

**LEA PERMIT CONDITIONS
EAC MEETING
September 7, 2011**

Allow me to explain why I asked this item be placed on today's agenda. At our previous EAC meeting on June 29th, CalRecycle requested this issue be on that day's agenda, though it remains unclear their intent for doing so. At that time, I took the opportunity to discuss both the premise that LEAs have the authority to set permit conditions and the specifics as relate to the Contra Costa County LEA—and will do so again, today. This situation arose last year when the CCC LEA included a permit condition for a new solid waste facility that required the payment of fees. I want to emphasize that we did not do this lightly. A prominent solid waste attorney represents the applicant and we anticipated a vigorous challenge to this condition and perhaps other conditions. As an LEA should do with any permit condition, we did so based on the following criteria: (1) We believe it was necessary and useful; (2) We anticipated and planned for potential opposition; and (3) We assured ourselves we could confidently defend our position, should some party appeal it to our hearing body.

As it turned out in CCC, no appeal was made regarding the fee permit condition, but our relief was short-lived as a challenge came from an unanticipated quarter (i.e., CalRecycle). CalRecycle requested the removal this permit condition. We declined to do so. Eventually CalRecycle officially concurred on a permit which included this condition, and the LEA issued it. When I told this story at the last EAC meeting, I was heartened to see support for the CCC LEA from the other LEAs—including two who could not be here today. I believe that the LEA can include permit conditions that it feels are necessary and which it is willing to defend to its appeal body should an appeal be filed. This is a reasonable and commonsense approach that maintains the integrity of the due process associated with permit conditions.

Unfortunately, since the time that this issue arose last year, the CCC LEA has faced a number of troubling occurrences. I'm hoping to discuss these at length with Mr. Leary at a meeting with CCC that our agency has requested and will be held after today's EAC meeting.

I believe the fee permit condition issue is important, but I want to make clear that this is a larger issue, namely the right of the LEA to set permit conditions and the related due process to which others may avail themselves if they so choose. A due process mechanism is already in place and I encourage CalRecycle staff to defer to this mechanism. While I am a regulatory official, I am also a constituent and as such I expect the appropriate due process be respected by all government agencies.

I will explain this as it relates to permit conditions. When officially presented with a permit, CalRecycle can concur, not concur, or stay silent and concur by default. Those are its options. It is ultimately up to the LEA to issue the permit. In fact, the LEAs were

told by CalRecycle last year at a Bay Area LEA Roundtable that CalRecycle does not need to concur for a permit to be issued, a statement which resulted in a lively debate. Regardless of whether that is true or not, here is the important part: If an applicant or any other party, including a member of the public at large, objects to a permit or condition contained therein (or lack thereof), they can appeal to the LEA's hearing body. And this leads to an intriguing rhetorical question, particularly in light of recent events, that I pose to CalRecycle:

Take as a hypothetical example, a proposed permit which does not contain a provision for the payment of permit fees. A member of the public then appeals this lack to the local hearing body—which is his or her right. In the case of CCC, this body is comprised of three members of the Board of Supervisors. If this occurred in CCC and the hearing body agreed with the appellant and ordered that such a condition be included in the permit, would CalRecycle subsequently oppose it? I doubt it.

Basically, this is a sovereignty issue. I do not want to sound flippant, but with all due respect, CalRecycle needs to better demonstrate to the LEAs, on issues such as this, that the "L" in LEA does not stand for *lesser* or *lowly*. Certainly, there should be a partnership between an LEA and CalRecycle, but ultimately, an LEA needs to make its decision. The most prudent role for CalRecycle in these matters should be advisory and I encourage this, even if it includes a hearty debate with an LEA. But I must emphasize that unless an LEA insists on a permit condition (or lack thereof) that itself poses a direct environmental or safety hazard, CalRecycle should defer to the judgment of the LEA, particularly if an LEA is willing to appear before its hearing panel and defend it, should the need arise. Examples where CalRecycle's opposition would be justified include the unlikely case where an LEA wanted to allow a landfill to dispose of unacceptable waste material or where an LEA wanted to issue a permit without undertaking the proper review process.

I suggest a constructive approach to address this controversy, similar to the one that we are currently using for the 5-year review controversy. You may remember that the 5-year review issue started out in a similar fashion: CalRecycle insisting that it was not going to approve permits unless a 5-year review was done, which then caused a resultant controversy between it and the LEAs. Fortunately, CalRecycle's had a more measured response to vigorous (and thoughtful) push-back from the LEAs, which I consolidated into a formal letter from the EAC and which was addressed to CalRecycle. The agency is now working collaboratively with the EAC and the LEAs on that matter. The EAC expects to have a resolution on the 5-year review issue ready for a vote at our next meeting.

In a similar fashion, I prepared a preliminary draft EAC resolution on the issue of permit conditions. My goal is that this serves as a template for the EAC and the LEA Roundtables to solicit comments and suggestions from their members. Based on this feedback, and, if there is continued support to protect the rights of the LEAs and the due process associated with permit conditions, we will prepare a proposed final version of a

resolution. My suggestion is that the resolution be addressed to CalRecycle and the CCDEH SWPC and contain the following components: (1) An articulation of EAC's position, (2) a description of the nature of the dispute, and (3) suggestions that might lead to an amicable solution. Hopefully, we will be in a position to vote on this resolution at an EAC meeting in the near future.

A permit condition is essentially a tool, one that may accompany other tools, including statutes, regulations, and local ordinances. It is important that the LEA have an assortment of tools, so if the need arises, it can choose the right tool (or tools) for the job at hand. I know when we've dealt with our district attorney in the past, they like having as many options as possible and ultimately as they see best should an enforcement action be necessary.