at the Recyclery and then moved to a bunker located on the Landfill facility. The operator constructed a concrete bunker on the Landfill to hold unprocessed materials from the Recyclery. Use of the bunker caused odors. It was one of the worst odor point sources. The Landfill operator was storing putrescible materials in the open air bunker for up to five days prior to processing. The materials were kept on a first in last out basis. The practice had been

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continued despite its apparent significant contribution to numerous odor complaints by Milpitas residents. *Testimony of Bob Bates; Ex. 234.*

On November 13, 2014, LEA Inspector Bob Bates found that the bunker holding overages from the Recyclery was full. The contents were one half unprocessed MSW and one half ZWED materials. He did not note any odor concerns. *Testimony of Bob Bates; Ex. 11.* However, the LEA has no odor jurisdiction over the Landfill. Landfill odors are under the control of the Bay Area Air Quality Management District (BAAQMD). *CalRecycle decision dated June 9, 2015, ¶ 29 at pages 10-11, ¶ 41 at p. 15.*

The Landfill was not permitted as a transfer facility. *Ex. 234.* Therefore, the LEA Landfill inspection reports dated October 22 and November 13, 2014, *Ex. 11*, improperly indicated that there were no violations or areas of concern.

On November 25, 2014, Troy Weber of CalRecycle performed a pre-permit inspection and issued citations that the bunker storage area and transfer type operations violated the Landfill permit. *Ex. 221, LEA000614.* CalRecycle also cited the Landfill for violations of 27 CCR 20510- Disposal Site Records and 27 CCR21600- Disposal Site Information. *Ex. 218, LEA_000100.*

Daily cover is placed at the active fill area of the Landfill at the end of each operating day. The purpose of daily cover soil or an equivalent alternative daily cover (ADC) is, among other things, to minimize the escape of odors. ADC may be placed over exposed refuse on the face or slopes. *Ex. 200, B. 5-1.*

On November 25, 2014, Troy Weber noted that the Landfill operator was combining sludge with green waste to use as alternative daily cover (ADC) at the Landfill. *Testimony of Bob Bates; Ex. 216, LEA_000096.* Both green waste and sludge can be used as ADC under the Landfill permit. *Testimony of Bob Bates; Testimony of George Savage; Ex. 200, B.5.2.1.* However, when they are mixed, a demonstration project is required under state law. Any ADC must be the equivalent to six inches of soil in sealing off from vectors to control odor. *Testimony of Bob Bates.*

CalRecycle issued two Notices of Violation concerning the "bunker" storage for the Recyclery and the harvesting (stripping back of Alternate Daily Cover). The bunker and possibly this stripping back activity were concerns as contributors to odor. The LEA did cite an Area of Concern for the unauthorized activity as a transfer station in a parallel inspection. *Ex. 245.*

The operator cleaned out bunker on December 8, 2014. *Testimony of Bob Bates.*

On December 9, 2014, a focused inspection of the Landfill was conducted by Troy Weber of CalRecycle, in conjunction with Bob Bates and Ed Schreiner of the LEA staff. The reason for the inspection was to check on the status of the large bunker near the tipping face, the use of mixed ADC, and to check the status of material used for intermediate cover. One purpose of the inspection was to evaluate whether the local LEA was appropriately applying and enforcing

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State Minimum Standards at the Landfill. The Landfill facility was evaluated for compliance with applicable sections of Division 30 of the Public Resources Code (PRC), the terms and conditions of the Solid Waste Facility Permit, Title 12, California Code of Regulations (27 CCR) and Title 14, California Code of Regulations (14 CCR). The operator told Troy Weber that it was not mixing approved ADC materials for daily cover, and instead was using clean soil for intermediate cover. *Testimony of Bob Bates.*

On December 9, 2015, Troy Weber smelled odors outside the Newbry Island Resource Recovery Park. Once inside the park, he determined that the odors were coming from the Landfill and the Recyclery, not the Compost Facility. He reported his odor findings to BAAQMD, which has the duty to investigate them and provide enforcement for any violations. *Testimony of Troy Weber, August 14, 2015.*¹

LEA inspector Bob Bates inspected the Landfill on 12/18/14 and found no violations. He made the following comments:

Facility has received over 5" of rain total over the last two rain events. Some rills and initial erosion was observed on some of the NE outer slopes. These areas have consistent vegetation and have not historically had problems.

In addition, an area of the levy in that area has shown signs of some erosion. An outside consultant is scheduled to be onsite tomorrow to ascertain the severity of the situation and make recommendations for remediation if necessary.

Below the active face, 4 staff were containing and covering a portion of the waste on the slope which equipment could not reach due to wet conditions. A motor patrol was spread dry fines on the roadways in the area approaching the face.

The Landfill operations staff is responsible for maintaining the truck well wash adjacent to the Recyclery. Tony Boccaleoni stated that the wash is utilized from October to May. During that time the water is continually topped off by a float controlled input. Landfill staff drains and refills the unit 3 times per year. Dredging out the solids is done annually in May +/-.

Ex. 217, LEA_000099.

By letter dated December 19, 2015, CalRecycle notified the LEA about disposal site records and information it had found during the November 25, 2014 inspection. It requested the LEA to work

¹ After the inspection, Troy Weber prepared a report saying that he did not observe any violations. Ex. 36. His report, *Exs. 36 and 216*, was sent by CalRecycle to the LEA by letter dated January 6, 2015, *Ex. 220*, and was then withdrawn. *Ex. 235*. No CalRecycle inspection report for its December 9, 2014 inspection has been re-issued. Testimony of Troy Weber. I have given no weight to his "no violation" report, *Exs. 36 and 220*.

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with the operator to correct the disposal site records and information and document any corrections of the violations in subsequent LEA monthly inspection reports, including how compliance was attained. *Ex. 218, LEA_000100-101.*

On December 29, 2014, LEA inspector Bob Bates conducted a focused inspection to follow up on the issue of stripping back ADC in the mornings.

