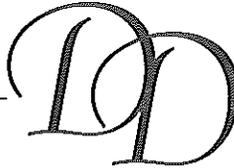


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April 6, 2015

Caroll Mortensen, Director  
California Department of Resources,  
Recycling and Recovery  
(CalRecycle)  
1001 I Street, P.O. Box 4025  
Sacramento, California 95812-4025

*Via Electronic and U.S. Mail*

**Re: NOTICE OF APPEAL OF THE MARCH 25, 2015 DECISION  
OF THE CONTRA COSTA COUNTY  
LOCAL ENFORCEMENT AGENCY  
INDEPENDENT HEARING PANEL**  
*Request for Hearing and Summary of Legal and Factual Issues*

Dear Ms. Mortensen:

This office represents Petitioners Evan Edgar and Monica White,<sup>1</sup> and on their behalf we submit the following appeal of the above-referenced Decision of the Contra Costa County Local Enforcement Agency Independent Hearing Panel and request a hearing regarding same.

More specifically, pursuant to Section 45030 of the Public Resources Code, Petitioners request a hearing to appeal the Contra Costa County Local Enforcement Agency ("LEA") Independent Hearing Panel's ("IHP") March 25, 2015 decision denying Petitioners' request to overturn the LEA's January 14, 2015 approval of the Report of Disposal Site Information ("RDSI") amendment for Keller Canyon Landfill ("Keller Canyon or KCL").

## **I. PROCEDURAL HISTORY**

On October 10, 2014 and November 19, 2014, the California Department of Resources, Recycling and Recovery ("CalRecycle") performed inspections of Keller

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<sup>1</sup> Petitioners Evan Edgar and Monica White have over 40 years combined experience in waste management and related matters. Petitioners have an interest in compost and ensuring that compostable waste materials go to the highest and best use. Accordingly Petitioners are interested in ensuring that green waste, especially that which has been mixed with food waste, is used for compost rather than Alternative Daily Cover.

Canyon and found that the landfill operator's handling of green material used as ADC was not in compliance with the description in the facility's RDSI, as amended in 2002, and not in compliance with the requirements of Title 27 of the California Code of Regulations Section 20690.<sup>2</sup>

On December 23, 2014 CalRecycle notified the LEA, through correspondence to Contra Costa Health Services, of the violations found at KCL and advised of the need for the RDSI to be amended to accurately reflect the KCL operations.

On December 29, 2014, the LEA received an application package from Republic Services, Inc. to amend the RDSI for the Keller Canyon Sanitary Landfill ("Keller Canyon" or "KCL").

On January 14, 2015 the County LEA certified the application package as complete, approved the RDSI amendment, and posted a Notice of Approval of the RDSI amendment and a Notice of Exemption indicating that the project was exempt from CEQA pursuant to CEQA Guidelines Section 15061(b)(2).

On February 13, 2015, Petitioners timely filed a Request for Hearing and Statement of Issues pursuant to Public Resources Code Sections 44307 and 44310(a)(1)(B), to appeal the LEA's January 14, 2015 approval of the RDSI amendment for Keller Canyon alleging that the LEA had failed to act in a manner required by law in approving the RDSI as presented.

On March 6, 2015, Petitioners submitted a request to the IHP for the removal of Larry Sweetser as a Panel Member to hear this matter due to a potential conflict of interest.<sup>3</sup>

On March 13, 2015, the requested hearing before the IHP was opened and then continued until March 19, 2015 in order to provide the parties and the IHP more time to review and respond to a brief submitted by Real Party in Interest ("RPI"), Keller Canyon Landfill, earlier that day.<sup>4</sup>

On March 19, 2015, the continued hearing before the IHP was held and following the presentation of arguments by the Petitioners, Respondent, and the Real Party in

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<sup>2</sup> See Petitioners' Exhibits which will follow under separate cover.

<sup>3</sup> Mr. Sweetser ultimately recused himself, citing a contractual relationship to RPI related entities.

<sup>4</sup> The RPI argued that the Petitioners' appeal was time-barred because Petitioners had previously raised concerns regarding KCL's ADC practices before the Contra Costa County Board of Supervisors. However, the IHP determined that the appeal was timely with regards to the LEA's January 14, 2015 RDSI approval. While the IHP was limited from addressing issues related to the LEAs' prior failures in regulating KCL, evidence regarding same was presented by Petitioners largely to demonstrate the basis for proper amendments to the RDSI.

