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BEFORE THE DEPARTMENT OF
RESOURCES RECYCLING AND RECOVERY

In the Matter of:)
City of Milpitas,)
Petitioner,)
v.)
City of San Jose Department of Planning,)
Building and Code Enforcement, Local)
Enforcement Agency,)
Respondent,)
and)
International Disposal Corp. of California and)
Browning-Ferris Industries Of California, Inc.,)
Intervenors and Real Parties.)

APPEAL OF THE CITY OF SAN JOSE
LOCAL ENFORCEMENT AGENCY
HEARING DECISION, ISSUED AUGUST
28, 2015

DECISION

Public Resources Code Sections 44307,
45030 et seq.

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1. This matter came before me based upon an appeal filed pursuant to Public Resources Code (PRC) section 45030. Petitioner, the City of Milpitas (Milpitas), is represented by Kelly T. Smith, attorney at law. The City of San Jose Department of Planning, Building and Code Enforcement, Local Enforcement Agency (LEA), is represented by Richard Doyle, Nora Frimann, Ardell Johnson, and Margo Laskowska, attorneys at law. Real Parties in Interest, International Disposal Corporation of California and Browning-Ferris Industries of California, Inc. (Real Parties in Interest) have joined in this appeal and are represented by Thomas M. Bruen and Erik A. Reinertson, attorneys at law.
 2. Milpitas appealed a decision by Hearing Officer, Suzanne K. Nusbaum, denying all of Milpitas' claims against the LEA. Specifically, the Hearing Officer found that Milpitas

1 failed to establish that the LEA failed to act as required by applicable laws and
2 regulations with regard to permits for all three Newby Island Facilities during the
3 statutory 30-day time period prior to Milpitas' petition. I determined that Milpitas'
4 appeal raised one or more substantial issues and accepted the appeal. I also decided,
5 pursuant to PRC section 45031(c), that I would review this matter based upon written
6 arguments submitted by the parties. The arguments were submitted by December 21,
7 2015, and rebuttal arguments were submitted by January 8, 2016.

- 9 3. Having considered the arguments of legal counsel and the documents submitted by the
10 parties, and for good cause appearing, I have made the following determinations:

11 **Relevant Statutes**

- 12 4. PRC section 44307, under which this matter was filed provides, in part, that:

13 ...The enforcement agency shall also hold a hearing upon a petition to the
14 enforcement agency from any person requesting the enforcement agency to
15 review an alleged failure of the agency to act as required by this part, Part 5
16 (commencing with Section 45000), or Part 6 (commencing with Section 45030) or
17 a regulation adopted by the department pursuant to this part, Part 5 (commencing
18 with Section 45000), or Part 6 (commencing with Section 45030). A hearing shall
19 be held in accordance with the procedures specified in Section 44310.

- 20 5. PRC section 45032(b) specifies that remedy that the Department may order in its review
21 of an appeal and provides, in part, that:

22 ...If the [department] finds that the enforcement agency has failed to act as
23 required, the [department] may do both of the following:

- 24 (1) Direct that the appropriate action be taken by the local enforcement agency.
25 (2) If the local enforcement agency fails to act by the date specified by the
26 [department], take the appropriate action itself.

- 27 6. Title 14 California Code of Regulations (CCR) sections 18085 et seq. provide the process
for [Department] actions over LEA's, only one of which includes decertification (section
18086). Section 18087 provides a process for making determinations about appropriate

1 action to take. The scope and nature of that process is different from that which occurred
2 in the instant hearing. Thus, at the outset it must be made clear that at most, the
3 Department could order that such a process to consider decertification be initiated based
4 upon the record of this hearing, but the Department could not immediately decertify the
5 LEA as a result of this hearing itself.
6

