

LAMONT PUBLIC UTILITY DISTRICT

FILED
SUPERIOR COURT, METROPOLITAN DIVISION
COUNTY OF KERN

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18 SUPERIOR COURT OF CALIFORNIA, COUNTY OF KERN
19 METROPOLITAN DIVISION

20 * * *

21 COMMUNITY RECYCLING & RESOURCE)
22 RECOVERY, INC., a California corporation and)
LAMONT PUBLIC UTILITY DISTRICT, a public)
23 entity,)
24 Petitioners/Plaintiffs,)
25 vs.)
26 COUNTY OF KERN, a public entity, and DOES 1)
through 100, inclusively,)
27 Respondents/Defendants.)
28

CASE NO. S-1500-CV-275272-EB
Complaint filed: 11/22/11

PETITIONERS' REPLY TO RESPONDENT'S
OPPOSITION TO EX PARTE APPLICATION
FOR STAY OF ADMISTRATIVE ORDER
REVOKING CONDITIONAL USE PERMIT
[CCP §1094.5(g)]

DATE: January 24, 2011
TIME: 8:30 a.m.
DEPT: T2

COPY

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1 **INTRODUCTION**

2 On November 29, 2011, this Court properly granted a stay of Respondent County of Kern's
3 revocation of Community Recycling & Resource Recovery, Inc.'s ("Community") Conditional Use
4 Permit ("CUP"). The Court's order has prevented the closure of the facility and avoided the
5 numerous deleterious health and safety, economic and environmental effects that revocation would
6 have caused. In the interim, Community continues to work cooperatively with state and local
7 regulatory agencies to maintain compliance with the numerous laws, rules and regulations which
8 govern the operation of the compost facility. There exist no health and safety threats to either the
9 general public or the employees of the facility from its continued operation during the pendency of
10 this proceeding.

11 To the contrary, the public interest would suffer greatly if the stay of revocation is
12 withdrawn and the facility is required to begin the closure process. The Lamont Public Utility
13 District ("LPUD") would be deprived of its primary method of disposal of its wastewater and the
14 residents of Lamont would be faced with an imminent threat to their health and safety. The
15 California Regional Water Quality Control Board for the Central Valley Region agrees with
16 Petitioners that "uncontrolled discharges of undisinfected wastewater and hasty site closure
17 represent a larger threat to water quality and public health than the ongoing, adequately supervised
18 application of effluent to the composting facility."¹ In addition, California would lose one of its
19 largest and most effective compost facilities, many tons of compostable materials would be diverted
20 to landfills and many local jurisdictions would be unable to meet their statutory recycling mandates.
21 Finally, the local agriculture community would lose an important soil amendment that improves soil
22 quality and crop yields.

23 The County's revocation of Community's CUP was a decision guided by passion and
24 emotion rather than an analysis of the facts and law. The decision is unsupported by the
25 administrative record. The record reveals the existence of no current violations of the terms and
26

27 ¹ November 28, 2011 letter from Clay L. Rodgers, Assistant Executive Officer, California Regional Water
28 Quality Control Board, Central Valley Region, ("RWQCB") to Chuck Lackey, Engineering Dept., County
of Kern and others. (See, Declaration of T. Mark Smith dated November 29, 2011, Ex. "A".)

1 conditions of the CUP or land use violations on the CUP property. Petitioners would suffer great
2 and irreparable injury unless the stay is maintained during the pendency of this litigation.

3 **ARGUMENT**

4 **I. The Stay Should be Imposed Unless it Would be Against the Public Interest.**

5 **A. The County Ignores the Legal Standard.**

6 Respondent's opposition never references the legal standard for imposing a stay of the
7 administrative act while a petition for writ of mandate is pending. *Cal. Code of Civ. Proc.* §
8 1094.5(g) provides that the stay should be imposed or continued unless "the court is satisfied that it
9 is against the public interest." The County has not met its burden to establish that extending the stay
10 would be against the public interest. The County presented no evidence that public health or safety
11 would be compromised by maintaining the stay. To the contrary, the evidence presented by the
12 parties indicates that there is a present threat to the community if the stay is not maintained and the
13 compost facility fails to take the LPUD's waste water. Additionally, much of the County's
14 "evidence" is inadmissible hearsay or unsupported, clearly biased and improper non-expert opinion.
15 The overwhelming evidence presented with Petitioners' Application and concurrently herewith
16 establishes that the public interest would be in jeopardy if the stay is not maintained.

17 **B. The Court Should Maintain the Status Quo.**

18 Both Community and the LPUD have a great deal at stake in the continued operation of the
19 compost facility. Once the compost facility is closed, it cannot be reopened and Community will
20 have lost its vested rights, capital and interest in the compost operation. If the revocation is not
21 stayed, applicable regulations provide that no permits can be held by Community. In the absence of
22 necessary permits, the facility will be required to immediately proceed with closure activities in
23 accordance with the Waste Discharge Requirements currently in place under the jurisdiction of the
24 RWQCB. (Declaration of Mary Jane Wilson ("Wilson Dec."), ¶¶ 9-12.)

