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SECOND COMMENTS BY PETER ANDERSON OF THE CENTER FOR A COMPETITIVE WASTE INDUSTRY ON BEHALF OF SIERRA CLUB CALIFORNIA (RELATING TO THE ICF'S PROPOSED TASKS 2, 3 AND 4)

We must confess that we do not fully understand what determinations have been made and what has not from the key matters we sought to raise in our earlier filing, because: [1] no response was provided to the specific comments previously submitted on the revised workplan so that we can know what has been decided, [2] the contractor is hewing to a process-heavy checklist developed for other unrelated jurisdictions, [3] the issues in those other jurisdictions do not remotely address the singular issues specific to landfills, [4] there is apparent tension between the Board's staff and the contractor's view of the key issues, and [5] the consultant's disparate sets of papers have no clear logic of where they fit together.

This suggests it is not inconceivable that some of our comments that follow on the latest set of ICF's papers may already have been addressed. But, we trust that you will understand that we are doing the best that we can to sort things out from the material we have been provided by the contractor.

With that caveat, we are quite concerned from what we can discern that the contractor is proposing to continue on the same discredited path laid out by the U.S. Environmental Protection Agency, which vigorously champions captive insurance that has been rejected by the Board. That course has been single-mindedly contrived to minimize costs to the landfill owner, unconcerned with the fact that the decision to do so, although it does avoid political pressure from landfill lobbyists today, simultaneously maximizes risk to the taxpayers in the future. The contractor is doing this by expediently ignoring these three critical matters:

® ***Fatally flawed design.*** EPA's and California's design basis for licensed landfills at best only postpones, but does not prevent, pollution in the future, as the Board's staff has repeatedly acknowledged ("CIWMB informed ICF...that most, if not all landfills will eventually require corrective action.")1

© ***Mega-fills.*** EPA's and California's mid-1990's decision to accept the private industry's decision to scale up the size of landfills by 100 times in order to significantly reduce unit costs was never validated by engineering tests. Instead, it has made a new generation of mega-fills that are too big to fix and susceptible to an entirely new failure mechanism, namely massive landslides that, in populated areas, will be expensive to remediate.

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[1] ICF, Revised Work Plan/Methodology (Undated), at p. 7, n. 7.

™ ***Imprudent siting.*** In implementing Subtitle D in California, the risks from poor designs have been heightened further by unfortunate siting decisions. Permits have repeatedly been approved for landfills to be sited in extremely high risk locations, primarily because they were nearer to collection routes so that one company could derive an ill-gotten competitive advantage. This questionable permitting includes sites on bays, in wetlands, on top of unlined hazardous landfills, and next to active earthquake faults, which are far more susceptible to fail and to fail with far greater negative consequences.

Taken together, this means that there is major *systemic* risk, which does not appear to be addressed in the working papers. It further suggests that the contractor's proposed process will diligently ignore the very consequential issues that need to be addressed if we are to protect the citizenry from a future tax increase in the tens of billions of dollars to bailout the landfill industry.

We trust that the Waste Board, which instituted this process for the very purpose of revamping its rules to prevent such a regulatory failure, will not permit this abdication to happen. Today, of all times, it would be especially tragic to resort to severe myopia in order to evade responsibility for the assigned task. For we are right now inundated with newspaper headlines warning how an identical recourse to analytical horse blinders has led to the current meltdown of our credit markets that threatens the entire economy.

Estimable institutions like S&P's and Moody's, according to the New York Times, rated tranches of high risk subprime mortgages the same as U.S. Treasury bonds. This, notwithstanding the fact they were made to the riskiest borrowers with undocumented income on their applications, who were lured in by no down payments via piggyback loans, teaser rates, and interest-only payment options, all specified to reset to market terms in two to three years.2 How could such a thing occur?