7 **Hearing Officer Decision**

- 8 7. On March 2, 2015, Milpitas filed a Petition for Administrative Hearing with the LEA
9 alleging that the LEA had failed to act as required by law with regard to solid waste
10 facility permits for the Newby Island Sanitary Landfill (the Landfill), the Newby Island
11 Recyclery Facility (the Recyclery), and the Newby Island Composting Facility (the
12 Composting Facility) (collectively, the Newby Island Facilities).
13
- 14 8. Milpitas alleged that the permits for all three facilities constituted a failure by the LEA
15 and CalRecycle to “require the appropriate design, operation and feedstock revisions to
16 control the severe public odor nuisance caused by the Newby Island Facilities.” (Petition
17 for Administrative Hearing (Petition) at ¶ 2.) According to Milpitas’ Petition, the LEA
18 failed to require revisions to all three facilities’ permits to address odors as well as
19 requiring monitoring, reporting, and abatement to address odors. (*Id.* at ¶ 3.) Finally,
20 Milpitas alleged that the LEA acted arbitrarily and abused its discretion by failing to
21 revoke the solid waste facility permits for all three facilities. (*Id.* at ¶ 4.)
22
- 23 9. On March 11, 2015, the LEA denied Milpitas’ request for a hearing because it found that
24 the request was untimely and did not allege a failure to act as required by applicable laws
25 or regulations by the LEA within the statutory time period. The LEA also denied
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1 Milpitas' Petition because the LEA alleged that it does not have jurisdiction over the odor
2 nuisance allegations set forth in the Petition.

3 10. Milpitas appealed the LEA's decision to CalRecycle on March 20, 2015. CalRecycle
4 accepted Milpitas' appeal and decided the matter on the parties' briefs on June 9, 2015.
5 CalRecycle decided that the LEA should have held a hearing on Milpitas' March 2, 2015,
6 Petition for the limited purpose of determining whether the LEA failed to act as required
7 by applicable laws and regulations with regard to the issuance of a revised permit for the
8 Landfill and its oversight of all three of the Newby Island Facilities. That Decision made
9 clear that odor issues at the Recyclery and at the Landfill were not within the LEA's
10 jurisdiction and should not be part of the hearing.
11

12 11. On August 12, 13, and 14, 2015, the Hearing Officer heard the matter. Prior to the
13 hearing, Milpitas submitted its Statement of Claims, which altered the relief sought from
14 the original March 2, 2015, petition. In its Statement of Claims, Milpitas asked that the
15 LEA's certification be revoked for the LEA's alleged failure to perform its required
16 duties, and that the permits for all of the Newby Island Facilities be revised.
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18 12. At the hearing, the Hearing Officer heard testimony from the parties and received
19 evidence regarding the Newby Island Facilities and the LEA's oversight activities of
20 those facilities. The Hearing Officer found that Milpitas failed to establish that the LEA
21 improperly approved and issued a revised permit for the Landfill. The hearing officer also
22 found that Milpitas failed to establish that the LEA failed to act as required by applicable
23 laws and regulations with regard to the Landfill, Recyclery, and Compost Facility.
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Milpitas' Argument

13. In its appeal, Milpitas argues that the permits for all of the Newby Island Facilities should be revised and that the LEA's certification should be revoked for repeated failures to act as required by applicable laws and regulations.

14. Milpitas alleges that the LEA failed to investigate odor nuisances allegedly caused by the Compost Facility. Milpitas also alleges that the LEA failed to enforce permit compliance at all of the Newby Island Facilities while also concealing significant violations at all of the Newby Island Facilities.

15. Finally, Milpitas alleges that all three Newby Island Facility permits should be revised. Specifically, the Compost Facility permit should be revised so that the Odor Impact Management Plan (OIMP) better addresses odor nuisance allegedly caused by the Compost Facility; the Recyclery permit should be revised to handle mixed waste materials within 48 hours; and the Landfill permit must be revised to provide demonstrations of any alternative daily cover (ADC).

LEA's Argument

16. In its reply to Milpitas' appeal, the LEA argues that Milpitas failed to establish that the LEA failed to act as required by law with regard to its oversight of all three Newby Island Facilities in the statutory 30-day time period prior to the filing of Milpitas' petition.

17. The LEA also argues that all evidence to support Milpitas' allegations against the LEA come from issues that occurred prior to December 9, 2014; all of which, the LEA argues were resolved well before Milpitas filed its original Petition.

1 18. Finally, the LEA argues that Milpitas failed to present evidence that the LEA failed to act
2 as required applicable laws or regulations with regard to any alleged odor issues at the
3 Compost Facility.

4 19. Real Parties in Interest join in the arguments made by the LEA.