25 Failure to maintain the stay will render this action futile. If the facility is closed before the
26 action is litigated, Petitioners will lose the fundamental rights that this action was filed to protect,
27 without due process of law. LPUD will lose its interest in its lease with Community and will be
28 faced with an imminent health threat, having no viable disposal alternative for its wastewater.

1 Notwithstanding rather bold claims by the County that alternatives for disposal of the LPUD's
2 wastewater exist, the County fails to present any evidence of such illusory alternatives. On the other
3 hand, evidence produced by Petitioners proves that no feasible alternative arrangements exist and
4 the public and environment will be at risk if Community's compost facility closes.

5 It is well settled that the Court should attempt to maintain the status quo pending a
6 resolution of the substantive matter in dispute. *Continental Baking Co. v. Katz* (1968) 68 Cal.2d
7 512, 528 ("The general purpose of such an injunction [or stay] is the preservation of the status quo
8 until a final determination of the merits of the action") (citing *Stewart v. Superior Court* (1893) 100
9 Cal. 543, 545; *People v. Black's Food Store* (1940) 16 Cal.2d 59, 62). Fundamental to this analysis
10 is the recognition that "the trial court must determine which party is the more likely to be injured by
11 the exercise of its discretion [to enjoin an action] and it must then be exercised in favor of that
12 party." *Family Record Plan, Inc. v. Mitchell* (1959) 172 Cal.App.2d 235, 242. In accordance with
13 the law, the Court's discretion in this case should be exercised in favor of preserving the compost
14 facility and protecting the vested rights and interests of Community and the LPUD while this matter
15 is adjudicated.

16 **II. Continuing the Stay Would Not be Against the Public Interest.**

17 **A. The Residents of Lamont Have an Important Public Interest in Wastewater**
18 **Disposal.**

19 Since the compost facility opened in 1994, the residents of Lamont have enjoyed a mutually
20 beneficial relationship with Community. The LPUD leases the 190 acre site of the compost facility
21 to Community along with other parcels that Community utilizes to support the compost operation
22 and for waste water application. The LPUD recycles up to 1.7 million gallons of wastewater per
23 day through Community's application of the wastewater on compost windrows in the initial stages
24 of the composting process. The use of wastewater in the composting process provides a number of
25 beneficial synergies. (Declaration of Jess Frederick ("Frederick Dec."), ¶ 16.)

26 The operative lease between Community and the LPUD contains mutual obligations for the
27 LPUD to deliver wastewater to Community and for Community to accept that wastewater.
28 (Declaration of Larry Pennell, ("Pennell Dec."), ¶ 8; Declaration of Larry F. Peake ("Peake Dec.") ¶

1 7.) The LPUD relies on that lease arrangement to environmentally dispose of its wastewater, to
2 keep its costs of waste water disposal low and to provide necessary high limit insurance. (Pennell
3 Dec., ¶ 13; Wilson Dec., ¶ 32.) Wastewater disposal savings are passed on to the LPUD's
4 ratepayers – residents with among the highest rates of unemployment and lowest average income
5 levels in Kern County. Should the LPUD be forced to purchase land and construct facilities such as
6 pipelines to transport waste water, the rates paid by the LPUD's ratepayers will inevitably double or
7 even triple from their current level. (Pennell Dec., ¶ 32.) The LPUD's current rate structure does
8 not allow for the expenditure of any funds to replace the wastewater disposal capacity that the
9 Community facility currently provides. (Peake Dec., ¶ 9; Pennell Dec., ¶ 33.)

10 **B. No Feasible Alternative Means of Wastewater Disposal Exists.**

11 Absent a stay of the County's revocation order, the LPUD has no legal means for disposal of
12 its wastewater. The County's revocation jeopardizes the ability of the LPUD to continue to provide
13 uninterrupted sewerage service to the community of Lamont.

14 The LPUD had no extant contingency plans or funds available to recover from the County's
15 unexpected and hasty action. (Pennell Dec. ¶¶ 20-26.) Notwithstanding the lack of funding, the
16 LPUD has engaged in an exhaustive search for potential alternatives for waste water disposal, even
17 extending the search to three miles from the District's ponds. (Peake Dec., ¶ 18.) The LPUD has
18 been unable to find any feasible alternative method of disposal. (Declaration of Tracie White
19 ("White Dec."), ¶ 5; Pennell Dec., ¶¶ 28-30; Peake Dec., ¶¶ 19-20; Declaration of Nick Turner
20 ("Turner Dec."), ¶ 20.) Securing an alternative site for agricultural application of the waste water
21 would cost in excess of \$8 million to \$10 million. (Pennell Dec., ¶ 36.)