Agustin Moreno stated that the facility had ceased stripping back the ADC and reapplying these materials the next evening upon receipt of the November CalRecycle pre-permit report and Notice of Violation.

The roadways had been wetted and the main entry road exit lane was washed by the water truck. The truck wheel wash was operational but also sprayed the adjacent exit lane vehicles which tried to bypass it. The water was odorous and lingering despite having the windows up and trying to avoid the spray.

No litter or other issues were noted at the time of inspection.

Ex. 219, LEA_000104.

As of December 30, 2015, in response to these violations from CalRecycle and the LEA, Republic Services had ceased daily stripping back the ADC at the active face. *Ex. 245.*

By January 23, 2015, the bunker storage area had been removed, and the transfer type operations had ceased. *Ex. 221, LEA 000164; Testimony of Bob Bates.* LEA inspector Bob Bates found no violations or areas of concern. He commented:

The site in general was clean and free of blowing litter. The active face had ADC staged on both sides which was primarily C&D fines some green waste. After the CalRecycle pre-permit November 25th inspection report was received, the Landfill no longer strips back ADC each morning. The ADC is left in place to receive the next day's MSW materials with some keying-in to enable the next lift of disposal not to slip off. In addition, biosolids are now buried rather than used as an ADC. The bunker storage area adjacent to the face has been removed and filled with soil reserves. The modification of ADC procedures/materials, removal of the unapproved storage area and ceasing of transfer type operations have corrected the conditions cited in the two violations by CalRecycle. Therefore, the operations have returned to compliance in regard to these violations.

Roadways were in good condition and wetted for dust control. The closed slopes have consistent vegetation which is green from the recent rains. The area on the levy that was of concern last month has been inspected by a consultant. The determination was that no

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major issues could be found but some remedial dirtwork was needed to stop any erosion prior to being a problem. Work is progressing on that area by the facility.

Exs. 5, 221.

On February 9, 2015, the LEA issued a Solid Waste Facilities Permit for the Sanitary Landfill, Facility No. 43-AN-0003. The design and operation of the Landfill is described in the Joint Technical Document and Subsequent Amendments, dated January 2014, *Ex. 200*, and the Environmental Impact Report, SCH No. 2007122011, dated June 2012. *Ex. 222, LEA_000108-112.*

LEA inspector Bob Bates inspected the Landfill on February 18, 2015 and found no violations or areas of concern. He commented:

Current fill location has been staked out for top out at the current maximum elevation of 150 MSL. Future fills in that area will slope down from this high reference point. Roadway between the previous bunker and the composting operation has been moved further SW to allow for disposal in that area. All roadways have been wetted to minimize dust. No issues with litter observed throughout facility including entry roads and scalehouse area. The wheel wash has been used for one day since being cleaned out last month. Minor corrective measures have been completed on the levy. Some of the NE outer slopes have focused erosion where natural flumes have occurred. These areas will have 6" rip rap placed to enable utilization as a permanent drainage feature. Some imported special soils are being used on interior facing slopes for stabilization. The BAAQMD did perform an inspection for methane emissions from the Landfill and extraction system. Two violations were issued for these areas during that inspection.

Ex. 223.

LEA inspector Bob Bates inspected the Landfill on March 23, 2015 and found no violations or areas of concern. He commented:

Inspected Landfill with Tony Boccaleoni. Two employees are checking for methane at wells and surface emissions in a self-identified emissions monitoring program. Five horizontal wells are being installed above and West of the leachate collection tanks.

The truck filling station for hauling leachate has been retrofitted to seal around input port and removes gases through a biofilter gas recovery system. The leachate tanks have a similar wood chip biofilter system in the vapor recovery venting piping also.

Some asphalt grindings are being received and re-used for roadway improvements. Some additional work being done by contractor at the levy area previously done. Subgrade at

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levy road reconstructed to a specific cross-sectional design to eliminate undercutting of levy/roadway by run-off.

All roadways including perimeter ones were in good, maintained condition. No stray litter noted. An additional 700' of deodorizing infrastructure has been added.

Self Haul tipping separated from commercial haulers of MSW and soils. Moveable litter fences were positioned on the leeward side of these tipping areas. Soil for ADC was positioned on either side.

Ex. 224.

LEA inspector Bob Bates inspected the Landfill on April 23, 2015 and found no violations or areas of concern. He commented:

Toured facility with Tony Boccaleoni. All roadways appeared in good condition and wetted for dust control. No litter issues on entire permitted area. Much of the green waste accumulation has been chipped and is being placed on slopes for erosion control and stabilization.

No signs of erosion issues on slopes or perimeter slopes/levy roadway.

Public tipping area was well separated from franchise haulers. Twelve additional vertical wells and the previously installed horizontal are now online with main extraction system. The system is currently being balanced and set for optimum performance with these newly installed system components.

Two observation overlook areas have been set up by the field office and above the composting area. These will facilitate tours particularly those from school and community groups. The bales which have been stored on Parcel D are gradually being reduced as the MRF is exporting more of its backlog since the port slowdown. The algae growth in the sed pond seems to be less than noted last month. A more permanent control center has been set up on the odor system across the East boundary and an additional 1,600 LF of misters added. Sheetrock materials from C&D sorting is being exported to Keith Day dba Gabilan Ag Services at the MRWMD in Marina.

One object of this visit was to investigate why odor complaints were received on 4/16 and 4/17 in the evening. Tony stated that by evening the working face is covered except for about 25% and all compost/chipping operations should have stopped by 4:30-5:00 pm. Republic records indicate that the winds were WNW at 10-12 which would correlate with Milpitas but no specific activity or source could be determined to be the cause.

Ex. 225.

