

# THE SMITH FIRM

ATTORNEYS

1541 Corporate Way, Suite 100  
Sacramento, CA 95831  
T 916.442.2019 ■ F 916.442.0220  
www.thesmithfirm.com

March 20, 2015

Ms. Caroll Mortensen, Director  
CalRecycle  
1001 I Street, P.O. Box 4025  
Sacramento, CA 95812-4025

**RE:** City of Milpitas appeal of San Jose City LEA hearing refusal

Dear Ms. Mortensen:

Pursuant to California Public Resources Code §§ 44010 and 45030, I write representing the City of Milpitas to appeal the City of San Jose Local Enforcement Agency (LEA) blocking Milpitas' proper request for hearing under PRC §44307.

Milpitas served the LEA with the attached request for hearing on March 2, 2015. Exhibit A. On March 11, Milpitas received the attached letter from the LEA, stating that the LEA had summarily made the "final" decision not to proceed to independent hearing. Exhibit B.

The gravamen of Milpitas' petition is that the LEA is complicit in covering up operations at the massive Newby Island garbage operation which result in horrible odors and nuisance in the City of Milpitas. This allegation is not subject to a time bar.

The LEA now attempts to stonewall an impartial administrative review of the problem.

Milpitas will shortly file a petition for writ of mandate in superior court to order the hearing. This appeal to CalRecycle is brought to preserve what should be a simple and clear right to review the alleged LEA failures.

The LEA's action is fundamentally improper in the due process sense, in that it is the LEA who is defending the allegations of Milpitas' petition. The petition asserts that the LEA has intentionally refused to inspect and report violations of operations at the three Newby Island waste management facilities, including not only the landfill but the composting and recycling operations there. (See paragraphs 46 a, b and c.)<sup>1</sup>

The LEA has no authority to block the independent administrative review of the LEA's own faults. This is clear in common sense, and it is clear in statute and caselaw. Once requested, the referral to independent hearing officer or panel is ministerial, not discretionary.

---

<sup>1</sup> For example: "The LEA on multiple inspections knowingly failed to require or obtain information about such practices and to require the operator to submit for revision of the permit as required. The LEA thereby violated 14 CCR §18081(c). The LEA failed to require that the Composting Facility permit be revised properly every five years as required pursuant to PRC §44015." Petition paragraph 46c.

“Where a statute requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial. Where a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion. [Citation]. Here, The Department’s obligation to hold a hearing upon receipt of a petition challenging its alleged failure to act as required by law or regulation plainly falls within that category of governmental actions.” *Sustainability of Parks, Recycling and Wildlife Legal Defense Fund (SPRAWLDEF) v. County of Solano Department of Resources Management* (2008) 167 Cal. App. 4th 1350, 1359.

Statute is consistent with *SPRAWLDEF*. PRC §44010, at subsection 2 states:

“The enforcement agency shall, within 15 days from the date of receipt of a request for a hearing, provide written notice to the person filing the request notifying the person of the date, time, and place of the hearing.” (Emphasis added.)

The LEA may contend that the following subsection provides grounds for rejecting the petition as untimely. That subsection reads:

“If that person fails to request a hearing or to timely file a statement of issues, the enforcement agency may take the proposed action without a hearing or may, at its discretion, proceed with a hearing before taking the proposed action.”<sup>2</sup>

Relying upon §44010(a)(1)(B), the LEA’s refusal to provide the hearing is keyed to its December 9, 2014 permit revision submittal to CalRecycle. But this limitation contorts the issues stated in the request.<sup>3</sup>

Milpitas contends that the LEA continues to cover up violations and operations at the Newby Island facilities which create nuisances, including but not limited to the severe odors that plague the city’s residents continually.

Milpitas contends that the LEA’s failure to investigate, enforce and disclose is an ongoing failure, a failure which corrupted the disclosures required in the landfill permit revisions not made final until after CalRecycle’s February 5, 2015 concurrence in the permit.<sup>4</sup>

Finally, the LEA refuses to set the hearing by making the factual determination that “LEA had no authority to issue, revise or impose conditions on the proposed permit after submitting it to CalRecycle for concurrence.”