According to the Wall Street Journal, the rating agencies admitted that they used the underwriters' data of how these loans had performed for only the first few years of this decade. But that period was a singular time when the Federal Reserve Board had set the federal funds rate at a historically low 1% in an effort to avert deflation, dreaded by then Fed Chief Alan Greenspan. This aberrational low rate had inflated asset values and created a real estate bubble large enough to temporarily keep such unsustainable high risk loans afloat. But, by definition, these unique conditions could only last for a short time until interest rates reverted to historic norms. The rating firms well knew all this.

[2]Nelson Schwartz and Vikas Bajaj, "How Missed Signs Contributed to a Mortgage Meltdown," *New York Times* (August 19, 2007).

And how could these astute firms fail to have seen how the data with which they carefully ran their computer risk assessments patently had no relationship to the loans' long term risk profile of concern to those purchasing securitized mortgage portfolios? According to the Wall Street Journal, there appeared to be a sordid relationship between their sudden case of astigmatism and the lucrative fees they received from the underwriters who packaged mortgages for providing the grossly inflated ratings ("Moody's Investors Service took in around $3 billion from 2002 through 2006 for rating [these securities] ... 'It was always about shopping around for higher ratings,' says Mark Adelson, a former Moody's managing diector, although he says Wall Street and mortgage firms called the process by other names, like 'best execution' or 'maximizing value.'").3

Corruption of financial analyses and reporting did not begin with Enron, nor with Waste Management, which until Enron had perpetrated the largest accounting fraud in U.S. history. In fact, it is all too frequent in our society, most eerily reminiscent of the 1980's Savings and Loan Debacle, which wound up costing the American economy over a trillion dollars – in 1990 dollars. Among other shocking revelations about how revered institutions colluded to disguise transparent theft, Alan Greenspan – yes, the same Alan Greenspan – then in private practice, was hired for $40,000 by Charles Keating in 1984. After an embarrassing SEC consent decree for cheating his clients, Keating was fresh from refurbishing his image with contributions to Mother Teresa and a heavily publicized campaign against pornography.

Mr. Greenspan used his prestige as a former member of the President's Council on Economic Advisors to scrub his client's image before the Federal Home Loan Board. The future Fed Chief urged the Home Loan Board to permit high rolling thrifts headed by swindlers, and backed by federal deposit insurance, to make extremely risky and speculative investments with middle class families' deposits, instead of providing them with home loans for which the associations were organized. Mr. Greenspan supported his view with an analysis of the profitability of 17 S&Ls following similar practices in order to show that loose lending standards were safe. He failed to note the fact that those bank's ersatz profits were erected on an obvious Ponzi scheme. It was a game played by offering double digit rates to attract purchasers of jumbo CDs, which they had no chance of paying off, and could only be sold because of the federally bestowed guarantees. Within the next four years, 16 of those 17 thrifts that Mr. Greenspan had vouchsafed for had gone bankrupt.4

Here, we have a redux of these historical analytic failures in which esteemed individuals and institutions firmly assured regulators that feared problems did not exist based upon patently dishonest data bases. For ICF focuses most of its analysis, which it appears to have copied from studies previously done for the EPA, NRC and others to justify discounting the problem of providing perpetual care to long lived threats. These flawed studies describe very low bankruptcy

[3] Aaron Lucchetti and Serena Ng, "Credit and Blame: How Rating Firms' Calls Fueled Subprime Mess," *Wall Street Journal* (August 15, 2007).

[4] Stephen Pizzo, *Inside Job: The Looting of America's Savings and Loans* (Harper Perennial, 1991), at 474.

rates by large corporations, and are argued to show that this proves there is little to fear concerning large landfill companies defaulting on their obligations for the relevant time period.[5]

However, for one thing, the longest bankruptcy study cited extended for 42 years, while the time span of concern that the Board's staff states is relevant here is measured in *"centuries*."[6] The very idea of listing bankruptcy records over at most 42-years is, in this context, an absurd effort to avoid contemplating the full dimensions of the problem in assuring such protracted landfill threats. No company today can be expected to retain its corporate existence for such extended periods, and any implication that a 42-year record can be extrapolated over that time is patently absurd.[7]

