

May 6, 2015

Via Mail and Email: compost.transfer.regs@calrecycle.ca.gov

Mr. Ken Decio

Waste Permitting, Compliance, and Mitigation Division
California Department of Resources Recycling and Recovery
P.O. Box 4025
Sacramento, CA 95812-4025

Re: Proposed Amendments to Compostable Material, Transfer/Processing
Regulations

Dear Mr. Decio:

This office represents the City of Milpitas ("City") concerning odor nuisance issues associated with the Newby Island Sanitary Landfill facility and related operations (NISL), which include a large composting operation. As is well known to CalRecycle, residents of Milpitas and nearby cities have been plagued by noxious odors from NISL, including the composting operation, for many years. Compost odor nuisance to the residents in the City has been allowed to continue because of an appalling lack of oversight and enforcement from the Local Enforcement Agency. In this context, we are writing to provide the City's comments concerning the above proposed amendments.

In general, the City supports amendments that strengthen the ability of CalRecycle and the Local Enforcement Agency to identify odor impacts and nuisances emanating from composting operations, and proactively to require immediate and complete mitigation of such impacts and nuisances through effective enforcement mechanisms. While the City supports many of the specific revisions, the current and proposed amended regulations do not go far enough to achieve the goal of effective enforcement by the Local Enforcement Agency regarding odor nuisance violations from composting operations.

The proposed amendments to Section 17863.4—Odor Impact Minimization Plan—key the requirement for preparation and implementation of an Odor Best Management Practice Feasibility Report ("Report") to an Enforcement Agency's determination, in a manner consistent with (amended) section 18302(d), that odor impacts are occurring. (We address the significant flaws in the proposed amended section 18302(d) below.) Further, Section 17863.4 requires the Enforcement Agency to consider the results of the Report before requiring an operator to take additional

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reasonable and feasible measures to minimize odors unless, among other things, a “public nuisance” has occurred.¹ While “nuisance” is defined in Sections 17852(a)(27.5) (and section 17896.2(a)(20)), there is no definition of “public nuisance.” This ambiguity should be removed.

This leads to the most serious flaw in the proposed amended regulations—one that has been exposed in practice in connection with the ongoing odor nuisance caused by the composting operation at NISL. By way of background, at NISL, there are multiple nuisance-level odor-causing operations, including the landfill, the Recyclery and the composting operation. The Bay Area Air Quality Management District (“BAAQMD”)—which has a staff of investigators trained to investigate air and odor issues—investigates complaints concerning, and has enforcement power over, odors emanating from the landfill and the Recyclery—but CalRecycle and the San Jose Local Enforcement Agency have enforcement power concerning odors from the *compost* operation pursuant to Health & Safety Code Section 41705. This division of authority, and air and odor expertise and enforcement, has resulted in an unacceptable and inexcusable lack of action by the Enforcement Agency concerning the clear public nuisance caused by odors from the composting operation.

As an initial matter, we note that those citizens complaining about odors often do not know what is causing the odor and may be unable to differentiate whether it is coming from compost as opposed to another source at NISL, so it is not realistic to anticipate odor complaints relating to a compost operation to be channeled directly to the Local Enforcement Agency. Further, we are not aware of any effort by the San Jose Local Enforcement Agency to publicize its role to receive and respond to odor complaints involving the NISL composting operation. Conversely, as the agency charged with regulating and enforcing air and odor issues in the Bay Area, the BAAQMD has an easily findable and publicized Odor Hot Line (1-800-334-ODOR) for citizen odor complaints. That is the number that citizens will call when experiencing an unpleasant odor.

When citizens call the Odor Hot Line, a BAAQMD investigator attempts to meet with the complainant where the odor was experienced, confirm—together with the complainant—the nature of the odor, and attempt to trace the odor back to its source. A complaint is “confirmed” when (1) both inspector and a complainant can together smell the odor and (2) the inspector can trace the emissions to a particular source.

¹ The phrase “public nuisance” is also used in Section 17896.31(f).

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Odors often come and go in unstable and unpredictable patterns. Shifts in wind direction and variations in processes can make odorous emissions difficult to verify over the time required for the complaint confirmation process. If an inspector and the complainant cannot together smell the odor at the same time and place, the complaint cannot be confirmed, even if the inspector has independently detected the odor. Complaint verification thus depends on the concurrence of the following factors: (1) a complaint being made; (2) the continuation of the odor-causing process; (3), stable meteorology; (4), the presence of the complainant when the inspector arrives; and (5), and the inspector's ability to trace the odor to a source. Only when all of these coincide during the inspector's visit to the site of the complaint and to the source can a complaint be confirmed.