5 **DISCUSSION**

6
7 20. After reviewing the parties' arguments and the record below, I agree with the Hearing
8 Officer's decisions. The LEA and Real Parties in Interest have noted that Milpitas'
9 arguments on appeal have changed from those it made in its original petition and before
10 the Hearing Officer. Nevertheless, in the interests of allowing parties to have their
11 grievances heard, I will review each of Milpitas' allegations in turn.

12 **LEA Investigation of Alleged Compost Odor Nuisance**

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14 21. Milpitas argues that the LEA has a duty to report all odors no matter which Newby Island
15 Facility is causing them. (Milpitas Hearing Brief 17.) Milpitas states that the LEA must
16 enforce abatement of any odors from the Compost Facility and report any odors from the
17 other two facilities to the Bay Area Air Quality Management District (BAAQMD). (*Id.*)
18 Finally, Milpitas argues that the OIMP for the Compost Facility contains "dysfunctional"
19 reporting and response protocol, which should be amended. (*Id.* at 18.)

20 I. LEA Enforcement of Odor Abatement at the Compost Facility

21
22 22. Milpitas' argument regarding odor allegations at the Compost Facility appears to consist
23 of the conclusion that because there are odors at the Newby Island Facilities and because
24 testimony from a BAAQMD inspector stated that it is difficult to distinguish exactly
25 which facility is causing the odor, the Compost Facility must be causing odors. Milpitas
26 also claims that the LEA "often failed to respond to odor complaints" and "failed to
27

1 investigate composting odor because it failed to investigate odors.” (Milpitas Hearing
2 Brief 18.)

3 23. While the record does show that there is an odor issue at the Newby Island Facilities, it
4 does not show specific instances of odor complaints against the Compost Facility or a
5 subsequent failure by the operator or LEA to respond to complaints as required by
6 applicable laws and regulations. Evidence that BAAQMD confirmed 194 odor
7 complaints for the Newby Island Facilities between December 2014 and August 2015 is
8 not sufficient to prove that the LEA has failed to act with regard to odors at the Compost
9 Facility. Milpitas’ only specific evidence is an odor complaint on December 8, 2014, that
10 was submitted to BAAQMD. BAAQMD ultimately concluded that the odor had come
11 from the Compost Facility and forwarded the complaint to the LEA on March 26, 2015.
12 Given that Milpitas filed its original petition on March 2, 2015, before the LEA even
13 received this odor complaint, that single complaint cannot form a basis for Milpitas’
14 allegation and it is unreasonable to expect the LEA to have presented evidence relating to
15 allegations outside the scope of the underlying petition. It is also noteworthy that the
16 Hearing Officer, who heard this testimony in person, found that “I am not persuaded by
17 Mr. Argao’s (BAAQMD inspector) testimony about the source of the odors. Instead, I
18 find more persuasive the testimony of Troy Weber (CalRecycle Inspector) about the odor
19 source. On December 9, 2015, Troy Weber determined that the odor was not coming
20 from the Compost Facility.” (Administrative Hearing Decision 34-35.)
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24 II. LEA Duty to Report Any Odors

25 24. According to Milpitas, the LEA has a duty to “report any odors. If they arise from
26 composting the LEA should enforce their abatement. If they are from other facilities, the
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1 LEA is required to report them to the BAAQMD.” (Emphasis in original.) (Milpitas
2 Hearing Brief 17.) This, however, is not what the law requires. It is also not a violation of
3 PRC section 43214(d) as Milpitas seems to suggest. (Milpitas Hearing Brief 18.) As the
4 LEA correctly states in its briefs, section 43214(d) sets out standards for CalRecycle
5 when CalRecycle evaluates LEA performance. Title 14 of the California Code of
6 Regulations (CCR), starting with section 18080, state, among other things, an LEA’s
7 duties, responsibilities, and performance standards.
8