Interest, the IHP determined that the LEA had not failed to act as required by law or regulation in approving the 2015 RDSI amendment for Keller Canyon.<sup>5</sup>

On March 25, 2015, six days after the March 19, 2015 IHP hearing, the IHP issued its written decision on the matter.<sup>6</sup>

## II. STATEMENT OF ISSUES ON APPEAL

This appeal derives from concerns about the use of green waste as Alternative Daily Cover ("ADC") and involves two major areas related to same. The first is whether or not commingled food waste and green waste can be applied to the active face of a landfill as ADC and the second is whether so-called processing of green waste to be used as ADC can occur *after* otherwise unprocessed green material has been spread on the active face of the landfill as a result of operational limitations.<sup>7</sup>

The March 25, 2015 Decision of the IHP leaves these two critical concerns unresolved and, instead, makes an erroneous determination that food waste mixed with green material is not used as ADC at Keller Canyon. In particular, the IHP Decision is in error because:

- 1) The Decision is not supported by the evidence in the record and is instead based on evidence *not* in the record;
- 2) The Decision is based on *ad hominem* attacks on the credibility of CalRecycle staff;
- 3) The Decision ignores credible evidence in the record, including CalRecycle staff's reports of operational defects at KCL;
- 4) The Decision is based on an erroneous interpretation of relevant law related to the processing of green waste and co-collected food waste.

As part of Petitioners' appeal to the IHP, Petitioners raised the following issues for the Panel to review:

1. The 2015 RDSI amendment does not address the issue of residential food waste mixed with unprocessed residential green waste being hauled to Keller Canyon Landfill for use as ADC.<sup>8</sup>

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<sup>5</sup> Per discussion with counsel for CalRecycle, Petitioners Exhibits, the transcripts of the IHP hearings, and the IHP decision will be submitted under separate cover.

<sup>6</sup> See the IHP's Written Decision dated March 25, 2015, exhibit to follow.

<sup>7</sup> Petitioners raise other issues that derive generally from failures of the LEA related to these two major issues.

<sup>8</sup> See Petitioners' Exhibits.

2. The 2015 RDSI amendment does not require the exclusion of the presence of food waste in green material used as ADC as required by the California Code of Regulations Title 14, Section 17852(a)(21).<sup>9</sup>
3. The 2015 RDSI amendment does not address operational limitations discovered by CalRecycle as noted in its November 19, 2014 inspection report, wherein the inspector states that green material used as ADC was improperly processed for the removal of contaminants while on the active face of the landfill.<sup>10</sup>
4. The 2015 RDSI amendment describe an alternative grain size specification that has not been concurred with by CalRecycle and the actual processing method employed is against regulation and has not been concurred with by CalRecycle.
5. The LEA's approval of the RDSI was improper since the green material ADC practices employed by Keller Canyon are not consistent with State minimum standards.
6. The Categorical Exemption under CEQA did not apply to the 2015 RDSI amendment because using green material mixed with food waste in ADC and processing green material while on the active face of the landfill has a potentially significant effect on the environment and such practices do not comply with performance standards for ADC set forth in Title 27 CCR Sections 20690 and 20695.

### III. SUMMARY OF FACTUAL/LEGAL ERRORS

#### **A. The March 25, 2015 IHP Decision is in Error Because the 2015 RDSI Amendment Does Not Address the Issue of Residential Food Waste Mixed with Residential Green Waste Being Hauled to Keller Canyon Landfill for Use as Alternative Daily Cover**

At the hearing held before the IHP, Petitioners provided sworn testimony and waste collection records, including DRS reports for relevant periods, showing that tons of co-collected green waste mixed with food waste from the cities of Benicia, Walnut Creek, Brentwood, and Lafayette had been hauled to Keller Canyon to be used as ADC.<sup>11</sup>

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<sup>9</sup> See Petitioners' Exhibits.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

Additionally, Petitioners provided LEA training presentations from CalRecycle showing that LEAs throughout the state are instructed that food waste is not allowed in green material used as ADC.<sup>12</sup> Moreover, Petitioners provided a letter from Harllee Branch, Senior Staff Counsel for CalRecycle, which further articulated CalRecycle's position that green waste comingled with food waste cannot be used as ADC.