---

<sup>2</sup> Milpitas contends that under PRC §44030 only the “governing body” of the LEA, the San Jose City Council, can decline to refer a hearing, not the LEA.

<sup>3</sup> 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.” PRC §44010(a)(1)(B).

<sup>4</sup> Furthermore, Milpitas has not received notice that the final permit has been issued.

These are the very factual determinations for which impartial hearing is requested. The LEA cannot sit in judgment of its own faults.

It is Milpitas' contention, as alleged, that the LEA has not only the authority but the duty to review and revise solid waste facilities permits where operations violate or are outside of permit conditions. Instead, it is alleged, the LEA continues to allow improper stockpiling of putrid wastes and other violations. Petition, paragraphs 18-22.

Nor is it only issues with the landfill permit which Milpitas raises, but also the recycling and composting operations at the location and their permits. The garbage shell game played by the operations is allowed by the LEA, in violation of its job to inspect and enforce. It will be Milpitas' contention on impartial hearing that the moneys paid by the garbage operations to the City of San Jose function as "hush money."

In the event that the Milpitas does not obtain the independent hearing provided at the LEA level, CalRecycle is requested to review the substantial issues raised.

Thank you for your attention to this problem of great concern to the citizens of Milpitas.

Sincerely,



KELLY T. SMITH

cc: Client

# **EXHIBIT A**

1 Kelly T. Smith 196821  
THE SMITH FIRM  
2 1541 Corporate Way, Suite 100  
Sacramento, CA 95831  
3 T: (916) 442-2019

4 Attorney for Petitioner  
CITY OF MILPITAS  
5  
6  
7

8 **BEFORE THE ADMINISTRATIVE HEARING OFFICER**  
9 **FOR THE CITY OF SAN JOSE LOCAL ENFORCEMENT AGENCY**

10  
11 CITY OF MILPITAS,

12 Petitioner,

13 vs.

14 CITY OF SAN JOSE DEPART-  
15 MENT OF PLANNING, BUILD-  
16 ING AND CODE ENFORCE-  
17 MENT, ACTING AS LOCAL  
ENFORCEMENT AGENCY,

18 Respondent.  
19

File or matter no.

**PETITION FOR ADMINISTRATIVE HEARING**

**ON NEWBY ISLAND LANDFILL, RECYCLERY AND  
COMPOSTING FACILITY SOLID WASTE FACILITY  
PERMITS AND OPERATIONS**

[Pubic Resources Code §44307]

20 **REQUEST**

21 1. Pursuant to California Public Resources Code §44307, Petitioner City of Milpitas (hereinafter  
22 "Petitioner" or "Milpitas") requests a hearing to correct actions and/or failures to act by the City of San  
23 Jose Local Enforcement Agency (LEA) regarding the solid waste facility permits for the Newby Island  
24 Sanitary Landfill ("Landfill"), Newby Island Recyclery Facility ("Recyclery") and the Newby Island  
25 Composting Facility ("Composting Facility"), (hereinafter sometimes collectively referred to as the  
26 "Newby Island Facilities")

27 2. Petitioner contends that the solid waste facility permits, including that for the landfill concurred  
28 in by the California Department of Resources Recycling and Recovery ("CalRecycle") on February 5,

1 2015, as proposed by the LEA, constitute a failure by those agencies to require the appropriate design,  
2 operation and feedstock revisions to control the severe public odor nuisance caused by the Newby Island  
3 Facilities.

4 3. The administrative record contains substantial and undisputed evidence of odors emanating  
5 from and creating nuisance conditions caused by the Newby Island Facilities. The LEA also failed to  
6 require revisions to the solid waste facility permits to address interrelated impacts associated with the  
7 Landfill and the proximate Recyclery and Compost Facility, both of which are integral to the landfill  
8 operations and each other. The LEA has failed to require monitoring, reporting and abatement of odors  
9 emanating from those joint operations and consequent nuisance to the residents of the City of Milpitas.

10 4. The LEA acted arbitrarily and abused its discretion when its failed to apply Public Resources  
11 Code §44306(a) to revoke the solid waste facility permits for the Newby Island Facilities after it failed  
12 to disclose information relevant to the significant health and safety impacts caused by those operations,  
13 which the LEA has ignored repeatedly during inspections there.