9 25. With regard to Milpitas’ claim that the LEA has a duty to report any odors, and, if those
10 odors are not from the Compost Facility, the LEA has a duty to report them to
11 BAAQMD, there is no such standard in Title 14 of the CCR. The LEA’s duty to act is
12 limited to the enforcement of state minimum standards, the terms and conditions of a
13 permit, the LEA’s Enforcement Program Plan, or any solid waste law or regulation
14 within the LEA’s purview. (Cal. Code of Regs., tit. 14, § 18084(a).) Milpitas states that
15 the LEA cannot say that it is properly addressing odors at the Compost Facility if it is not
16 checking all odor reports to see what facility is causing them. (Milpitas Reply Brief 5.)
17 However, odor complaints go to BAAQMD, and BAAQMD investigates them. Not only
18 does the law not require the LEA to investigate any and all odor complaints lodged with
19 BAAQMD just in case the Compost Facility might be involved, it would be unreasonable
20 to require this of the LEA. Despite Milpitas’ assertions, the Hearing Officer noted that
21 “[Mr. Argao] testified that BAAQMD cooperated with from (sic) LEA in investigating
22 odor complaints.” (Administrative Hearing Decision 34.) I would also note that Milpitas
23 City Officials and hundreds of city residents that testified before CalRecycle at hearings
24 on the landfill permit in December 2014 and January 2015 were well informed about
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1 where to file odor complaints related to the landfill and the Recyclery. Given the 2400
2 odor complaints received by BAAQMD, to suggest that the LEA was remiss in its duties
3 by failing to inform BAAQMD of odor complaints is without merit. It is clear that the
4 agency that does have the authority to act with regard to odors at the Landfill and
5 Recyclery is well aware of odor allegations.
6

7 III. Amendment of the OIMP¹

8 26. Milpitas also alleges that the Compost Facility's OIMP's odor reporting protocol is
9 "useless" and should be revised to address, among other things, "composting feedstock
10 from the Recyclery or wherever it is stockpiled", and be proven by a feasibility study.
11 (Milpitas Hearing Brief 18-19.) Milpitas also takes the time to describe new regulations
12 regarding OIMPs, which did not become operative until January 1, 2016, and suggests
13 that these new regulations support Milpitas' argument that the Compost Facility's OIMP
14 should be revised. (*Id.* at 19.) I am not certain why Milpitas thought that these new
15 regulations could be applied here; as I stated above, they did not become operative until
16 January 1, 2016. Nevertheless, with or without the argument about the new compost
17 regulations, Milpitas fails to make any arguments that support its claim.
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20 27. Milpitas says the OIMP's reporting protocol is useless because:

21 1) the operator, given the most of the responsibility under the OIMP, refused
22 and refuses to acknowledge any odor complaints arising from the operations
23 there; 2) the composting operations overlap the landfill operations and
24 Recyclery; 3) the OIMP's failure to provide a mechanism to respond to the
25 BAAQMD allows the operator to ignore potential violations; 4) the LEA's
26 inspector Bob Bates testified he rarely even looks at the complaint logs
27 required to be maintained by the facilities because "I know what I'm looking
for. Yet, the one time the written evidence shows he looked at composting odor

¹ This discussion refers to the OIMP revised March 2010, which was the OIMP effective at the time of Milpitas' Petition. Since that time, the Compost Facility operator submitted a revised OIMP on April 24, 2015.

1 complaints, it was almost a week after the complaints. (Milpitas Hearing Brief
2 18-19.)

3 I will address each of Milpitas points on this issue in turn.

- 4 28. First, it is unclear what evidence Milpitas has to support its assertion that the Compost
5 Facility operator refuses to acknowledge odor complaints regarding its operations.
6 Milpitas cites to the OIMP for the Compost Facility, but the OIMP does contain a
7 protocol for responding to odor complaints. Milpitas also refers to testimony from Don
8 Litchfield, Republic Services Northern California Environmental Manager, to apparently
9 support the assertion that the operator refuses to acknowledge odor complaints at the
10 Compost Facility. However, after reviewing Mr. Litchfield's testimony, there is no
11 evidence that the operator refuses to acknowledge odor complaints. Rather, Mr.
12 Litchfield's testimony establishes that the operator has a good relationship with
13 BAAQMD and other agencies with oversight of facilities in the area. The operator
14 receives every single odor complaint received by BAAQMD and reviews them to
15 determine whether any of the Newby Island Facilities are responsible. (AR 1744-1749.)
16
17 29. Milpitas's second reason for claiming the OIMP is inadequate is that "the composting
18 operations overlap the landfill operations and Recyclery." It is true that the Compost
19 Facility is co-located with the Landfill and Recyclery; however, Milpitas fails to
20 elaborate as to why this fact affects the adequacy of the OIMP odor reporting protocol.
21
22 30. Third, Milpitas states that the OIMP does not have a mechanism to respond to BAAQMD
23 allowing the operator to ignore potential violations. There is no requirement in the law
24 for an OIMP's complaint response protocol to coordinate with the local air quality
25 district. (See Cal. Code Regs., tit. 14, § 17863.4, subd. (b)(3).) This is because the OIMP
26 is designed to deal with matters within the jurisdiction of the LEA and CalRecycle. The
27