The Harllee Branch letter states that:

“Typical kitchen food waste from residential sources would likely meet the definition of “food material” and thus should not be included in *processed* green material going towards ADC use.”<sup>13</sup>

The letter further explains that:

“[t]he regulatory definition of ‘green material’ allows for 1% physical contamination. Since, by definition, physical contamination can only include “inert” material, putrescible food material is not included.”<sup>14</sup>

Further, the CalRecycle Inspection Report for Keller Canyon dated November 19, 2014 states that “[f]ood waste is not allowed in the curbside collected residential green waste material received for ADC use.”<sup>15</sup>

Title 27 CCR 20690(a)(11) requires that:

“The owner or operator shall implement a program described in the Report of Disposal Site Information as required by section 21600(b)(6) to minimize contamination of alternative daily cover with wastes not included within the individual alternative daily cover material types specified in subdivision (b) of this section and wastes that would conflict with the performance requirements of (a)(2).”

The use of green waste mixed with food waste is not an approved ADC material type under subdivision 20690(b) CCR and the use of such material would increase the incidence of vectors in conflict with the performance standards of 20690(a)(2).<sup>16</sup> The operator is therefore required to implement a program described in the RDSI to minimize contamination.

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<sup>12</sup> See Petitioners' Exhibits. See also Transcript of IHP hearing on March 19, 2015, exhibit to follow.

<sup>13</sup> See Petitioners' Exhibits.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Section 20690(a)(2) of Title 24 CCR requires, among other things, that alternative daily cover be applied in a manner “... to control vectors, fires, odors, blowing litter, and scavenging without presenting a threat to human health and the environment.”

No such program exists or is detailed in the RDSI and the operator makes no distinction between food waste contaminants and other contaminants, as noted in the testimony of the Rick King, General Manager of Keller Canyon Landfill, despite the zero tolerance requirements of CalRecycle.<sup>17</sup>

Despite the evidence depicting thousands of tons of commingled food waste and green waste being delivered to KCL and admissions by the RPI and the LEA that all food is removed only when seen but also that it is rarely seen, the IHP appears to determine that the presence of food waste in ADC is not occurring at KCL.<sup>18</sup>

At the March 19, 2015 hearing, the LEA attempted to rebut the evidence presented by Petitioners by alleging that the LEA had never personally witnessed food waste within the green material used as ADC at Keller Canyon.<sup>19</sup> The LEA also alleged that the green material used as ADC is generally clean material and any contaminants that are found are removed.<sup>20</sup>

Mr. King testified that he was recently staring at a pile of green material from Walnut Creek, a city that has a well-established co-collection program, which was larger than the room the hearing was being held in and that he looked really hard for food waste but was unable to find any.<sup>21</sup> Based on this evidence, Mr. King argued that food waste mixed in green waste is “very, very, very, very minimal.”<sup>22</sup> This anecdote clearly illustrates how difficult it is to observe food waste within green material even when food waste is known to be present. However, regardless of how minimal it may be, food waste within green material used as ADC is strictly prohibited.<sup>23</sup>

In his statements to the IHP, Rick King stated that at KCL all food waste is treated as a contaminant and removed *if found*.<sup>24</sup> While the Real Party in Interest allegedly considers a contaminant to be a contaminant without distinction, CalRecycle and the law does distinguish between inert and putrescible contaminants and therefore these contaminants should be treated distinctively. The difficulty in locating food waste within green material, as noted by Mr. King, underscores the need for a more mindful approach for ensuring that food waste does not get used as ADC.

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<sup>17</sup> See Petitioners' Exhibits, *See also* the Transcript of IHP hearing on March 19, 2015, exhibit to follow.

<sup>18</sup> The IHP decision relies on alleged testimony of Rick King, General Manager for Keller Canyon Landfill, that food waste is buried at the landfill and not used as ADC. However, Mr. King did not so testify.

<sup>19</sup> *See* Transcript of IHP hearing on March 19, 2015, exhibit to follow.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *See* Title 14 CCR Section 17852(a)(20.) *See also* Title 14 CCR Section 17852(a)(21). *See also* Title 27 CCR 20690(b)(3)(A)

<sup>24</sup> *See* Transcript of IHP hearing on March 19, 2015, exhibit to follow.

None of the evidence presented by the LEA or the Real Party in Interest address the issue of zero tolerance for the presence of food waste in green material used as ADC or the absence of adequate procedures in the RDSI to prevent the use of green material contaminated with food waste as ADC.

From Mr. King's testimony it appears that Keller Canyon allegedly has an unwritten policy or procedure for handling food waste within green material but no documented evidence of that policy or procedure has been provided for the record and the fact remains that it is not documented in the RDSI as required by law in order for the RDSI to comply with the requirements of section 21600(b)(6)(b) of Title 27 of the California Code of Regulations ("CCR"). The lack of such information in the RDSI shows that the LEA has failed to act as required by law in regulating Keller Canyon.