14  
15 **PARTIES**

16 5. Petitioner City of Milpitas is a general law city in Santa Clara County, incorporated 1954, now  
17 with roughly 70,000 residents. The Newby Island Facilities are a short distance outside Milpitas'  
18 western boundary and lie inside the boundary of the city of San Jose. Residents, businesses and  
19 institutions of Milpitas have repeatedly, and with increased frequency, cited terrible odors from the  
20 Newby Island Facilities to their elected and appointed City representatives and their staff.

21 6. Respondent City of San Jose Department of Planning, Building and Code Enforcement  
22 ("City") functions as the designated "Local Enforcement Agency," designated as such by Public  
23 Resources Code §43200 *et seq.* The City, as the LEA, provides inspection, enforcement and permitting  
24 of the Newby Island Sanitary Landfill, the Recyclery at Newby Island landfill and the Newby Island  
25 Composting Facility.

26 7. Petitioner City of Milpitas has participated in the public hearing and public notice processes  
27 associated with the regulatory role of respondent City of San Jose Local Enforcement Agency over the  
28 Newby Island Facilities.

**BACKGROUND ALLEGATIONS**

1  
2 8. The issues and allegations herein are supported by the administrative record and such other  
3 evidence and exhibits which the City of Milpitas will offer at the requested hearing.

4 9. On February 5, 2015, CalRecycle concurred, pursuant to PRC §44209, in the solid waste  
5 facility permit proposed by the City of San Jose LEA for the vertical expansion of the Newby Island  
6 Sanitary Landfill, on Dixon Landing Road, in the City of San Jose, state Solid Waste Facility Permit  
7 (SWIS) number 43-AN-0003.

8 10. International Disposal Corporation is the owner of all three Newby Island Facilities, with  
9 offices for all three at 1600 Dixon Landing Road. The two adjacent facilities under separate solid waste  
10 facility permits are the Recyclery (43-AN-0014), and the Composting Facility (43-AN-0017).

11 **The odor problem**

12 11. The Newby Island Facilities have a long-existing and still-ongoing failure to avert nuisance  
13 odors. The landfill accepts, handles, stockpiles, land-spreads, composts and recycles a list of materials  
14 which require close regulation, because they potentially increase odor.

15 12. For example, "mixed waste" composting at the site has in the past included food waste. Thus as  
16 early as 1999 the landfill's pilot food waste composting was cited by the state for improperly stockpiled  
17 chicken parts.

18 13. Currently, large quantities of "wet-dry" waste (putrescible and non-putrescible waste sorted at  
19 the source) are being accepted at the landfill facilities. Yet, neither the supporting environmental impact  
20 report for the landfill permit, nor the 2015 permit's Joint Technical Document even mention it.

21 14. Under the CalRecycle concurred permit, the landfill operations would be permitted to conduct  
22 "mixed waste" composting. But the application fails to even describe the actual food-waste, wet-dry and  
23 "co-composting" feed stocks currently handled at the facility.

24 15. The landfill permit would also allow the use of biosolids—dried human waste from nearby  
25 beds—as landfill cover. According to recent inspections, the stockpiling and use of biosolids has been  
26 correlated with wind directions as a source of odors—highly objectionable odors—throughout the  
27 adjoining Milpitas community.

1 16. A massive spike in odor complaints to the Bay Area Air Quality Management District  
2 (“BAAQMD”) have been reported during January of this year: 719 versus 121 in December 2014. The  
3 odor problem negatively effects school, government and business activities in Milpitas and elsewhere.

4 17. The Newby Island Facilities therefore violate the regulations that: “Each disposal site shall be  
5 operated and maintained so as not to create a public nuisance.” 27 CCR §20760.<sup>1</sup>

6 18. More recently, the Landfill has been cited for stockpiling putrescibles headed to the site’s  
7 Recyclery operation (43-AN-0014). That practice was observed and cited in recent pre-permitting  
8 inspections by CalRecycle.

9 19. According to a December 9, 2014 inspection report by CalRecycle, the Recyclery has been  
10 using the landfill area as its backup storage for mixed waste materials, and the Recyclery has “con-  
11 sistently” failed to move waste through the facility within 48 hours as required by 14 CCR §17410.1.