1 OIMP cannot be found deficient because it fails to include provisions regarding the
2 jurisdiction of another agency. Nevertheless, Mr. Litchfield's testimony establishes that
3 the operator is going above and beyond its OIMP protocol and coordinating with
4 BAAQMD and other agencies operating facilities in the area. (AR 1744-1749.)

5
6 31. Finally, Milpitas refers to testimony by LEA inspector, Bob Bates, where Mr. Bates
7 admitted to not always checking the Compost Facility's complaint logs. (AR 1702.)

8 Again, this does not appear to relate at all to the reporting protocol in the OIMP since the
9 OIMP describes the operator's odor minimization procedures. Additionally, Mr. Bates
10 does clarify that he is notified by BAAQMD of compost odor complaints, and he does
11 respond if and when he receives those. (AR 1703-1704.)

12
13 32. Based on the foregoing, I do not see any evidence to support Milpitas' claim that the
14 LEA should have required that the OIMP reporting protocol should be revised.

15 Additionally, since the OIMP was subsequently revised on April 24, 2015, this claim is
16 moot as there is no further action for the Department to order the LEA to do at this time
17 (i.e., require a revision to a document that has already been revised subsequent to this
18 appeal). (*See* Pub. Resources Code, § 45032, subd. (b).)

19
20 **LEA Enforcement of Permit Compliance at the Newby Island Facilities**

21 33. Milpitas next alleges that the LEA failed to discover and/or report to CalRecycle ongoing
22 operations at all three Newby Island Facilities that allegedly violated each facility's
23 permit. Milpitas alleges that the revised permit for the Landfill is not a complete and
24 correct representation of the Landfill. In addition, Milpitas alleges that the Landfill's
25 permit must be revised to provide demonstrations for any ADC. Finally, Milpitas alleges
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1 that the Recyclery's permit must be revised to handle mixed waste materials within 48
2 hours.

3 34. Milpitas claims that the Landfill permit revision approved by the LEA on February 9,
4 2015, does not fully describe the parameters of the Landfill because of the "integrated"
5 nature of the three Newby Island Facilities. (Milpitas Hearing Brief 20.) To support this
6 argument, Milpitas references an instance that occurred in November 2014, where
7 CalRecycle issued a Notice of Violation for use of a bunker at the Landfill to store
8 overages from the Recyclery. However, this bunker was cleaned out on December 8,
9 2014, which was confirmed by a CalRecycle inspection conducted on December 9, 2015.
10 (AR 1026). Furthermore, the bunker was disassembled several weeks later. (AR 1642.) In
11 the time period subsequent to the December 9, 2014, inspection and prior to the filing of
12 Milpitas' petition on March 2, 2015, the LEA inspected the Landfill four times
13 (December 18, 2014, December 29, 2014, January 23, 2015, and February 18, 2015) and
14 found no violations or areas of concern. (AR 1027, 1032, 1038, and 1046.) In fact,
15 according to the record, in every inspection since December 2014 until the end of the
16 time encompassed in the administrative record (June 26, 2015), there have been no
17 violations or areas of concern at the Landfill. (AR 1049, 1052, 1055, and 1058.)