Other than Mr. King's testimony that if food waste is seen in the ADC it is removed, neither the LEA nor the Real Party in Interest provided any evidence to show what happens to the thousands of tons of co-collected residential green material with food material delivered to Keller Canyon for use as ADC. No records were provided to show that any portion has been diverted for composting. No records were provided to show that any portion was diverted as municipal solid waste. No records were provided to show that any portion was rejected because it was too contaminated. No records were provided to show what contaminants were actually removed from the green material used as ADC, if any.

The March 25, 2015 decision is in error because it disregards documented evidence from waste-hauler records and from CalRecycle. Instead, the decision relies on the unsupported opinions of the LEA and the Real Party in Interest. The unsupported opinions provided by the LEA and the Real Party in Interest were not sufficient to overcome the evidence presented by Petitioners.

**B. The March 25, 2015 Decision is in Error Because the 2015 RDSI Amendment Does Not Require Exclusion of the Presence of Food Waste in Green Material Used as ADC as Required by the California Code of Regulations Title 14, Section 17852(a)(21).**

The LEA did not act as required by law when it approved the 2015 RDSI amendment because it did not require that Keller Canyon exclude food waste from green waste used as ADC and describe how green waste mixed with food waste would be handled in loads that go to Keller Canyon for use as ADC as would be required for full compliance with Section 21600(b)(6)(B) of Title 27 CCR.

At hearing, Joe Doser, Supervisor for the LEA, claimed that CalRecycle's interpretation of the definitions of green material and food waste are inconsistent and incorrect.<sup>25</sup> It is the LEA's contention that the Title 14 definitions of Green Material

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<sup>25</sup> See Transcript of IHP hearing on March 19, 2015, exhibit to follow.

and Food Waste only apply to composting facilities and the Title 27 definition of Green Material only applies to ADC.<sup>26</sup> The LEA contends that CalRecycle is incorrectly combining the definitions in the two titles and doing so inconsistently.<sup>27</sup>

Joe Doser opined that the LEA's opposite interpretation of the regulations defining Green Material and Food Waste, under Titles 14 and 27, was the only correct one and urged the IHP to accept its interpretation, over that of CalRecycle.<sup>28</sup> Under its own interpretation of the regulations, the LEA stated that food waste is not prohibited within green material used as ADC.<sup>29</sup>

Further, the LEA attacked the credibility of the disposal reports submitted to the Contra Costa County Department of Conservation Development, and other local bodies, that are then submitted to CalRecycle as part of its regulatory oversight. Mr. Dozer claimed that the reports are inconsistent and inaccurate.<sup>30</sup>

As discussed above, Petitioners presented evidence, at the March 19, 2015 hearing, showing that green material mixed with food waste was being taken to Keller Canyon for use as ADC, that food waste is not allowed in green material used as ADC, and that for jurisdictions that have co-collected curbside green waste and food waste, the average amount of food waste would be 5% to 10% of the total tonnage collected.<sup>31</sup>

While arguing that there was no evidence to show food waste was included in green waste ADC at KCL, neither the RPI nor the LEA could offer any explanation as to why KCL's food waste collection rates would be so much lower than average or what was actually happening to food waste that was not seen at the site.

Instead, the RPI and the LEA argued that the co-collection programs from the various jurisdictions had not matured significantly enough to create a problem with food waste and that because food waste could not be seen in the ADC, even in green waste collected from jurisdictions with mature collection programs, the food waste was not present or only present at the landfill in "very, very, very, very," small amounts.

The March 25, 2015 decision is in error because it disregards the regulatory interpretations and policies of CalRecycle. Instead, the decision relies on the unsupported opinions and anecdotes of the LEA. The anecdotes, unsupported opinions, and misrepresentations of the law provided by the LEA are not evidence and were not sufficient to overcome the evidence presented by Petitioners.

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Petitioners' Exhibits. See also The Declaration of Monica White. See also Transcript of IHP hearing on March 19, 2015, exhibit to follow.