For another, whatever the case with corporate failures *in aggregate* has absolutely nothing to do with a subset of the economy that suffers from *systemic* risk, which is what the staff means when it states that "most, if not all landfills will eventually require corrective action." For an industry suffering from systemic risk bears substantial sectoral risks of failing at far higher rates than the economy at large, such as has afflicted the U.S. steel and automobile industries vulnerable to global trade. Also, an industry that the SEC has found rife with accounting scandals ("[o]ur complaint describes one of the most egregious accounting frauds we have ever seen."),[8] has even higher risk factors than all companies bundled together.

Finally, bankruptcy, which ICF repeatedly emphasizes is highly uncommon among large firms, is not an appropriate metric for evaluating the issues here, in any event. Of course there is the important question lost in ICF's analysis, which is the practical impossibility of forcing any company to make significant non-revenue producing expenditures years later (even if the firm continues to exist). That is precisely why, for more than a decade, landfill permit holders have been required to provide postclosure care assurances before completing the revenue producing phase of their operations. There is the same practice in mining, nuclear power generation and other industrial activities that remain a continuing threat to the public or the environment, which requires expensive postclosure maintenance and repairs, long after the facilities are closed,

More important, ICF's argument fails to break out the number of these surviving companies that, while they did not go bankrupt, were merged into successor entities. Successor companies can be expected to vigorously oppose being penalized for events that preceded their involvement. The refusal, for example, of Dow Chemical to acknowledge the transgressions in Bhopal of Union Carbide, which Dow acquired for a distressed price several years after the tragedy, is a case in point that is also ignored by the contractor.

Tragically (for this history suggests that while mankind may sometimes learn from its mistakes, regulators and their consultants in Washington rarely do), ICF's terminal case of

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[5]ICF, Draft White Paper on Modeling Performance Defaults in Task 3 Fund Working Model (August 9, 2007), at pp. 6 to 12.

[6]ICF, Revised Work Plan/Methodology (Undated), at p. 7, n. 7 (emphasis added).

[7]Parenthetically, if one really wanted to use bankruptcy filings to begin to reflect the protracted periods involved, it would have been necessary to first determine the names of all corporations or large partnerships from the beginning of the Republic, and then cross-check them with the current list of firms to see how many remain, with the rest added to the list for compiling relevant failure rates.

[8]Jonathan Weil, "Waste Management Suit by SEC Zings Anderson," *Wall Street Journal* (March 27, 2002).

binocular vision blithely ignores inconvenient truths. It repeats precisely the exact same short-circuited analysis that previously occurred in the case of another waste company, Safety-Kleen.

That company was deemed by EPA and its consultants to be a large $2 billion, and therefore a financially strong, company impervious to problems. It was also considered to have proper assurances because Frontier Insurance, its third party guarantor for financial assurance, was on the Treasury Department's approved list for sureties. EPA remained oblivious to the underlying financial weaknesses of both entities until 2000 when, first Frontier collapsed. Then, because Safety-Kleen was too weak to get legitimate replacement coverage, it also declared Chapter 11 in the carnage that followed. EPA finally "discovered" that the Treasury list was only intended for qualifying completion insurance/bonds for road building contracts *over the next six months*, not over decades, nonetheless centuries.

But, the Treasury list was never intended for the purpose of long term viability, and EPA could not credibly claimed to have been unaware of that when it chose it. Nor could it have denied knowledge of rating institutions that do look out past the short term, such as A. M. Best, which it could have selected, but did not.