22 The County in its Opposition and supporting Declaration of Mathew Constantine suggests
23 several conjectural interim alternative methods of disposal. It is important to note that none of these
24 overly general purported alternatives are encompassed within the LPUD's current Title 22
25 approvals, have not been approved by the RWQCB and have not undergone the CEQA process.
26 (Pennell Dec., ¶ 37; Peake Dec., ¶ 19.) Indeed, none of the County's purported "alternatives" for
27 disposal would provide an adequate and lawful method of disposal.

28 \\\

1 The County contends that there exist four potential options for the disposal of waste water:
2 (1) Disposal on land owned by the city of Bakersfield; (2) Disposal on land owned by H&P Dairy;
3 (3) Disposal on land owned by the Fry Family Trust; and (4) Percolation ponds. No supporting
4 declarations and appropriate scientific analysis are provided by the County because none of these
5 illusory potential alternatives provide a feasible or reliable method of disposal.

6 First, negotiations between the County, the LPUD and the city of Bakersfield have not
7 produced even a workable hypothetical plan for disposal. Disposal of LPUD waste water on the city
8 of Bakersfield's property by application to silage crops not for human consumption would require
9 construction of a substantial pipeline at a cost of several million dollars even if difficult
10 environmental approval could be obtained. (Pennell Dec., ¶ 37; Turner Dec., ¶ 23; Peake Dec., ¶
11 19.) The city of Bakersfield has not even explored whether such application would require
12 amendment of its Waste Discharge Requirements with the RWQCB. Furthermore, the city of
13 Bakersfield has advised the LPUD and the County that even if a pipeline could be planned and
14 constructed, the City could only accept the waste water for a limited number of years until the City
15 has a need for additional acreage for the disposal of its own effluent. (Pennell Dec., ¶ 37.)
16 Transportation of LPUD's effluent to the city of Bakersfield's junction box would require
17 construction of a pipeline exceeding four miles at a cost in excess of \$4 million to the LPUD.
18 (Turner Dec., ¶¶ 48, 51.) Finally, the city of Bakersfield has advised the LPUD that it could not
19 accept the LPUD's wastewater under its current Title 22 requirements because the salt content is too
20 high. (Turner Dec., ¶¶ 49-50; Pennell Dec., ¶ 37; Peake Dec., ¶ 19.)

21 Second, disposal on land owned by the H&P Dairy is not an alternative because H&P has
22 advised the LPUD that it is not willing to accept any waste water from the LPUD for any period of
23 time. (White Dec., ¶ 4; Pennell Dec., ¶ 37; Peake Dec., ¶ 19.)

24 Third, application of effluent to land owned by the Fry Family Trust is neither contractually
25 required, nor a feasible alternative. Without any evidentiary support or authentication, the County
26 mistakenly argues that an unsigned lease drafted in 2005 governs the relationship between the
27 LPUD and Community. In fact, the unsigned lease (exhibit A to the Declaration of Teri A. Bjorn)
28 has never been agreed to by the parties and is not operative. The operative lease between the parties

1 was signed in 1993. There have been two subsequent amendments. (Peake Dec., ¶ 6; White Dec., ¶
2 2.) The Fry Family Trust has no contractual obligations to the LPUD under the unsigned lease or
3 any other agreement. There exist no pipeline to the Fry Trust property. (Turner Dec., ¶ 53.)
4 Moreover, the Fry Family Trust has not agreed, and cannot lawfully, apply effluent to its wine grape
5 property. The RWQCB no longer allows application of effluent waste water to wine grapes.
6 (Turner Dec., ¶ 52.)

7 Fourth, and finally, percolation ponds are not a viable alternative. Percolation ponds would
8 severely degrade the quality of the groundwater in the region because contaminants in the effluent
9 would be allowed to pass directly into the aquifer. Percolation ponds are not currently in the
10 LPUD's Title 22 approvals and there exists no funding for their construction. (Turner Dec., ¶¶ 46-
11 47.) The County's proposal that the LPUD's effluent be stored in percolation ponds is not only
12 impractical, it is irresponsible. Regardless, the County failed to present any admissible evidence to
13 show that percolation ponds would be approved under current environmental regulations.

14 **C. An Imminent Danger to Public Health and Safety Exists From Effluent Run-**
15 **Off.**

16 The absence of a feasible alternative creates an imminent health and safety threat if the
17 compost facility is no longer authorized to accept LPUD's wastewater. The LPUD only has
18 approximately 46 days of excess storage capacity in its treatment ponds. Once the storage capacity
19 is consumed, LPUD's ponds will be at free-board and uncontrolled releases of undisinfected waste
20 water will occur thereby jeopardizing the health and safety of Kern County residents. (White Dec.,
21 ¶ 10; Turner Dec., ¶ __; Pennell Dec., ¶ 46; Peake Dec., ¶ 20.) The Court's November 29, 2011
22 Order staying revocation prevented sewer ponds which were at free board from overflowing onto
23 adjacent roads and cropland. (White Dec., ¶¶ 8-9.) If the Stay Order is not extended, the LPUD
24 and the residents of Lamont will once again be confronted by the threat of overflowing waste water.
25 (White Dec., ¶¶ 11-12; Peake Dec., ¶ 20.)