18 35. Milpitas' only evidence to support its claim relies on an incident that not only occurred
19 well before the PRC section 44310(a)(1)(B) 30-day statutory time period prior to
20 Milpitas' filing of its petition, but also that incident was promptly corrected and has not
21 subsequently been an issue. Accordingly, I find that Milpitas has failed to establish that
22 the LEA failed to act as required by application laws and regulations with regard to its
23 claim against Landfill permit compliance.
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1 36. Milpitas next claims that the Landfill permit must be revised to provide demonstrations
2 of any ADC. (Milpitas Hearing Brief 21.) Milpitas claims that the LEA is arguing in its
3 briefs that “sewage ‘co-compost’” is permissible ADC. (Milpitas Reply Brief 9.) Milpitas
4 also states that the LEA would allow the use of unprocessed waste-derived ADC in
5 violation of Title 27 of the CCR section 20960(a)(1). (*Id.*) However, what the LEA
6 actually states is that the Landfill previously used ADC consisting of mixed green waste
7 and sludge. (Respondents’ Rebuttal Brief 9.) The LEA argues, correctly, that the use of
8 mixed green waste and sludge is permitted without a demonstration project pursuant to
9 27 CCR section 20960(b)(4) (“Site specific demonstration projects are not required for
10 the following materials...sludge or sludge-derived materials, either alone or blended with
11 ...processed green material...”.) Additionally, the Landfill’s JTD specifically states that
12 biosolids and sludges are allowable ADC when used according to the terms delineated in
13 the JTD. (Newby Island Sanitary Landfill Joint Technical Document (October 2014) B.5-
14 2.) If Milpitas is suggesting the Landfill was or is using something other than sludge and
15 green waste as specified by these provisions, there is no evidence in the record to support
16 that conclusion. The only conclusion the record supports is that the Landfill was using
17 mixed sludge green waste and is now no longer using biosolids. Based on the record and
18 what the parties have presented to me, I see no grounds to find that any permit
19 modification is necessary regarding the Landfill’s ADC use. Furthermore, to the extent
20 Milpitas is concerned that this blending might resume in the future, it should seek
21 assistance from BAAQMD to prohibit that activity, rather than having the LEA require a
22 permit revision since the concern raised by this blending activity relates to odor being
23 caused at the landfill, something within BAAQMD’s jurisdiction.
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1 37. Finally, Milpitas alleges the Recyclery permit must be revised to handle mixed waste
2 materials within 48 hours. The only evidence Milpitas offers to support this assertion is
3 the fact that the Landfill stored overages from the Recyclery in a bunker in October and
4 November 2014. (Milpitas Hearing Brief 21.) Milpitas states that its argument is not
5 exclusively based on the instance of bunker storage (Milpitas Reply Brief 5); however,
6 Milpitas offers no additional evidence. As I have previously stated, this practice was
7 noticed as a violation by CalRecycle and was remedied by the operator in December
8 2014. There have been no similar violations since that time. Thus, there is currently no
9 action for the Department to order the LEA to take at this time. (*See Pub. Resources*
10 *Code, § 45032, subd. (b).*)
11

12 **Alleged Concealment by LEA of Significant Violations**
13

14 38. Finally, Milpitas claims that the LEA concealed significant violations at the Newby
15 Island Facilities by allegedly concealing the acceptance and use of unauthorized
16 materials; allowing the Newby Island Facilities to improperly transfer waste between the
17 three facilities; and allowing the operator of the Newby Island Facilities to conceal
18 violations.
19

20 39. The only evidence Milpitas presents in support of its argument is the violations
21 CalRecycle noticed on its November 25, 2014, inspection of the Landfill. However, all of
22 these violations were remedied by the time of CalRecycle's December 9, 2014,
23 inspection. And, all subsequent inspections by the LEA confirm that none of those
24 violations have reoccurred.
25

26 40. Milpitas also claims that the LEA allowed the operator to conceal violations. Milpitas
27 says that there are confirmed odor complaints of odors from the Compost Facility that the

1 LEA has failed to respond to. (Milpitas Hearing Brief 23.) In addition, Milpitas says that
2 the LEA has allowed the operator of the Compost Facility to avoid reporting odor
3 complaints. (*Id.*) Milpitas offers no evidence to support this argument other than what it
4 offered to support its argument about the LEA's duties with regard to odors from the
5 Compost Facility, which are discussed above. As I stated there, there is not sufficient
6 evidence to show that either the LEA or the operator failed to act as required by any
7 applicable law or regulation with regard to odor reporting or investigation at any of the
8 Newby Island Facilities.
9