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LEA inspector Bob Bates inspected the Landfill on May 28, 2015 and found no violations or areas of concern. He commented:

All roadways were wetted to prevent dust. All odor systems were in use while onsite. Working face was minimal and tucked in NE of compost area. Adequate separation between franchise and self-haulers. Litter fence in place with no stray litter except where green waste is being applied on vegetative slopes. These materials contain some contamination of film plastics and paper. These materials will be removed by contract farm labor crews to complete this process. Levy repairs are complete. The Coastal Commission has determined that the levy road must be raised 3' in anticipation of sea level rise.

The second week of May there the condensate pump located south of the leachate tanks failed causing a backup in the loop. This caused the methane extraction system to be ineffective for several days. The system was back online and functioning at the time of inspection.

Ex. 226, LES_000123.

RECYCLERY

The Recyclery is permitted as a material recovery facility, processing facility and transfer station by SWIS Permit No. 43-AN-0014 issued on November 8, 1999. It is limited to peak tonnage per operating day of 1600 tons. *Ex. 230.* The operator is required to keep daily and monthly gross tonnage records. *Id.* The Recyclery's permit was reviewed on October 16, 2009. No significant changes were found. The permit was not revised in 2009. *Ex. 231.*

Operations at the Recyclery are detailed in the Transfer/Processing Report (TPR) prepared for Republic Services, Inc. by SWT Civil and Environmental Engineering, dated May 2012, *Ex. 232.* The Five Year Permit Review, dated November 8, 2014, indicates that the TPR § 3.1.4.4 removed the 48 hour limit on storing unprocessed materials. *Ex. 233, LEA_00169.* It also indicates that the TPR § 3.2.1 removed the requirement that all recyclables be processed within 48 hours of receipt. *Id.*

On December 9, 2015, Troy Weber inspected the transfer station at the Recyclery and found it odoriferous. He reported his findings to BAAQMD. He did a full inspection of the Recyclery. *Testimony of Troy Weber, August 14, 2015.*

On December 9, 2014, LEA staff Bob Bates, Paul Taveres and Ed Schreiner accompanied Troy Weber and Martin Perez of CalRecycle, on the inspection. LEA Inspector Bob Bates saw piles of garbage outside the Recyclery tipping room floor. The piles were eight to nine feet high. They were outside of the tipping room doors. He wrote up the violation and notified CalRecycle four

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to five days later. The pile of garbage outside the door was an odor factor, but if it was moved into the Recyclery building soon, it would not be a significant factor. *Testimony of Bob Bates.*

LEA inspector Bob Bates reported:

The main focus of the inspection was the outside activities including the receiving, storage and loading areas. Concern was noted about the possibility of some materials after processing could be contributing to odor generation. These areas included the glass pile, 2-8" ZWED materials, daily bunkered pile of accumulated litter and other outside MSW, incoming wet bunker and wet residues on pavement tracked out by vehicles not using truck wash (with recycled water) on this day.

A large amount of baled recyclables were being stored outside around the perimeter fence. These bales could also be a source of some odor over time.

The estimated amount of materials on the tipping floor was 1,700 tons (per Brian Ezyk) not including trucks queued up outside. Brian Ezyk, Division Manager, said that the extra incoming trucks would be diverted but refused to identify the destination.

Upon a records check, Troy Weber with CalRecycle noted that one of the spotters did not have adequate training in load check and hazard identification. In addition, he noted that the bird control worker on a quad runner needed more visibility as to the vehicle and her PPE.

The bunker used for offsite storage had been cleaned out on Monday, December 8th. Mr. Ezyk stated some of these bunkered materials were on the tipping floor adding the excessive amount of water and odor at the facility during inspection.

Ex 234, LEA_00315.

LEA inspector Bob Bates cited the Recyclery for the following permit violations and areas of concern:

Permit Filing Requirements & Permits. PRC 44014(b) - Operator Complies with Terms & Conditions:

Operator has been stockpiling incoming and outgoing materials offsite at a facility not permitted as a transfer facility. The TPR limits tipping of incoming materials to inside the facility building. The TPR and SWFP also set a daily maximum at 1,600 tpd.

Permit Filing Requirements & Permits. PRC 44004 - Significant Change:

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Changes in design or operation must be submitted for approval six months prior to implementation. Offsite storage and retention/processing of materials has been exceeding the mandatory limits.

Controls. 17408.5 - Nuisance Control:

The operator has been storing putrescible materials in a open air bunker for up to 5 days prior to processing. In addition, outgoing materials (70% putrescible) have been similarly stored for up to 5 days. All these materials were kept on a first in last out basis. This practice has been continued despite its apparent significant contribution to the numerous Odor complaints and lawsuits by the community of Milpitas.

Operating Criteria. 17410.1 - Solid Waste Removal:

Facility has consistently failed to process and remove solid waste with 48 hours after receipt.

Ex 234, LEA_00313-314.

In response to these violation citations from CalRecycle and the LEA, the operator, Republic Services, cleaned out and stopped usage of the bunker storage, ceased daily stripping back the ADC at the active face, and limited materials received outside the Recyclery building proper and placed a yard manager to supervise. LEA inspector Bob Bates was looking into other sources of possible odor such as the wheel wash for exiting trucks. Paul Tavares and the City of San Jose LEA had been communicating with other regulatory agencies involved to develop a cooperative approach to these odor issues. *Ex. 245.*

On January 26, 2015, LEA inspector Bob Bates commented:

Beginning on January 12, 2015, the facility returned to compliance as to delivery/tipping activities being restricted to inside the transfer/processing building. Daily monitoring since January 12th and today's inspection confirm that this portion of the operations have been maintained within the permit conditions. In addition, usage of the storage bunker and the transfer operations at the adjacent Landfill has ceased.

The five additional trailers for export of wet line residuals/ZWED have been received increasing this fleet to 10 total. In addition, ZWED is now accepting delivery of most of the materials generated and is now open on Saturdays for delivery from the Recyclery.