Even with these stringent verification requirements, there have apparently been over 40 **confirmed** odor complaints traced by BAAQMD's investigators *directly to the NISL composting operation* from 2013 to February 2015.² Needless to say, there have been thousands of odor complaints that, because of the rigorous confirmation process, could not be confirmed. As an example of a confirmed complaint, one such complaint traced to the composting operation was documented in the BAAQMD investigation report we attach hereto—importantly, this recent confirmed complaint indicates that there were multiple complaints about that odor, which evidences a “nuisance” as defined in newly revised Section 17852(a)(27.5), and a “public nuisance” under Civil Code Section 3480 and common law. Further, the report noted that “[o]dor detected was same characteristic compost odor previously and historically determined and observed and known to be sourced from large-scale composting operations at Site #A5472—thus confirming that the compost odor nuisance is historical and ongoing.

Each time BAAQMD confirms an odor complaint traced back to the compost operation, the Local Enforcement Agency is notified.³ Of course, by that time, the ability of the Local Enforcement Staff to confirm the odor probably has long since passed. It is not apparent what, if anything, the Local Enforcement Agency has done in response to confirmed complaints referred by BAAQMD, but what is clear is that the odor nuisance continues and no Notices of Violation have been issued by the Local Enforcement Agency for such nuisance, notwithstanding all of the confirmed complaints referred to it.

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https://docs.google.com/spreadsheets/d/1RgaxxleDKmdUtdP68_jeExaldkHquDa74z7bHg9pRA8/edit?pli=1#gid=2131851248

³ BAAQMD Compliance & Enforcement Division, Policies & Procedures, Complaint Guidelines (Rev. 2004); Part 2.B.

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This dislocation between BAAQMD-confirmed odor complaints traced directly to the composting operation and the lack of action by the Local Enforcement Agency reveals unacceptable flaws in the proposed revised Section 18302. Proposed subsection (d) to Section 18302 provides:

(d) Upon receipt of an odor complaint related to a compostable material handling operation of facility, the EA shall investigate the complaint as soon as practical prior to issuing a violation for failing to minimize odor. The odor complaint investigation shall include the following:

(1) The date and time the EA arrived and departed within the complaint area.

(2) Observations of wind direction and speed, and general weather conditions such as clouds fog, high wind speed, humidity, and temperature.

(3) If odor is detected, the EA shall:

(A) Record the location where odor was observed, such as the street address, latitude/longitude, Tax parcel number, etc.

(B) Verify the odor event at the complainant's location and ascertain if document the complainant's claim, if any, that the odor is interfering with the complainant's use and comfortable enjoyment of life the or property.

(C) Document odor characteristics, intensity, and duration at the complainant's location, the solid waste facility/operation, and other odor sources adjacent to the solid waste facility/operation,

(D) Identify activities conducted at the solid waste facility/operation at the time of the odor event.

The EA should consult with the operator to determine if there were unusual operational changes or atypical feedstocks accepted during the time of the complaint(s).

The first flaw is that it appears to presume a real time complaint and investigation by the Enforcement Agency. As noted, most odor complaints in the Bay Area are made to the BAAQMD, so the complaint will likely be stale by the time it reaches the Local Enforcement Agency. The second flaw is that there is no apparent provision for the Local Enforcement to rely upon the results of investigations by the BAAQMD (or other regional AQMD or other regulatory agency) that have confirmed odor nuisance complaints to a composting operation in lieu of the procedures set forth in Section 18302(d).

For these reasons, the City of Milpitas respectfully requests that the proposed regulation be further revised to:

1. Remove the word "public" before "nuisance" in Sections 17863.4 and 17896.31;

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2. Revise Section 18302 to require allow the Enforcement Agency, when investigating and taking action in response to odor complaints, to rely upon all material information, including investigations performed by other regulatory agencies, including investigations by the applicable Regional Air Quality Management District and Regional Water Quality Control Board.

Thank you for considering our comments and proposed revisions. Please feel free to contact the undersigned with any questions.