12 20. The Newby Island Facilities are playing a shell game with materials to evade state regulation,  
13 which requires material to be disposed of or processed within 48 hours. According to an LEA inspec-  
14 tion: “The landfill has been functioning as a transfer station for the adjacent MRF, the BFI Recyclery.  
15 An open air bunker has been utilized for stockpiling incoming MSW and outgoing processed materials.”

16 21. In the LEA’s November 25, 2014 inspection: “An open bunker which was noted on previous  
17 inspection reports containing MSW and outgoing materials from the Recyclery. This procedure was  
18 determined to be functioning as a transfer station. The facility permit does not allow for this activity.”

19 22. The report continues: “A records check found that the Odor Complaint log contained  
20 information on complaints and the wind direction at the time of the complaint. Many showed a  
21 correlation between Newby Island, the ESE afternoon prevailing winds and the complaints. Several of  
22 these complaints were randomly selected, scanned and sent to the LEA for review.”

23 23. The LEA is required to respond to odor complaints, yet respondent City of San Jose LEA has  
24 failed to cite permit violations found during inspections. It has failed to require the facilities to submit  
25

26  
27 <sup>1</sup> “Nuisance’ includes anything which is injurious to human health or is indecent or offensive to the senses and interferes  
28 with the comfortable enjoyment of life or property, and 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.

1 revised permit applications which propose design and operational changes and alternatives such as  
2 enclosing operations to eliminate the odor nuisance to Milpitas residents, businesses and institutions.

3 24. The stockpiling of putrescible waste at the Newby Island facilities continues. The odor  
4 nuisance caused by the Newby Island Facilities' solid waste operations, including the landfill, the  
5 landfill cover, the Recyclery and the Composting Facility, has continued and continues to cause a  
6 significant, regular, almost-daily odor nuisance in Milpitas.

7 **The JTD is woefully incomplete**

8 25. Despite the clear evidence of the persistent and ongoing nuisance attributable to the odors  
9 emanating from the Newby Island Facilities, the LEA's December 9, 2014 permit submittal to  
10 CalRecycle failed to provide required documentation. The Joint Technical Document (JTD) submitted in  
11 support of the permit includes insufficient information on odor abatement.

12 26. Other deficiencies in the JTD also relate to odor problems, especially the failure to demonstrate  
13 the effectiveness of alternative daily landfill cover ("ADC") in minimizing odors.

14 *Failure of the JTD to describe nuisance odor abatement*

15 27. The discussion of odor nuisance and its alleged abatement under the proposed permit is found  
16 at page B.7.1.8 of the JTD. The discussion, however, fails to even mention the historical odor problems  
17 and increasing complaints about the odors from the landfill.

18 28. A complete JTD requires, under 27 CCR §21600(b)(8)(A), that the document: "Describe  
19 procedures to prevent or control public nuisances."

20 29. The JTD discussion contains only a cursory survey of odor controls, none addressed to the  
21 specifics of the Newby Island Facilities. Thus, the JTD does not discuss the particular problems with  
22 mixed waste stockpiling which inspectors have uncovered. The JTD fails entirely to reference the  
23 particular odor concerns of biosolids and other ADC which would be permitted at the facility under the  
24 proposed permit.

25 30. Nor does the landfill JTD address how its co-facilities, the Recyclery and Composting Facility,  
26 impacts odors. As recent inspections have shown, the operations of these three facilities are closely  
27 intertwined. Materials from the Recyclery are used for landfill cover. Materials for the Recyclery are  
28 stockpiled at the landfill. Composting is conducted with feedstocks from those facilities. The LEA has

1 failed entirely to consider the intersection of the landfill permit with the permits of the Composting  
2 Facility and the Recyclery, certainly not in Section B-3.7.1 of the JTD, where it should be addressed.

3 *Failure to demonstrate daily landfill cover requirements*

4 31. According to 27 CCR §20690(a)(1): “Alternative materials of alternative thickness for daily  
5 cover (other than at least six inches of earthen material) for municipal solid waste landfill units may be  
6 approved by the EA with concurrence by the CIWMB, if the owner or operator demonstrates that the  
7 alternative material and thickness control vectors, fires, odors, blowing litter, and scavenging without  
8 presenting a threat to human health and the environment.” (Emphasis added.)