A nylon brush unit has been added to one of the wet line down chutes which fill the ZWED trailers. This unit knocks down the stream into the truck and thereby minimizes the broadcasting across the loading dock area. More of these may be added. BFI has

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working on determining aspects of operations which could be a possible contribution to odors. Since returning to compliance, the paved areas have been maintained in an acceptable condition. Liquids from the wet line have not been observed running onto the apron as before. The general background odor seems to have decreased since cleaning of the apron and moving receiving activity under roof.

Although the responsibility of the Landfill, the adjacent truck wheel wash has been drained and dredged. This stagnant water sprayed in the air which further contributed not counting tracking. The site has been free of litter. The quad rider had high-vis PPE and helmet.

As with many recyclers in our area, issues at the Port of Oakland have caused a backlog of bales onsite. Those such as paper/OCC are being tarped to prevent wetting by rain. Two additional semi-loads +/- have been stored on the Northside of the D parcel and were tarped as well.

Exs. 10 and 236, LEA_000319.

He noted:

The facility received a violation from the Bay Area Air Quality Management District but failed to notify the LEA within 2 business days as required by Condition 16.a.6 of the SWFP.

Id.

On February 26, 2015, LEA staff Bob Bates inspected the Recyclery and found no violations or areas of concern. In his report, he commented:

Toured facility with Mike Serpa, Operations Supervisor. The amount of baled recyclables has increased dramatically since last month due to the port issues. Stacked bales extend past the water tank to the extent of the West entry lane.

Mike says that some bales have began (sic) to be removed this week. Guidance from CalRecycle received this month advises modifying documents to allow for these occasional backlogs which are beyond the operators control. There was some litter issues being attended to in the baling area since 1 of the 4 balers was out of service.

Some recent equipment adjustments to the wet line system have helped increase production rate in that area. Concern was expressed to Brian Ezyk about materials processed on Saturday were not being disposed within 48 hours of receipt.

Milpitas v. San Jose LEA Decision, cont.

The timelines which he provided indicate that the facility is attempting to remain in compliance on the 48 hour from receipt to disposal at ZWED.

The apron outside the receiving door for the wet line appeared covered in a layer of slurry extending out 40 feet from the building line (well past the dedicated drain area). Some type of operational or design change needs to eliminate these putrescible materials leachate from entering the stormwater drainage system and eventually the adjacent ponds. The Storm Water Pollution Prevention Plan (SWPPP) in Appendix J of the TPR was created prior to the current design or operations including the wet processing line. The SWPPP needs to be updated in the next upcoming permit action.

Exs. 9, 237.

On March 23, 2015, LEA staff Bob Bates inspected the Recyclery and found no violations or areas of concern. In his report, he commented:

Don Litchfield and Scott McCourty stated that a trench drain will be installed across doors 4, 5 and 6 to keep leachate from entering the stormwater drainage. The entire footprint of the fenced area was stockpiled with bales two high. In addition, a large portion of the North end of the D-parcel had bales stored. Don Litchfield said that they are removing 8 more containers than they are producing currently. The rain on Sunday and this morning found most of the bales untarped. The lanes in between the bales at both locations were clean and litter free as was the roadways outside and at the scales. A new sweeper has been purchased for the site, awaiting delivery.

The falconer was onsite and no seagulls were observed.

Ex. 238.

On April 30, 2015, LEA staff Bob Bates inspected the Recyclery and found no violations or areas of concern. In his report, he commented:

Since the last periodic report, the facility has been visited 7 or 8 times. The paved areas have been clean and swept of loose litter. A spotter has been positioned to direct incoming and exiting haulers.

The spotter and all personnel including the bird crew have PPE on and are easily visible. Material is being tipped inside the building and not protruding onto the apron. The amount of accumulated bales from the port slowdown appear to be decreasing from the Recyclery and D parcel.

The footing has been installed for the extension of the bunker designed to catch liquids coming from the wet load tipping door.

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No issue with birds onsite were observed. Republic has submitted and (sic) application for a TPR amendment to update the current version from the 2012.

Ex. 239, LEA_000326.

LEA inspector Bob Bates inspected the Recyclery on May 28, 2015 and found no violations or areas of concern. He commented:

TPR Amendment accepted on May 26th and submitted to CalRecycle on May 28th. Visits to the site this month have found that the incoming materials are being tipped inside the building as required. The apron and outside paved areas have been kept swept and free of blowing litter.

The accumulated bales onsite have been reduced from last month. These bales are being loaded out at five locations on the footprint and the D-parcel. There is some localized litter at the loading ramp areas which is being addressed daily.

Ex. 240, LEA_00340.

LEA inspector Bob Bates inspected the Recyclery on June 26, 2015 and found no violations or areas of concern. He commented:

All extra bales from the backlog accumulation have been shipped from the Recyclery footprint. Some bales remain on the D parcel but are being loaded. No litter issues were noted inside or outside the building. The inspection of the interior found some weekly accumulation of litter of some of the upper ledges and dust collectors. The record log from Perry was checked and found that these areas are addressed on the weekend when other employees are not in the area. Brian Ezyk pointed out some improvements to the conveyor system and bunkers outside. One conveyor can now be set to divert the 2-8" heavies directly to the ZWED trailer when desired rather than via the bunker/loader.

More brush mechanisms will be added to the upper outside conveyors to help with stray materials around the trailer area. The bunker at the East end for busted bale materials will be replaced with bins to contain those materials. This will reduce stray litter and possible odors at that location.

The apron and most of the fence line around the facility have incorporated misting systems for odor control. The removal of the bales which were onsite were a contributing factor to a residual odor but most importantly as a fire hazard. (sic).

Ex. 242, LEA_000330.

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COMPOST FACILITY

The Newby Island Compost Facility is permitted as a composting facility by SWIS Permit No. 43-AN-0017, issued January 29, 2002. *Ex. 14*. Some of its activities are located on the Recyclery parcel, and some on the Landfill parcel. “Organic wastes are stockpiled, ground and processed in a paved area west of the Recyclery building, then transported to southern portions of the Landfill for composting, curing and screening.” *Ex. 200, § B.3-4*.