**C. The March 25, 2015 decision is in error because the RDSI Does Not Adequately Address the Green Material Processing Methods Actually Employed at the Landfill and the Decision Disregards the Issue Based on Ad-hominem Attacks Directed at CalRecycle's Inspector and his November 19, 2014 inspection Report regarding Keller Canyon Landfill**

In the March 19, 2015 hearing before the IHP Petitioners presented a CalRecycle inspection report, dated November 19, 2014, which indicated that CalRecycle performed a two day inspection of Keller Canyon landfill ("Inspection Report"), wherein CalRecycle observed and evaluated, among other things, the practices of Keller Canyon in its use of green material as ADC.<sup>32</sup>

The Inspection Report stated that the operator was removing contaminants *after* the ADC was placed on the active face due to operational limitations of a small working face and that this practice is not allowed under Title 27 CCR 20690, as material must be processed before application of the ADC to the active face.<sup>33</sup> Further, the Inspection Report stated that this issue should be addressed as part of the RDSI amendment.<sup>34</sup>

The subsequent amendment to that inspection was the 2015 RDSI amendment and it fails to address such concerns.

The relevant code section relied on by the CalRecycle inspector is Title 27 CCR 20690(b)(3)(B) which requires that:

"[g]reen Material used for alternative daily cover shall be processed prior to being applied to the working face unless the material to be used as alternative daily cover already meets the grain size specifications..." (Emphasis added.)

The LEA did not act as required by law when it approved the 2015 RDSI amendment because it did not require that Keller Canyon address the operational limitation observed by CalRecycle, and documented in the Inspection Report dated November 19, 2014.

At the hearing, Joe Dozer attacked the credibility of CalRecycle inspection report by first stating that the LEA was not present on the day that the CalRecycle inspector made that observation and therefore he could not vouch for the accuracy of the

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<sup>32</sup> See Petitioner's Exhibits.

<sup>33</sup> See Petitioner's Exhibits (Italics added). Also note that the CalRecycle Inspector states that the "site operator explained that due to the location of the working face (tight corner fill), they were not able to spread the pile for the employees in order to remove contaminants that may be hidden inside the material pile."

<sup>34</sup> See Petitioner's Exhibits.

observations reported.<sup>35</sup> Mr. Dozer then continued to attack the credibility and professionalism of the CalRecycle inspector by stating that there were no photographs of the observations and that, for an enforcement officer, photographs are necessary to the enforcement of a violation.<sup>36</sup> Mr Dozer went so far as to say the CalRecycle inspector gave a “hinky” response and was evasive when the LEA allegedly asked to see photographs of his observations.<sup>37</sup>

Mr. Rick King, General Manager for the Real Party in Interest further added that the November 19, 2014 inspection was “bizarre” and that the CalRecycle Inspector had not informed him personally of any improper conduct.<sup>38</sup>

The IHP decision is in error because the IHP disregarded documented evidence from CalRecycle, the State authority for which the LEA operates as the local enforcement arm, and instead based its determination on ad-hominem attacks on CalRecycle staff by the LEA. Such attacks are not sufficient to overcome the evidence presented by Petitioners.

**D. The March 25, 2015 Decision is in Error Because the 2015 RDSI Amendment Describes an Alternative Grain Size Specification That Has Not Been Concurred with by CalRecycle and the Actual Processing Method Employed is Prohibited by Regulation**

At the hearing, Petitioners provided evidence showing that alternative processing methods and grain size specifications for green material to be used as ADC must be approved by the LEA with concurrence from CalRecycle. Under Title 27 CCR Section 20690(b)(3)(B):

“Alternative processing and grain size specification requirements may be approved by the EA if the EA determines that the alternative meets the performance requirements of ¶(a)(2) and (a)(3) of this section and the CIWMB concurs.”

The 2015 RDSI Amendment describes an alternative grain size specification for green material used as ADC and vaguely describes an alternative processing method for green material used as ADC, both of which have not received concurrence from CalRecycle.<sup>39</sup>

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<sup>35</sup> See Transcript of IHP hearing on March 19, 2015, exhibit to follow.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See Petitioners' Exhibits.

The LEA asserted that written concurrence is not required under the regulations and that CalRecycle has given *passive* concurrence by being aware of the grain size and procedures and not issuing a violation.<sup>40</sup>

While the regulation does not specifically require written concurrence from CalRecycle it is the preferred policy of CalRecycle to have a written concurrence on file.<sup>41</sup> Nonetheless, the need for written concurrence in this situation is critical given the fact that the LEA is claiming that CalRecycle has concurred with the processing method employed at Keller Canyon while at the same time allowing a processing method that is expressly prohibited by regulation. This prohibited method involves the processing of green material used as ADC while on the active face of the landfill, where operational limitations exist.<sup>42</sup>