9 32. The 2015 landfill permit and JTD insinuate that ADC using biosolids, green waste, recovery  
10 fines and street collections have already been demonstrated and approved. But that is not the case, as a  
11 closer examination of the permit application makes clear. JTD appendices include letters from the 1990s  
12 indicating that demonstration was conducted, but no final approvals were given. And the materials  
13 addressed appear only to include green waste—not biosolids, recovery fines or street collections.

14 33. No demonstration is provided that odor would be controlled. Yet the last specification of the  
15 currently proposed permit, no. 8 at page 5, states: “8. Only approved alternative daily cover materials  
16 described in the Joint Technical Document may be used.”

17 34. Thus the permit would open the door to the JTD’s ADC wish list, without the regulatory-  
18 mandated, case-by-case demonstration required for each of the ADC feedstock materials.

19 35. As described above, the permit would allow such ADC without demonstrating that the use of  
20 green waste, biosolids and other ADC can be conducted without the generation of odors which are  
21 received by the surrounding community.

22 *Failure to demonstrate intermediate cover requirements*

23 36. According to 27 CCR §20700(b): “Alternative materials of alternative thickness (other than at  
24 least twelve inches of earthen material) for intermediate cover may be approved by the EA with  
25 concurrence by the CIWMB, if the owner or operator demonstrates that the alternative material and  
26 thickness control vectors, fires, odors, blowing litter, and scavenging without presenting a threat to  
27 human health and the environment.” (Emphasis added.)

1 37. In the face of the substantial evidence of odors from the site, the JTD fails to provide any  
2 evidence whatsoever demonstrating that the landfill's intermediate cover plan satisfies the requirements  
3 of 27 CCR §20700(b) that the plan will control odors. (See JTD discussion, beginning 5.2.1.)

4 38. Nothing in the JTD's odor section accounts for the significant evidence that the biosolids, co-  
5 composting and green waste alternative intermediate cover which would be permitted will control odors.  
6 Nor does the thickness of such alternative cover suggested by the JTD meet the requirements of  
7 regulation.

8 39. Furthermore, the LEA ignored its own evidence that the intermediate cover was sloughing off  
9 of the landfill face, exposing the buried waste—and its odors—to the environment and Milpitas.

10 40. Because the permit application does not demonstrate that the site complies with State Minimum  
11 Standards regarding nuisance odor and odor control it is incomplete pursuant to 27 CCR §21685(b)(8),  
12 and permits such practice contrary to the demonstrations required under 27 CCR §20700(b).

13 41. The landfill environmental impact report prepared in support of the 2015 landfill expansion  
14 permit contained a mitigation plan which the permit requires to be followed by the operator. See Finding  
15 13(e), Condition 17(a)(2) of the landfill permit.

16 42. These mitigation measures are critical to the safe operation of the landfill. Most critical to the  
17 chronic and significant odor problems is mitigation measure BIO-13.1, a nuisance species abatement  
18 plan which includes the requirement that food waste processing be enclosed.

19 43. Yet, the LEA failed to require that the landfill expansion specify how specific mitigation will  
20 intersect with facilities, materials, handling and abatement under the permit, when it will be completed  
21 and how.

22 **The facilities' operations and permits consist of significant changes unanalyzed under CEQA.**

23 44. The 2015 landfill permit was approved with significant changes to the project analyzed in the  
24 2012 environmental impact reporting prepared in its support.

25 45. The Revised Permit exceeds the project scope analyzed in the EIR in that it proposes an  
26 increase in the daily tonnage and related traffic. This is the case because the permit as proposed to the  
27 state CalRecycle would allow an unspecified amount of composting material to be used as landfill cover.  
28 This material was not described in the EIR. The material would increase odor significantly.