In March 2010, the Compost Facility adopted a revised Odor Impact Minimization Plan, *Ex. 203*. A detailed description of the composting operation is contained in the Report of Composting Site Information Newby Island Compost Facility San Jose, California, prepared for BFI of North America, Inc. by GeoFIRM, revised January 24, 2012. *Ex. 204*. The Five Year Review approved July 6, 2012 found that no revisions needed to be made to the permit. *Ex. 205, LEA_000067*.

The cumulative tonnage for the Recyclery and the Composting Facility is limited to 1600 tons. *Exs. 202; 230*.

The peak maximum tonnage for the composting facility is 980 tons per operating day (TPD). *Ex. 202; Ex. 204, LEA_000050-60*.

In December, 2014, LEA Inspector Bob Bates checked the tonnage reports and found no evidence of any tonnage violations. *Testimony of Bob Bates*.

The Compost Facility is permitted to compost mixed solid waste (MSW) in addition to green waste. *Ex. 204, LEA_000047-52*. The compost facility is permitted to compost food waste. *Testimony of Edward Schreiner*. All feedstock must be incorporated into the composting system within 48 hours of tipping the feedstock load at one of the receiving areas. *Ex. 204, LEA_000050, 52*.

On December 8, 2014, the Bay Area Air Quality Management District (BAAQMD) received a bad odor complaint from a Milpitas resident. The complaint was investigated by Arnold Argao. He determined that the odor was from the Compost Facility. *Ex. 12; Testimony of Arnold Argao*. There were 30 odor complaints that day. Mr. Argao went to the Compost Facility to see what was causing the odor. He confirmed that the odor was from compost. Mr. Argao confirmed 10 more odor complaints from the compost facility from January to May 2015. He testified that BAAQMD cooperated with from LEA in investigating odor complaints. However, Mr. Argao did not file a report of the December 8, 2014 odor complaint until March 19, 2015. *Id.* The LEA, not the BAAQMD, had jurisdiction over odor complaints from the compost facility. *Id.*

I am not persuaded by Mr. Argao’s testimony about the sources of the odors. Instead, I find more persuasive the testimony of Troy Weber about the odor source. On December 9, 2015, Troy Weber determined that the odor was not coming from the Compost Facility. He drove briefly

Milpitas v. San Jose LEA Decision, cont.

through the Compost Facility to make sure it was not storing material. He did not see any storage of material from the transfer station at the Compost Facility. *Testimony of Troy Weber, August 14, 2015.*

On December 18, 2014, LEA staff Bob Bates inspected the Compost Facility and found no violations or area of concern. In his report, he commented:

The composting facility had a peak in incoming materials last week at 800-900 tpd. Normal would be around 600 tpd. Much of the green waste is residential curbside which contained the normal contamination but not excessive. In addition, the operators are attempting to remove more contaminants on the front end. No litter or odor issues noted at the time of inspection. Five laborers were policing the areas north and west of the compost area to capture any litter before being spread by winds.

Ex. 206, LEA_000072.

Since December, 2014, LEA has put a lot of pressure on the Newbry Island Resource Recovery Park to improve odor problems. *Testimony of Arnold Argao.*

LEA inspector Bob Bates inspected the Compost Facility on January 23, 2015 and found no violations or areas of concern. He commented:

No litter or excessive contamination observed at the time of inspection. Two piles of trash at the receiving area were identified as organic feedstock from select sources for certain select windrows.

Exs. 8, 207.

LEA inspector Bob Bates inspected the Compost Facility on February 18, 2015 and found no violations or areas of concern. He commented:

Facility is continuing to try and remove as much contamination on the front end particularly from residential tote loads. The designated MSW feedstock for the organic rows varies drastically in quality and usefulness of contents.

No stray litter was observed in the composting area.

Operators are adjusting windrow turning schedule with wind direction being the primary consideration to minimize odor impacts. The wood waste chipping operation had a substantial pile of pallets etc. which are to be processed this week.

Exs. 1, 208, LEA_000080.

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LEA inspector Bob Bates inspected the Compost Facility on March 23, 2015 and found no violations or areas of concern. He commented:

Inspected compost site with Tony Boccaleoni. Two loads had been delivered of MSW from select sources which is a typical day's input. Contamination varies greatly from load to load resulting in disposal of rejected bags. The facility has acquired a new trommel screen which has hastened production output. Compost sets in curing piles for 3 weeks prior to screening.

The BAAQMD inspected the compost operations on March 9. This inspector was unable to perform co-inspection due to jury duty. Paul Tavares and I met with the Air Dist inspection team on March 17th. Ronald Pilkington, Supervisor for Air Dist joined our meeting and discussed their findings and observations from that inspection. This input will be helpful in review of Best Management Practices and operational procedures in the facility Odor Impact Management Plan (OIMP). Scott McCourty stated that Cornerstone consultants are working on updating and revising the OIMP as previously requested by the LEA. BAAQMD recommended the addition of more carbon to the windrows to improve the C/N ratio. Republic is investigating using fines from the wood waste processing to achieve that addition of carbon if it can be done cost effectively in their operations.

On the day of inspection, the breeze was on-shore (towards Milpitas) which had caused the facility to stop turning windrows at 9:00 instead of later morning. At that time, operators switched to the screening operations. To minimize contamination of finished materials by windblown materials from working rows, a fence has been installed between those areas.

Ex. 209.

LEA inspector Bob Bates inspected the Compost Facility on April 23, 2015 and found no violations or areas of concern. He commented:

Toured facility with Tony Boccaleoni. No stray litter noted in compost or adjacent areas. New protocol has been established for blending green waste with wood chips. Incoming materials are mixed at a 5:2 ratio of green waste/wood chips. Existing rolls already in production have been topped off with wood chips so that when turned they will also have an improved C/N ratio. This procedure is one of the Best Management Practices recently employed to further minimize odor issues from the composting operation.