Very truly yours,

BURKE, WILLIAMS & SORENSEN, LLP



Timothy A. Colvig

Encl. (BAAQMD Complaint Report for Complaint #218184)

cc: Mike Ogaz (City Attorney for the City of Milpitas)



City Manager **COMPLAINT REPORT**

APR 10 2015

Routing		
	Init	Date
Supv Insp	<i>pm</i>	3/26/15
Com Center Update	JF	3/30/15

RECEIVED
CHANGES

ALLEGED SITE

<input type="checkbox"/>	Name: NONE (UNKNOWN)	Site # P8700
<input type="checkbox"/>	Address: (none given)	
<input type="checkbox"/>	City: Milpitas	Zip: 95035

DESCRIPTION

<input type="checkbox"/>	Type: Odor
<input type="checkbox"/>	Description: Bad
<input type="checkbox"/>	Occurrence Date: 12/8/14 Time: 1530 hours <input checked="" type="checkbox"/> On-going
<input type="checkbox"/>	Pertinent Data:

COMPLAINANT ("C")

<input type="checkbox"/>	Last Name: Currie	First Name: Rachelle	<input type="checkbox"/> Anonymous
<input type="checkbox"/>	Address: 455 East Calaveras Boulevard		
<input type="checkbox"/>	City: Milpitas	Zip: 95035	
<input type="checkbox"/>	Phone number where "C" can be reached within 30-60 minutes: (408) 586-3051		
<input type="checkbox"/>	Alternate phone number: () -		
<input type="checkbox"/>	Referral from: N/A	Petition - # of people:	
<input type="checkbox"/>	How "C" contacted: In Person	Date: 12/8/14	Time: 1616 hours

RESPONSE

First destination: Complainant's location	Date: 12/8/14	Time: 1616 hours
Confirmed site: Different from the alleged	If the confirmed site is different than alleged, show exact site name and address	
Name: BFI- Newby Island Organics	Site # A5472	
Address: 1601 Dixon Landing Road		
City: Milpitas	Zip: 95035	
Contact:		
Type of site: Plant		
Referred to LEA: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		

CONCLUSION

This complaint is: Confirmed
Reason - Emission detected with "C"; traced to source
NOV# issued for
NOV# issued for
NOV# issued for

FOLLOW UP ACTION

"C" requests the following:
<input checked="" type="checkbox"/> A copy of the written complaint report.
<input type="checkbox"/> The final disposition of any enforcement action (NOV#) that may result from the filing of their complaint.

Inspector: **Arnold Argao**

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Date: **3/19/15**

OBSERVATION

Wind direction: **from NW** Wind speed (mph): **0-10** NA
 Location taken at: **Complainant's location**

For odor complaints:

- ♦Odor detected with complainant: yes no
- ♦Same odor detected at the alleged site: yes no
- ♦Same odor detected upwind of the alleged site: yes no
- ♦Odor detected without the complainant within 60 minutes of the time of the allegation: yes no
- Is the odor from a compost operation: yes no
- Did the complainant allege health affects: yes no
- If unconfirmed, are there other sources in the area that may be the alleged source: yes no

For visible emissions, asbestos, fire-in, smoke, fire-out, soot, and dust complaints:

- Fire-in (visible smoke from chimney) observed: yes no
- Visible emissions observed: yes no
- Emissions exceed BAAQMD standard: yes no
- Open burning observed: yes no
- Allowable fire: yes no
- Fallout observed on the property: yes no
- Sample taken: yes no Lab No.
- Asbestos – sample taken: yes no Lab No.

Additional investigation:

A request has been made to the _____ group.

STATEMENTS

Complainant- "Our IS Department in another part of the City is also getting the odor. Odors happen all the time and it stinks. It has been smelling for many years. It got inside the building today as you can see, or smell. Today it was not the manure odor. I called Bob Bates at the City of San Jose LEA."

COMMENTS

LEA and non-District jurisdiction.

Mutual detection of the odor made with complainant. Odor was steady and non-fleeting. RI verified odor description with complainant. Odor detected was same characteristic compost odor previously and historically determined and observed and known to be sourced from large-scale composting operations at Site #A5472. On-site wind direction supports confirmation of the odor source. RI advised complainant her complaint was confirmed. One additional odor complaint (C #218191) for same odor was confirmed. Six total odor complaints were filed from the same location of Milpitas City Hall.

RI advised complainant Site #A9013- International Disposal Co. of CA & Newby Island- Republic Services Landfill, at the same location as Site #A5472, is also a potential known odor source. RI advised complainant of both operations and odor sources, and jurisdictional issues with the LEA (City of SJ Code Enforcement).

A confirmed complaint does not automatically indicate a violation of the state or Federal law or BAAQMD regulation.

Inspector: **Arnold Argao**

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Date: **3/19/15**

RI investigated complaint as back-up for Inspector Patel, who was advised of complaint/investigation results. RI advised Site #A5472 of the confirmed complaint, and referred any additional Site #A5472 contact/follow up to Inspector Patel. RI to conduct further surveillance as necessary. NFA on this complaint by RI. The complaint is confirmed.

The complainant was contacted with the results of the investigation.

A confirmed complaint does not automatically indicate a violation of the state or Federal law or BAAQMD regulation.

Inspector: **Arnold Argao**

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Date: **3/19/15**