**STATEMENT OF ISSUES RAISED**

1  
2 46. The City of Milpitas raises the following issues, pursuant to PRC § 44010, also incorporating  
3 those cited above to the extent they are not included below:

- 4 a. The LEA failed to reject or condition the Newby Island Sanitary Landfill permit to require  
5 operations which address the facilities' persistent, significant odors and related nuisance  
6 conditions off site. The LEA's failure to act on this impact includes the failure to review and  
7 condition the 2015 landfill permit proposed to CalRecycle for design and operational  
8 controls over putrescible solid waste, including but not limited to the storage and transfer of  
9 putrescibles between the landfill and the Recyclery and the Composting Facility. The  
10 applicant failed at multiple opportunities to provide such information and the LEA failed to  
11 require it. The LEA thereby failed to perform its duty to place "primary consideration" on  
12 the public's health and safety as required by PRC § 44012(a).
- 13 b. The LEA failed to review, suspend or revoke the Newby Island Composting Facility solid  
14 waste facility permit pursuant to Public Resources Code § 44004 for design, operation and  
15 feedstock failures which result in persistent, ongoing and significant nuisances, including  
16 but not limited to dust, odors and runoff. The LEA thereby failed to comply with PRC §  
17 43209(h)(1)(D). These impacts require significant revision to the composting operations,  
18 including environmental review under the California Environmental Quality Act ("CEQA"),  
19 with analysis of the alternative of enclosing the operations to protect the public health and  
20 welfare. The operator failed on multiple occasions to provide notice of changes to feed-  
21 stocks composted, of the use of unpermitted feedstocks, of stockpiling, and of operations  
22 resulting in odors offsite. The LEA failed to require the Composting Facility permit be  
23 properly revised every five years as required pursuant to PRC §44015.
- 24 c. The LEA failed to review, suspend or revoke the Newby Island Recyclery solid waste  
25 facility permit pursuant to Public Resources Code § 44004 to correct or modify design,  
26 operations and putrescible materials accepted which attract vectors, create health and safety  
27 impacts upon the residents of Milpitas, and which violate state minimum standards which  
28 prohibit the stockpiling of solid waste for more than 48 hours. The LEA thereby violated 14

1 CCR § 18081(d). The LEA on multiple inspections knowingly failed to require or obtain  
2 information about such practices and to require the operator to submit for revision of the  
3 permit as required. The LEA thereby violated 14 CCR §18081(c). The LEA failed to require  
4 that the Composting Facility permit be revised properly every five years as required  
5 pursuant to PRC §44015.

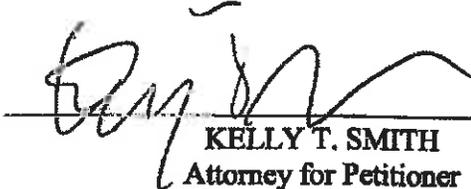
- 6 d. The Joint Technical Document submitted in support of the 2015 landfill permit application  
7 fails to demonstrate that the landfill's alternative daily cover (ADC) and intermediate cover  
8 will control odors. Nothing in the odors section of the JTD demonstrates ADC and  
9 intermediate cover sufficiently control odors from the facility. The ADC thicknesses  
10 suggested by the JTD do not meet the requirements of regulation. Specific feedstocks used  
11 for ADC and intermediate cover have never been successfully demonstrated. The feedstock  
12 are unsuccessful due to their odors and the sloughing of alternative daily and intermediate  
13 cover after application to the landfill slope, exposing waste, promoting odors and other  
14 nuisance.
- 15 e. The LEA failed to act to correct violations by the Newby Island Facilities of 27 CCR  
16 §20690(a)(9): "Storage and handling of waste derived materials at the landfill for use as  
17 alternative daily cover shall be conducted in a manner to protect public health and safety and  
18 the environment, and control vectors, fires, odors, blowing litter, scavenging, and nuisances.
- 19 f. The LEA failed to reject or condition the landfill permit application on the basis that it  
20 misstated, improperly counted, or otherwise misrepresented materials counted as alternative  
21 daily cover, recycling or beneficial use, in violation of state regulations, statutes or policies.  
22 The proposed permitted level of tonnage accepted for disposal is therefore inaccurate and  
23 fails to properly state the expected landfilled tonnages into the facility. This failure is  
24 compounded by the failure to require that the Composting Facility and Recyclery account  
25 for materials moving between them and the landfill such as, but not limited to, biosolids  
26 used in the compost and then for daily cover.
- 27  
28