Staff is still focusing on removal of contaminants on the front end of the process. In the select MSW stream for compost, Tesla Motors is now sending materials to be composted rather than disposed.

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Four rows or about 1,000 LF of windrows have been removed from the total production of the facility.

The facility is expected to submit an updated OIMP/RCSI for the composting operation as requested by the LEA. The current OIMP has not been revised since relocating to the present location and being permitted separately.

Exs. 6, 210.

The LEA agreed with Milpitas that the Odor Mitigation Management Plan (OIMP) for the Compost Facility needed revision. Bob Bates requested a new OINK this spring. *Testimony of Bob Bates*. On April 24, 2015, Cornerstone Environmental Group, LLC submitted an updated Odor Impact Minimization Plan (OIMP) for the Compost Facility. The updated OIMP reflected changes in feedstock, best management practices (BMPs) and standard operating procedures (SOPs) as required by California Code of Federal Regulations (CCR) Title 14, Division 7, Chapter 3.1, Article 3, Section 17863.4. *Ex. 211*. The new OIMP is to be annually reviewed by the operator to determine if revisions are necessary. *Id.*, P. 6.

Best Management Practices to minimize the release of objectionable odors include:

Maintaining adequate heat in the piles through appropriate pile density, limiting turning frequency and/or pile dimensions.

Providing adequate moisture through the use of the water truck and/or the water reel.

Frequent monitoring of temperature and moisture content assures composting conditions are within acceptable parameters.

Id., P.7.

Good housekeeping measures include:

Clearing spilled materials between windrows.

Eliminating areas with the potential for ponding water.

Maintaining reasonably sized stockpiles of feedstock and chipped material.

Id.

The new OIMP sets forth a Complaint Response Protocol requiring the operator to:

make a recommendation to the LEA within 24 hours of receiving the complaint or 48 hours should the citizen complaint be received weekends or holidays.

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If warranted, meet with the LEA and complainant (if known and choosing to participate) within a reasonable time frame to discuss the nature of the source of the odor and operational changes proposed and/or implemented.

Document the complaint and actions taken in the Log of Community Concerns and Complaints to minimize odors in the future.

Id., p. 10.

Odors emanating from windrows typically indicate problems in the initial mixing, turning frequency, pile porosity and/or moisture content of the pile. *Id.*, p. 12. Turning the windrows helps to control odors and emissions. *Id.*

Compost Facility operations that have the potential to create odors are the unloading of raw feedstock from incoming trucks, mixing, grinding, screening of the feedstock, and formation of new and dismantling of existing compost piles. During times when conditions are such that these operations result in offsite odors, the operator is required to defer or modify these operations until conditions improve. *Id.*, p. 14.

Feedstock material received typically consists of tree prunings, leaves, grass clippings, and incidental agricultural wastes, manure, and food wastes. If significant odors occur from the feedstock pile, the operator is required to immediately build a new compost pile. If it is not possible to build a new compost pile (e.g., due to a machine breakdown) or if it is determined that a significant odor problem will still occur, the operator is required to mix material with other materials on-site, including curing compost piles if necessary and reprocessed. If that will not work, the operator may request LEA permission to Landfill the material. *Id.*

Windrow aisles can be sources of odor if raw, un-composted material is left for excessive amounts of time without being exposed to the high temperatures of composting. The operator must regularly patrol the windrow aisles to clean any spilled materials. Windrow aisles can also be a source of odor if stormwater or process water is allowed to pond in potholes or other pad depressions. The operator must absorb any standing water with chipped material (or other absorbent) and fill the depression with pad material (typically dirt or clay). *Id.* at 17.

On April 24, 2015, the operator applied to amend the Compost Facility's SWFD to include the new OMIP's requirements. *Id.*, LEA000155-158.

LEA inspector Bob Bates inspected the Compost Facility on April 29, 2015 and found no violations or areas of concern. *Ex.* 212.

LEA inspector Bob Bates inspected the Compost Facility on May 28, 2015 and found no violations or areas of concern. He commented:

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No stray litter was observed in or around the composting area. The compost footprint is being relocated along the southside of the SW corner of the existing Landfill/compost footprint.

Both the current and future areas are on top of waste with liner below. This transition will occur over the next 3 months to allow for preparation of the winter deck this Fall.

All incoming loads of MSW are being checked prior to incorporation into windrows.

Ex. 213, LEA_000091-92. .

LEA inspector Bob Bates inspected the Compost Facility on June 26, 2015 and found no violations or areas of concern. He commented:

Compost facility is beginning to relocate to the South and East of its present location. The facility submitted a phased relocation plan on June 17th which was approved by the LEA as an attachment to the RCSI. During the relocation, the quantities of compost will not increase from the permitted 18 acres currently utilized. The OIMP in place will govern the BMPs and SOPs during and after the move. The new location is on the same lined portion of the Landfill cell and are (sic) on existing waste.

The receiving and processing incoming green waste and MSW has been moved next to the chipping equipment. No stray litter was observed in the compost or adjacent areas. Turning with the scarab is being done early from 5-8 if possible. A misting system has been added to the interior turning apparatus on the scarab to treat that point odor source.

Ex. 214, LEA_000161.

The best way to control odors from composting operations is to maintain and enforce the standard operating procedures and best practices set forth in the OIMP. *Testimony of George Savage.* LEA inspector Bob Bates has been inspecting and enforcing to see that odors from the Compost Facility are controlled.

CONCLUSIONS OF LAW:

LIMITED SCOPE OF THE HEARING AND DECISION

27 California Code of Regulations requires “Each disposal site shall be operated and maintained so as not to create a public nuisance.”

Nuisance is defined as including “anything which is injurious to human health or is indecent or offensive to the senses and interferes with the comfortable enjoyment of life or property, and

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affects at the same time an entire community or neighborhood or any considerable number of persons although the extent of annoyance or damage inflicted upon the individual may be unequal and which occurs as a result of the storage, removal, transport, processing or disposal of solid waste.” 14 CCR §17225.45.