The 2015 RDSI amendment does not address the processing method to be employed by Keller Canyon for green material used as ADC where operational limitations impede the ability of the operator to process the material prior to applying it to the active face. This is despite the fact that the RPI and the LEA were informed of this issue by CalRecycle in its November 19, 2014 Inspection Report.<sup>43</sup> This processing method cannot be considered to have been concurred with, even in a passive manner, since the CalRecycle inspector clearly states that it is a violation of regulation that should be addressed in the RDSI amendment.<sup>44</sup>

Further, the LEA asserts that CalRecycle was aware of and concurred with the 1999 demonstration project and the 2002 RDSI amendment that incorporated the ADC practices approved by the LEA in that project. However, the 2002 RDSI does not specifically mention the use of unprocessed green material as ADC. Moreover, the November 19, 2014 CalRecycle inspection report notes that “[t]he observation that contaminants were not removed prior to placement of the ADC material at the active face is also inconsistent with the ADC protocols approved by the LEA and described in its letter dated February 24, 1999.”<sup>45</sup> Under the circumstances, it is apparent that CalRecycle could not have concurred with such practices since it appeared to not be aware of them.<sup>46</sup>

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<sup>40</sup> Contrary to the LEA’s assertion, CalRecycle did issue a notice of violation to Keller Canyon Landfill in February of 2007 for its use of unprocessed green material as ADC. The inspection report notes that unprocessed green waste was observed on the active face and that it was not properly compacted. See Petitioners Exhibits. Also, a CalRecycle inspection report for Keller Canyon Landfill dated January 22, 2014 notes that “[t]he site uses green waste that is ground off site for cover at the active face.” This note indicates that the CalRecycle inspector was not aware of the facility’s actual green waste ADC practices. See Petitioners Exhibits.

<sup>41</sup> See Petitioner’s Exhibits.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> A CalRecycle inspection report for Keller Canyon dated February 21, 2013, for an inspection performed on January 22, 2013 indicates that the inspector believed that the site uses green waste that

The LEA did not act as required by law when it approved the 2015 RDSI amendment because it did not require that Keller Canyon receive concurrence for the actual green material ADC practices and grain specifications utilized by the landfill as would be required for full compliance with Section 21600(b)(6)(B) of Title 27 CCR.

The March 25, 2015, decision is in error because it dismisses the need for concurrence for deviations in grain size and or processing methods and does not address the documented evidence from CalRecycle of the unapproved and prohibited processing procedure employed by Keller Canyon when faced with operational limitations.

**E. The March 25, 2015 Decision is in Error Because the LEA's Approval of the RDSI was Improper since the Green Material ADC Practices Employed by Keller Canyon are Not Consistent with State Minimum Standards**

In order for the LEA to approve an RDSI amendment the proposed changes must satisfy all the requirements of 27 CCR §21665(c). Among these requirements is that the LEA has to deem the proposed changes:

“acceptable and consistent with, but not limited to, State minimum standards pursuant to Chapter 3, of this subdivision or applicable minimum standards in Title 14 (commencing with §17200), and including financial assurances and operating liability criteria pursuant to Chapter 6 of this subdivision if applicable;...”

As detailed above, the actual practices of Keller Canyon in its use of green material as ADC are not consistent with State minimum standards. These practices include, but may not be limited to, the use of green material mixed with food material as ADC and the processing of the green material while on the active face. Since these practices are outside the scope of what is allowed under the regulations, they do not comply with State minimum standards.

The LEA did not act as required by law when it approved the 2015 RDSI amendment because it did not require that Keller Canyon's green material ADC practices comply with State minimum standards as is required under 27 CCR Section 21665(c).

The LEA asserts that the RDSI amendment with regards to ADC is intended to better describe the longstanding use of green material at Keller Canyon. However, the LEA

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is ground off site. A CalRecycle inspection report for Keller Canyon dated February 22, 2007, for an inspection performed on January 23, 2007 shows a violation for the use of unprocessed green material as ADC. See Petitioners' Exhibits.

has failed to require that the practices raised by CalRecycle and the Petitioners, and supported by documented evidence, be described in the RDSI.

The failure of the LEA and Real Party in Interest to document these practices is not evidence of their non-existence and does not excuse the LEA from having to analyze whether they meet State minimum standards. The actual practices employed by Keller Canyon do not meet State minimum standards and the LEA's refusal to acknowledge that they are in place does not justify a contrary assertion.<sup>47</sup>

The March 24, 2015 decision is in error because it disregards the *actual* green material ADC practices employed by Keller Canyon that violate State minimum standards as evidenced by Petitioners through disposal reports prepared for the submission to CalRecycle and the observations made by CalRecycle document in the November 11, 2014 Inspection Report. In upholding the LEA's determination, the IHP's decision rests of the LEA's unsupported assertions that cannot stand in the face of the evidence presented by Petitioners.