Frontier, a known financially weak insurance company, exploited EPA's hear-no-evil/see-no-evil attitude. It offered low ball premiums to attract customers who could not secure legitimate assurances due to their own financial problems, knowing it could not afford to pay out on major claims. Their low A.M. Best ratings reflected this fact, all of which was ignored by EPA, just as ICF ignores systemic and long lived landfill risks in the studies it provides to the Board. As a result, in the wake of EPA's abdication of its responsibilities, states like South Carolina were left with a billion dollar cleanup at the Pinewood landfill near Marion landfill that Safety-Kleen abandoned.9

That EPA made a mistake – an extremely costly mistake – might lead those who are charitable to write that down as part of a legitimate learning curve. But, that would be the furthest thing from what transpired. Since the California Integrated Waste Management Board effectively eliminated captive insurance in the state, EPA has redoubled its efforts to produce reams of more irrelevant data about bankruptcy filings, which Waste Management encourages the Board to rely upon. Needless to say, these have been complêt with multiple regression analyses that represent garbage-in/garbage-out statistics taken to its highest form, in order to show that large firms using their own captive insurance policies pose no risk of future non-performance – all as if the embarrassing Safety-Kleen failure simply never happened.

This propensity to conduct test-short-of-failure analysis (TSFA) also runs throughout ICF's work papers, demonstrating that this is a consultant unwilling to conduct a meaningful analysis with any chance of protecting California's citizens from very large tax increases to clean up failed and abandoned landfills.

That the contractor has no intention of accepting direction to correct its errors can be seen from how it responded to comments and directions on how to evaluate the probability of perpetual care actually occurring. Earlier, we had conservatively put forward a prerequisite step-

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[9] Government Accounting Office, *Financial Statement, Restatements: Trends, Market Impacts, Regulatory Responses and Remaining Challenges* (GAO-03-138, October 23, 2002). Betsy McKay, Safety-Kleen Says Restatement Reduced Earnings for Fiscal 1997-1999, *Wall Street Journal* (July 10, 2001). Jim Johnson, "Clean Harbors buys Safety-Kleen unit," *Waste News* (March 4, 2002). Arlie Porter, "Waste dump closed, Safety-Kleen Site," *Post and Courier* (January 23, 2000).

by-step analysis to assess whether funds would be available to continue maintenance after the end of the 30-year postclosure period.[10] For without perpetual care, there is no dispute that the cover would "ultimately fail" (as EPA concedes),[11] and widespread and systemic failures would ensue. For its part, the staff, based on its experience, thought the facts were so clear this was unnecessary and directed that ICF should just assume that "most, if not all landfills will eventually require corrective action."[12] How does ICF respond? It ignores not only our comments, but also the staff's, and blandly proposes to the opposite effect that "F[inancial] A[ssurance] is not required for post-30 [year maintenance], but is *assumed* for the purpose of the study to continue."[13]

By this point, it is self-apparent that ICF answers to EPA's drummer, is temperamentally incapable of performing the analysis the Board wants, and will not correct its mistakes when directed to do so by staff. Before more money is thrown after bad, this contract should be terminated for non-performance so that the remaining funds can be husbanded to rebid this project to a qualified consultant.

Should the Board wish to test ICF's true commitment to their Pollyanna view, it need only ask them to state hov

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[10]"® ***Financial Assurance After 40 Year Postclosure.*** In view of the fact that current financial assurance requirements – as distinguished from nominal legal liability – terminate 40 years after closure, the Board needs to know what data exists to assess the probability that the current landfill owners: (a) will be in existence 50, 100 and 200 years in the future; and, if so (b) will at that time have the financial capacity to pay for (i) minor routine maintenance, (ii) non-routine major maintenance, and (iii) remediation for land-related corrective actions; and, if so, (c) whether the owners can be confidently relied upon to pay for these costs, which are non-revenue producing. Absent very strong evidence of all three predicates, there would be no supportable alternative but to assume through the remainder of the analysis that maintenance actively would decline and then cease at or around the end of 40 years following closure, which is when assurances end."

[11]53 FEDERAL REGISTER. 168, at pp. 33344-33345 (August 30, 1988).

[12]ICF, Revised Work Plan/Methodology (Undated), at p. 7, n. 7.

[13]ICF, Draft White Paper on Modeling Performance Defaults in Task 3 Fund Working Model (August 9, 2007), at p. 3 (emphasis added).