The scope of this hearing and decision was limited by the CalRecycle decision dated June 9, 2015. The scope of hearing does not include odor nuisance at the Landfill, odor nuisance at the Recyclery, allegations related to CEQA and deficiencies in the JTD with regard to odor. *CalRecycle Decision, p. 17.*

**MILPITAS FAILED TO ESTABLISH THAT THE LEA FAILED TO ACT
AS REQUIRED BY LAW**

The LEA’s obligations and responsibilities for Inspection are set forth in 14 CCR § 18083.

The LEA's particular duties and responsibilities for Enforcement are set forth in 14 CCR §18084.

Section 18084(b) provides that “LEA/EA enforcement action options include, but are not limited to 14 CCR Division 7 Chapter 5, Article 4, 27 CCR, Division 2, Subdivision 1 (§ 20005 et seq.), and Public Resources Code Division 30 Parts 4 and 5.”

Under § 18084(d), an LEA is taking appropriate enforcement action if the operator is making timely progress toward compliance. In December 2014, after the LEA issued citations for permit violations, the operator ceased its offending activities and brought its facilities into permit compliance. I conclude that the LEA’s actions were appropriate.

In its Response to the Tentative Decision, Milpitas requests the Hearing Officer to apply proposed, but as yet unadopted, Compostable Materials, Transfer/Processing regulations.² These proposed regulations are not yet required by law. Therefore, I refuse to apply them.

**THE LEA INSPECTED AND ENFORCED PERMIT COMPLIANCE AT ALL THREE
NEWBRY ISLAND FACILITIES.**

In October and November 2014, the LEA did not properly enforce permit compliance. However, this failure was corrected after CalRecycle issued a notice of violation on November 25, 2014, and LEA’s Bob Bates took over inspecting the facilities.

Milpitas was notified about the November permit violations on December 30, 2014. *Ex. 245.* It took no action within 30 days of this notification. Therefore, its claim for this October and November 2014 failure to enforce permit compliance is barred by PRC § 44310 (B).

2

<http://www.calrecycle.ca.gov/Actions/Documents%5c62%5c20152015%5c1417%5cRequest%20for%20Approval.pdf>.

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Since December 8, 2014, the LEA has performed inspections of all three Newby Island facilities to ensure that they are being operated in compliance with applicable Federal, State and local regulations.

I am not persuaded that LEA failed to act as required by law or regulations in inspecting the Newby Island facilities and enforcing the law concerning the facilities' operations and permits after December 8, 2014.

I am not persuaded that the LEA concealed significant permit violations after December 8, 2015. To the contrary, on December 9, 2014, the LEA cited the Recyclery for violations. Ex. 234.

COMPOST FACILITY OIMP

Under 14 CCR §17863.4(e) the LEA is to assure the OIMP is being followed. I am unpersuaded that the LEA is not enforcing OIMP compliance.

14 CCR §17863.4(f) provides that: "If the odor impact minimization plan is being followed, but odor impacts are still occurring, the EA may issue a Notice and Order (pursuant to section 18304) requiring the operator to take additional reasonable and feasible measures to minimize odors." The word "may" means that the LEA is not required to issue a Notice and Order. I find that the LEA took additional and reasonable measures to minimize Compost Facility odors by requesting and obtaining a new OIMP this spring.

SLUDGE

No sludge was used in composting. Therefore the LEA did not fail to act as required by law to control odors from sludge at the Compost Facility.

The LEA was not required to act to control odors from the Landfill or the Recyclery. That responsibility belongs to BAAQMD. The LEA is required to enforce the facilities' permits.

The Landfill permit allowed the operator to bury sludge. *Testimonies of George Savage and Bob Bates*. Sludge had been combined with green waste and used as cover at the Landfill. Bob Bates spoke with the operator about the odor complaints. The operator stopped the practice of combining sludge and green waste. *Testimony of Bob Bates*.

Pursuant to §18084(d), the LEA action was appropriate because it brought the operator into compliance.

LIMITED TIME TO FILE A HEARING REQUEST

California Public Resources Code (PRC), § 44307, provides in pertinent part:

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The enforcement agency shall ... hold a hearing upon a petition to the enforcement agency from any person requesting the enforcement agency to review an alleged failure of the agency to act as required by this part, Part 5 (commencing with Section 45000), or Part 6 (commencing with Section 45030) or a regulation adopted by the department pursuant to this part, Part 5 (commencing with Section 45000), or Part 6 (commencing with Section 45030).

PRC § 44310 (B) provides:

If the hearing request is made by a person alleging that the enforcement agency failed to act as required by law or regulation pursuant to Section 44307, the person shall file a request for a hearing within 30 days from the date the person discovered or reasonably should have discovered, the facts on which the allegation is based.

Where I found that as a fact the LEA did not fail to act as required by law and regulation, it is unnecessary to reach the issue of whether a claim of the LEA's failure to act was timely filed.

I have found that the LEA failed to enforce the Landfill and Recyclery Permits in October and November 2014. On December 30, 2014, the LEA informed Milpitas about the bunker storage on the Landfill for the Recyclery (unauthorized Landfill activity as a transfer station) and the harvesting (stripping back of daily cover). Bob Bates told Milpitas that the bunker and possibly this stripping back activity were concerns as contributors to odor. *Ex. 245*. I reject Milpitas's contention that "nobody outside the facility reasonably knew that this was the source of the odor." *Milpitas Response to Tentative Decision, p. 6*.

I find as a fact that, by December 30, 2015, Milpitas knew that facts on which its allegations of permit violations are based. Milpitas was told and therefore knew or should have known that these permit violations were odor sources. Milpitas did not file its claim until March 2, 2015. I therefore conclude as a matter of law Milpitas's claims that the LEA failed to act as required by law and regulation regarding these permit violations is barred by PRC § 44310 (B).