**F. The March 25, 2015 Decision is in Error Because the LEA's Approval of the RDSI was Improper Since the Practices Currently Employed by Keller Canyon Landfill in Its Use of Green Material as ADC are Not Categorical Exemption Under CEQA**

In order for the LEA to approve an RDSI amendment the proposed changes must satisfy all the requirements of 27 CCR §21665(c). Among these requirements is that the LEA has to deem the proposed changes:

“(1) the EA finds that the proposed change is consistent with all applicable certified and/or adopted CEQA documents in that no subsequent EIR or Negative Declaration or supplemental EIR is warranted pursuant to Title 14, Chapter 3, Article 11, §§15162 or 15163, or if the EA finds the change being requested is exempt from the requirements of CEQA pursuant to Title 14, Chapter 3, Article 5, §§15060 and 15061”

In the case of the 2015 RDSI amendment for Keller Canyon, the LEA determined that the green material ADC practices activities at Keller Canyon were Categorical Exempt from CEQA review pursuant to Section 15061(b)(2). However, only activities with no significant effect on the environment can be categorically exempted from CEQA review.<sup>48</sup>

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<sup>47</sup> It should be noted that the LEA refuses to acknowledge that the November 19, 2014 inspection by CalRecycle resulted in a violation for failure to comply with the green material ADC practices described in the 2002 amendment to the RDSI or for applying unprocessed waste to the active face as ADC.

<sup>48</sup> See *Salmon Protection and Watershed Network v. County of Marin* (2004), 125 Cal.App.4th 1098, 1107 (citing, PRC §§21080(b)(9), 21084(a) and *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 124); also see *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 269.

While the LEA claims that the 2015 RDSI amendment will not result in a significant change in the environment because there are no changes to the landfill project and operations at Keller Canyon, this assertion is in error and is not supported by the evidence.

In making its determination of CEQA exemption, the LEA relied on environmental review from decades ago which made no accommodation for use of co-collected green waste mixed with food waste as ADC, because the practice did not exist at the time. Because the application of food waste as ADC has the potential to impact air quality and other environmental concerns not previously analyzed, a categorical exception is not appropriate here.

Thus, the LEA did not act as required by law when it approved the 2015 RDSI amendment because the *actual* green material ADC practices employed by Keller Canyon may have a significant effect on the environment and would therefore not qualify for a categorical exemption under CEQA as would be required to comply with Title 27 CCR Section 21665(c).

The March 25, 2015 decision is in error because it disregards the potential environmental effects of food waste mixed with green material used as ADC and the need for operational changes to the landfill in handling this material. The LEA's unsupported assertion cannot stand in the face of the evidence presented by Petitioners.

#### **IV. SUMMARY OF PROCEDURAL ERRORS**

##### **A. The March 25, 2015 Decision is in Error Because the Independent Hearing Panel Did not Apply the Requisite Standard of Proof and Gave Improper Deference to the LEA**

In the hearing held on March 13, 2015 and March 19, 2015, Petitioners had the burden of proving, through the introduction of sufficient evidence, that the LEA failed to act as required by law.<sup>49</sup> While it is presumed that the LEA has properly acted, such a presumption is not evidence but merely places the burden of proof on the Petitioners to rebut the presumption.<sup>50</sup> As articulated by County Counsel at the March 19, 2015 IHP hearing "...the Panel must weigh all of the evidence to determine whether it has been established by a preponderance of the evidence, in other words, whether it is more likely than not that the LEA failed to act as required by law."<sup>51</sup> Since the presumption does not act as evidence, this means that the LEA's conduct is not entitled to deferential treatment once the presumption has been rebutted.<sup>52</sup>

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<sup>49</sup> See Public Resources Code § 44307.

<sup>50</sup> See Evidence Code §§ 600(a), 664.

<sup>51</sup> See Transcript of IHP hearing on March 19, 2015, exhibit to follow.

<sup>52</sup> See Evidence Code §604.