10 41. Accordingly, based on the record before me and the arguments presented, Milpitas has
11 failed to prove that the LEA has concealed violations and should have its certification
12 revoked.
13

14 CONCLUSION

15 42. I recognize the frustration on the part of those residing near these facilities. However, in
16 the context of this hearing, I am constrained by the way in which the issues have been
17 raised by Milpitas and by the authority that the statute and regulations provide to me.
18 Milpitas has chosen to address the issues at the facilities in question by alleging that the
19 cause of these issues is the LEA's failure to act in accordance with law to such an extent
20 that the LEA should be removed from its oversight role (decertified) because it did not
21 act quickly enough to stop activity that may have contributed to odor issues in the area
22 (bunker storage, blending of sludge and green waste for ADC, deficient OIMP) and/or to
23 require revisions to permits at the Newby Island Facilities to prevent these activities. Yet,
24 as discussed above, the activities in question have already been addressed due to the
25 LEA's oversight. Further, the activities in question are already either allowed or
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1 prohibited by existing regulations or are outside of the LEA's jurisdiction, thus obviating
2 the need for a permit revision. Given the authority provided to me by PRC section
3 45032(b), I see no order I could issue requiring the LEA to perform an act that they have
4 not already performed regarding oversight of the Newby Island Facilities.
5

6 43. As noted above, I cannot as a result of the hearings on this matter, order that the LEA be
7 decertified. CalRecycle has a separate regulatory process for review of LEA performance
8 and I can assure the parties the facts from this appeal will be included in this LEA's
9 review, along with all of its activities during the review period. However, in the context
10 of this appeal, the record before me shows that the LEA has already been diligently
11 working to police the issues that have been raised by this appeal and that it is working
12 with BAAQMD on those outside of its jurisdiction.
13

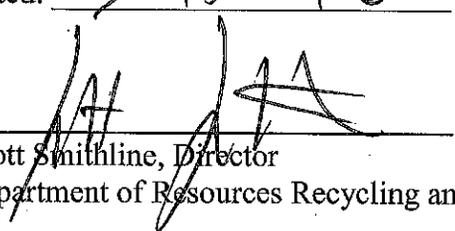
14 **ORDER**

15 Based upon the foregoing, I hereby uphold the Hearing Officer's decision. Specifically I make
16 the following determinations:

- 17 1. Milpitas failed to establish any failure on behalf of the LEA to act as required by
18 applicable laws or regulations with regard to odor reporting and enforcement at the
19 Compost Facility and other Newby Island Facilities;
20
- 21 2. Milpitas failed to establish any failure on behalf of the LEA to act as required by
22 applicable laws or regulations with regard to the LEA's enforcement of permit
23 compliance at any of the Newby Island Facilities; and
24
- 25 3. Milpitas failed to establish any failure on behalf of the LEA to act as required by
26 applicable laws or regulations with regard to Milpitas' claim that the LEA concealed
27 significant violations at any or all of the Newby Island Facilities.

1 This Decision shall be effective upon service.
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4 Dated: 3-15-16

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7 Scott Smithline, Director
8 Department of Resources Recycling and Recovery (CalRecycle)
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DECLARATION OF SERVICE BY MAIL

Case Name: **IN THE MATTER OF: APPEAL OF THE CITY OF SAN JOSE LOCAL ENFORCEMENT AGENCY
HEARING DECISION, ISSUED AUGUST 28, 2015**

I declare:

I am employed in the Legal Office of the California Department of Resources Recycling and Recovery, which is the office of a member of the California State Bar under which member's direction this service is made. My business address is California Department of Resources Recycling and Resources, 1001 I Street, MS 24B, Sacramento, CA 95814. I am 18 years of age or older and not a party to this matter.

On March 15, 2015, I served the attached **DECISION** by electronic mail by sending a true copy of the document identified above to the following persons at the indicated email addresses, which transmission was reported as complete and without error:

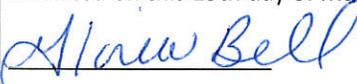
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 15th day of March, 2016, at Sacramento, California.


Declarant

