



CITY OF MILPITAS

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VIA EMAIL: Caroll.Mortensen@calrecycle.ca.gov

Caroll Mortensen, Director

Department of Resources Recycling and Recovery (CalRecycle)

1001 I Street--P.O. Box 4025

Sacramento, CA 95812-4025

RE: Newby Island Odor Issue; Proposed Solid Waste Facility Permit for Newby Island

Dear Ms. Mortensen,

Thank you and CalRecycle for hearing the concerns of the City of Milpitas and those of Milpitas and Fremont residents regarding problems arising from landfill operations at Newby Island. I hope this correspondence reaches you before CalRecycle makes a decision on whether to concur regarding the pending permit revision. At the meeting of January 27th, CalRecycle displayed on the overhead two Public Resources Code provisions, Sections 43020 and 43021. I would like to make a few observations regarding those Sections.

Both Sections refer to the authority of CalRecycle to promulgate and adopt regulations. Section 43020 clearly states that the regulations shall not include any requirements that are already under the authority of the Air Board for pollution control. Section 43021 further defines the scope of the authority to create regulations and again indicates the authority to create regulations shall not include matters within the jurisdiction of the Air Board.

It is significant that those sections define CalRecycle's authority to promulgate and adopt regulations but does not define CalRecycle's enforcement authority. For that we need to look to other provisions of the Public Resources Code.

Section 43300 defines CalRecycle's enforcement authority. It reads:

43300. The board, when acting in its capacity as an enforcement agency, may enforce all provisions of this division, and the regulations adopted thereto, for the protection of the environment and the public health and safety, and from nuisance.

From this it is reasonable to conclude that CalRecycle's authority to enforce for the protection of the environment and the public health and safety, and to prevent a nuisance is much broader than its authority to promulgate regulations.

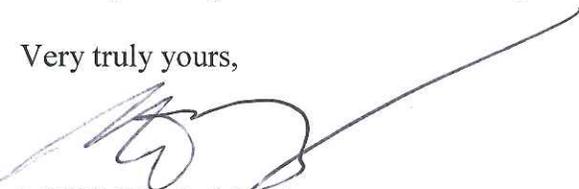
In the instant case, there is substantial evidence before CalRecycle that Newby Island is operated as an ongoing public nuisance. The endless public testimony plus the long history of BAAQMD complaints, some of very recent vintage and which are either confirmed or awaiting confirmation from BAAQMD, and the testimony regarding health effects is evidence that there is a clear and present nuisance with grave potential effect on the public health and safety from landfill operations. Issuing a permit to allow expansion and extend the life of the landfill operation for a minimum of 16 years with this serious background is to ignore Section 43300 and the LEA's duties under section 44012 that when issuing a permit that it "shall ensure that primary consideration is given to protecting public health and safety and protecting environmental damage..."

Granted that there are numerous unresolved questions regarding the source of odor, the effects of odor and particulate matter in the air, and how each of the operations at Newby affect distribution into the air. What is clear is that there is a problem. I believe that CalRecycle has a duty to assure the public that the LEA issues a permit or permit revision consistent with the LEA's duty under Section 44012 to give primary consideration to protecting public health and safety. The current Permit application does not include provisions which address the public nuisance health and safety concerns. No odor study is required prior to permit issuance; no resolution of a serious regional problem is required prior to allowing the status quo to continue with its history of ongoing complaints. These important issues should be resolved prior to issuance of the permit. To do otherwise is inconsistent with the duties of CalRecycle and the LEA under the law.

We ask you to consider the discussion contained herein prior to determining whether CalRecycle will concur in the Permit Revision proposed.

Thank you for your attention to this important matter.

Very truly yours,



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cc: Thomas C. Williams, City Manager, Milpitas
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