As discussed above, Petitioners established through documented evidence and testimony that Keller Canyon's processing practices with regard to green material used as ADC are not fully documented in the RDSI, as required by law.<sup>53</sup> Petitioners also established that green material mixed with food waste is not allowed for use as ADC, based on LEA training presentations provided by CalRecycle and CalRecycle's interpretation of the governing statutes.<sup>54</sup> As acknowledged by the hearing panelists, the disposal reports and other documents provided by Petitioners were sufficient to establish that green material mixed with food waste is going to Keller Canyon to be used as ADC. The IHP acknowledged that it is fact that green waste mixed with food waste is absolutely going to Keller Canyon.<sup>55</sup> The absence of documentation as to what happens to the green waste contaminated with food waste once it arrives at Keller Canyon allowed the IHP to infer that it is used as ADC, since that is its reported purpose.

The presence of these deficiencies in the 2015 RDSI amendment shows that the LEA has failed to act as required by law. As such, Petitioners satisfied the burden of proof needed to establish their claims.

In contrast, the evidence presented by the LEA and the Real Party in Interest consisted of bolstering their own unsupported opinions by casting doubt on the accuracy of DRS reports, casting doubt on the definitions of food waste and green material, claiming that CalRecycle is inconsistent in its application of the green waste and food waste definitions as applied ADC requirements, substituting their own interpretation of the regulations for CalRecycle's, and undermining the credibility of the CalRecycle inspector that observed the improper processing procedure at Keller Canyon, with ad hominem attacks on his professionalism.<sup>56</sup>

The arguments presented by the LEA and the Real Party in Interest are unsupported opinions, anecdotes, and ad-hominem attacks and should be given limited weight when compared to facts established by Petitioners that: (1) Keller Canyon is processing green material while on the active face of the landfill, (2) that co-collection programs are in place and green waste mixed with food waste is being taken to Keller Canyon to be used as ADC, and (3) that there is no properly documented procedure in the RDSI that explains how this particular contaminant, for which there is a zero tolerance, is prevented from being used as ADC.

The March 25, 2015 decision is in error because the IHP disregarded the documented evidence presented by Petitioners without having required that the LEA or the Real Party in Interest to present sufficient evidence to overcome the evidence presented by

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<sup>53</sup> See Petitioners' Exhibits.

<sup>54</sup> *Id.*

<sup>55</sup> See Transcript of IHP hearing on March 19, 2015, exhibit to follow.

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the Petitioners. In effect, the IHP gave deference to the LEA without sufficient evidence to do so.

## V. CONCLUSION

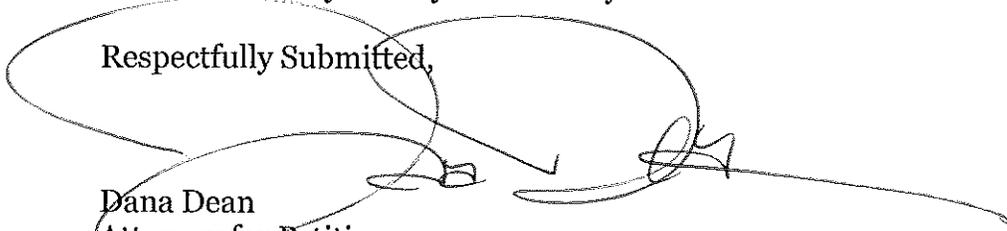
The March 25, 2015 Decision of the IHP fails to acknowledge or address the failure of the RDSI to reflect actual practices regarding commingled food waste and green waste used as ADC, as well as the operational limitation, as noted by CalRecycle, that allows for green waste to be applied to the active face without prior processing.

More specifically, the Decision was in error because the January 14, 2015 approval of the RDSI amendment for Keller Canyon Landfill by the LEA was improper since: (1) it does not adequately address the issue of green material mixed with food material being hauled to Keller Canyon for use as ADC; (2) it does not address the operational issue identified by CalRecycle of green material being applied to the active face of the landfill prior to processing; (3) the alternative grain specification has not been concurred with by CalRecycle and the actual green material processing method employed is prohibited by regulation, with regards to the act of processing green material while on the active face where operational limitations exist; (4) the green material ADC practices employed by Keller Canyon do not meet State minimum standards; and (5) the LEA's review of the green material ADC practices currently employed by Keller Canyon, as articulated in the RDSI amendment, is not categorically exempt from CEQA.

For all of the aforementioned reasons, the Petitioners respectfully request that the March 25, 2015 Decision of the IHP be set aside, that the LEA approval be rescinded and that a proper and complete RDSI amendment be required of Real Party in Interest

If you have any questions, please feel free to contact me at the above-referenced number. Thank you for your courtesy and consideration.

Respectfully Submitted,



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