1 **PRAYER**

2 Based upon the above actions and failures to act, Petitioner prays that the following actions be taken  
3 by the Local Enforcement Agency to address the respective issues:

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

23  
24 DATE: March 2, 2015

  
KELLY T. SMITH  
Attorney for Petitioner  
CITY OF MILPITAS

# **EXHIBIT B**



*Department of Planning, Building and Code Enforcement*

HARRY FREITAS, DIRECTOR

March 11, 2015

Kelly T. Smith, Esq.  
THE SMITH FIRM  
1541 Corporate Way, Suite 100  
Sacramento, CA 95831

Re: City of Milpitas Petition for Administrative Hearing  
On Newby Island Landfill, etc.

Dear Mr. Smith:

This responds to your letter dated March 2, 2015, requesting on behalf of the City of Milpitas an administrative hearing under California Public Resources Code § 44307 on the issues stated in the Petition for Administrative Hearing on Newby Island Landfill, Recyclery and Composting Facility Solid Waste Facility Permits and Operations, which accompanied your letter.

The City of San Jose Local Enforcement Agency, having reviewed the issues described in the Petition, hereby denies the City of Milpitas' request for hearing for the following reasons:

1. The request for hearing is denied because it is untimely. PRC § 44310(a)(1)(B) requires a person alleging that the enforcement agency failed to act as required by law or regulation pursuant to Section 44307, to 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.

Milpitas' petition asserts that LEA's approval of revisions to the solid waste facility permit for the Newby Island landfill failed to require appropriate revisions to control a public odor nuisance. The petition further asserts that LEA's submission of the proposed permit to CalRecycle on December 9, 2014, failed to provide required documentation and, that the JTD submitted in support of the permit included insufficient information on odor abatement. The City of Milpitas submitted written comments on the SWIS # 43-AN-003 permit application on November 6, 2014 and attended public hearings held by CalRecycle on December 16, 2014, by which time Milpitas knew, or reasonably should have known, LEA submitted the proposed permit and supporting documentation to CalRecycle for its concurrence.

LEA had no authority to issue, revise or impose conditions on the proposed permit after submitting it to CalRecycle for concurrence. Upon receipt of CalRecycle's concurrence, by statute LEA was required to issue the permit. Therefore, Milpitas' petition fails to identify or set

forth a failure by LEA to act as required by law or regulation which occurred after December 9, 2014. (PRC §§ 44007, 44014 and 44307). Milpitas did not request a hearing on the matters alleged in the petition within the time prescribed by PRC § 44310.

2. The request for hearing is denied because the petition fails to identify any discretionary act, or failure to act, by LEA that occurred within the statutory period subject to review by an administrative hearing as set forth in PRC § 44310(a)(1)(B).

3. The request for hearing is denied because LEA does not have jurisdiction to regulate or control or impose requirements relating to matters, including odors, within the jurisdiction of the State Air Resources Board and Bay Area Air Quality Management District. (PRC § 43020 and § 43021; Cal. H&S Code, §§ 40000 and 41700). The petition cites a multiplicity of claims that LEA failed to address "the severe public odor nuisance" caused by the Newby Island landfill at various times preceding December 9, 2014. (See *e.g.*, Petition at ¶ 2 and ¶ 25). These matters are within BAAQMD's jurisdiction.

4. The request for hearing is denied because the Administrative Hearing Officer does not have authority to issue the requested relief, which is within the exclusive jurisdiction of the Bay Area Air Quality Management District. PRC § 44310, City of San Jose Procedures for Adjudicatory Hearings adopted by Resolution No. 76169.

You are advised the decision to deny Milpitas' request for an administrative hearing pursuant to PRC § 44307 is final and not subject to further consideration by this Agency.

Very truly yours,



Paul B. Tavares  
Supervisor, Local Enforcement Agency (LEA)

cc: Thomas M. Bruen, Newby Island Facilities (by email) [tbruen@tbsglaw.com](mailto:tbruen@tbsglaw.com)  
Terra Chaffee, City of San Jose (by email) [Terra.Chaffee@sanjoseca.gov](mailto:Terra.Chaffee@sanjoseca.gov)