**MILPITAS HAS FAILED TO ESTABLISH THAT THE LANDFILL PERMIT WAS
IMPROPERLY GRANTED**

The LEA's duties and responsibilities for Permitting are set forth in 14 CCR § 18082.

14 CCR § 18208, Issuance of Permit; Final Environmental Determination provides in pertinent part:

(a) ... the enforcement agency may make findings and issue the permit as provided in subsection (a) of Public Resources Code section 44014. The permit shall specify the person authorized to operate the facility and the boundaries of the facility. The permit shall contain such conditions as are necessary to specify a design and operation for which

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the applicant has demonstrated in the proceedings before the enforcement agency and the board the ability to control the adverse environmental effects of the facility.

(1) As used herein, "design" means the layout of the facility (including numbers and types of fixed structures), total volumetric capacity of a disposal site or total throughput rate of a transfer/processing station, transformation facility, or composting facility vehicular traffic flow, and patterns surrounding and within the facility, proposed contouring, and other factors that may be considered a part of the facility's physical configuration.

(2) As used herein, "operation" means the procedures, personnel, and equipment utilized to receive, handle and dispose of solid wastes and to control the effects of the facility on the environment.

This regulation requires permit specifications that are sufficient to prevent odor at nuisance levels. It does not require the LEA to deny a permit where the operator has violated or not complied with the specifications. The statutory scheme encourages violating operators to come into compliance. See § 18084(d) (LEA taking appropriate enforcement action if the operator is making timely progress toward compliance). Prior to the permit issuance on February 9, 2015, the Landfill had come into compliance with its specifications.

LANDFILL TONNAGE

The Landfill expansion permit application was filed on December 9, 2015. Prior to the date of application, the Landfill was providing a spill-over function for the Recyclery. By the application date, this activity had ceased. *Testimony of Bob Bates.*

Since he took over inspecting in December 2014, Bob Bates has been receiving tonnage reports. *Id.*

The Compost Facility has daily tonnage limits. Bob Bates has been receiving reports of them. In December 2014 he checked the tonnage reports for the Compost Facility. *Id.*

The tonnage records in December 2014 showed less tonnage than what was allowed. The tonnage was within the permit requirements. *Id.*

Milpitas did not establish that the LEA failed to obtain correct tonnages when it issued the 2015 Landfill permit.

THE LEA PROPERLY CONCLUDED THAT THE LANDFILL PERMIT APPLICATION WAS COMPLETE AND CORRECT

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The applicant for a Solid Waste Facilities Permit (SWFP) must submit an application to the local enforcement agency (LEA). The LEA then reviews the application package for completeness and correctness.

“Complete” means all requirements placed upon the operation of the solid waste facility by statute, regulations, and other agencies with jurisdiction have been addressed in the application package. CCR, Title 27, § 21563(d)(1).

“Correct” means all information provided by the applicant regarding the solid waste facility must be accurate, exact, and must fully describe the parameters of the solid waste facility. CCR, Title 27, Section 21563(d)(2).

The LEA was not required to refuse to accept a permit application because of permit violations.

Once the LEA reviews the application for completeness and correctness, it then submits the application to CalRecycle for review. After the application date, the LEA issued citations for the violations and the violations were corrected. I conclude that the corrected violations did not make the permit application incorrect.

If a proposed permit is concurred by CalRecycle, the LEA can then issue the permit. Ex. 228, LEA_00130. At the time it concurred, CalRecycle was well aware of the permit violations and their correction. There was no cover-up of permit violations by the LEA.

I find as a fact and conclude as a matter of law that Milpitas failed to establish that the Landfill permit was improperly issued. The SWFP application for the Landfill expansion was complete and correct, and that the LEA processed the application in the manner required by law.

MILPITAS DID NOT ESTABLISH THAT THE LEA VIOLATED THE LAW IN ISSUING THE LANDFILL PERMIT

In conclusion, Milpitas has failed to establish that the LEA acted contrary to law in its handling of the Landfill permit issuance process.

THE LAW DOES NOT REQUIRE REVISION OF THE LANDFILL PERMIT TO SPECIFY ADC PRACTICES

ADC practices are covered by the Joint Technical Document, Ex. 200. Its provisions have been enforced by the LEA.

I am not persuaded that the Landfill permit needs to be revised to specify the already specified ADC practices.

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THE LEA WAS NOT REQUIRED BY LAW TO ANNUALLY REVIEW THE COMPOST FACILITY PERMIT

14 CCR § 17863.4(d) requires the operator to annually review the Odor Impact Minimization Plan. It does not require the LEA to do so.

The LEA is responsible to see that the operator follows the OIMP. Where the OIMP procedures are not adequately controlling odors, then the LEA may take actions to improve odor conditions. It did so here. Pursuant to § 14 CCR § 17863.4(e), the LEA required the operator to update its OIMP for the Compost Facility.

CONCLUSION

There are no continuing violations of applicable laws and regulations by the LEA.

I find as a fact and conclude as a matter of law that the City of Milpitas is not entitled to any of the relief it seeks, and that all its claims are denied.

Milpitas has not established that:

1. the LEA failed to act as required by applicable laws and regulations with regard to the issuance of the revised permit for the Landfill; or that
2. the LEA failed to act as required by applicable laws and regulations with regard to the Recyclery and the Landfill, other than odor allegations, after December 8, 2015, or that
3. the LEA failed to act as required by applicable laws and regulations with regard to the Compost Facility.

The LEA established that, with respect to Milpitas' claims that the LEA failed to act as required by applicable laws and regulations with regard to the Recyclery and the Landfill, prior to December 8, 2015, those claims are barred because they were not timely filed as required by PRC § 44310 (B).

WHEREFORE, IT IS HEREBY ORDERED THAT ALL CLAIMS IN THE PETITION ARE DENIED.

SO ORDERED.

Dated: August 28, 2015

Suzanne K. Nusbaum
Hearing Officer