26 The RWQCB agrees that uncontrolled discharges of undisinfected effluent to fields and
27 roads surrounding the waste water treatment ponds "would create threats to both the public health
28

1 and water quality.” (11/19/11 Smith Dec., Ex. A.) The public interest favors protection of the
2 health and safety of the citizens of Kern County by continuing the stay of revocation.

3 **D. The Compost Facility is Essential to Allow California Municipalities to Meet**
4 **Recycling Mandates.**

5 The compost facility contributes a significant public good in that it provides the
6 infrastructure for all of California to meet ambitious recycling mandates, including state recycling
7 laws (recently increased to a recycling requirement of 75% statewide), greenhouse gas reductions
8 mandated by AB 32, and forthcoming mandatory commercial recycling. (Declaration of Matthew
9 Cotton (“Cotton Dec.”) ¶ 3; Frederick Dec., ¶ 24.) In addition, the facility is one of the largest
10 sources of agricultural compost in the San Joaquin Valley, helping improve California’s and Kern
11 County’s vast agricultural economy. This unique facility took years to develop into the facility it is
12 today and would be both very difficult and extremely costly to replace. (Cotton Dec., ¶ 3.)

13 Over the past 20 years, California has invested millions of dollars in recycling infrastructure,
14 including collection programs, consumer education, and in the development of facilities. Recent
15 legislation (AB 341, Chapter 476, Statutes of 2011, Chesbro) increases the state’s recycling mandate
16 to 75 percent. (Cotton Dec., ¶ 4.) This legislation initiates a significant shift from landfilling as the
17 primary means of solid waste management in the state to recycling. Clearly, environmentally
18 appropriate stewardship of resources in the future will require virtually 100% recycling in lieu of
19 wasting materials to landfills which creates significant environmental risks in the process. (*Id.*) In
20 order to manage solid waste materials outside of landfills, various facilities must be developed to
21 transform solid waste material into useful end products. For example, creating benefit (i.e., valuable
22 compost for agriculture) from waste is a major benefit of the Community compost facility. (*Id.*)

23 In order to meet ambitious recycling goals, California must develop a robust composting
24 infrastructure making compost for agricultural uses out of a variety of organic products. The
25 Community facility, one of the largest existing facilities, is critical to California meeting these
26 ambitious new mandates. (Cotton Dec., ¶ 5.) Community has shown significant leadership in
27 developing one of the first and most successful commercial recycling programs that is truly
28 statewide in its reach. The compost facility is particularly important to state-wide recycling

1 mandates because it is permitted to accept food waste. Recycling food waste is critical to meeting
2 the 75% recycling requirements required by law to be achieved in the near future. (*Id.*)

3 However, if the Community compost facility were to be closed it could not be replaced in
4 the current economic and regulatory environment. Community receives approximately 25% of all
5 compostable materials in California. Replacing Community's capacity today would require
6 immediate permitting and construction of approximately 10 more of the largest typical composting
7 operations. (Frederick Dec., ¶ 31.) A new compost facility would have to apply for and obtain
8 numerous regulatory permits and undergo a lengthy CEQA process including an EIR. (Wilson
9 Dec., ¶¶ 14-17.) Because of the lengthy time needed for approvals and purchase of land, a new
10 facility would require a substantial expenditure of risk capital. (*Id.* at ¶¶ 18-19.) Furthermore, a
11 new facility and its owners would be unlikely to maintain the substantial contracts to receive
12 compostable materials necessary for a major facility to operate. (*Id.* at ¶¶ 20-22.) The public
13 interest clearly requires maintaining recycling facilities such as Community and emphasizes why a
14 stay is necessary while the litigation is pending.

15 **E. The Local Area Would Lose Jobs if the Compost Facility is Closed.**

16 Community provides employment for over 100 people in the Arvin and Lamont area. An
17 economic study has estimated an economic loss of \$9 million to the local economy if the plant is
18 closed. (Wilson Dec., ¶ 32.)

19 **F. Local Agriculture Would Lose the Benefits of Finished Compost if the**
20 **Community Facility is Closed or if the Stay is Not Maintained.**

21 Community's finished compost provides an important benefit to local agriculture. The
22 permitted materials Community accepts into the compost facility includes green waste, food waste,
23 supermarket materials, wholesale and retail food residuals, agricultural residuals, and soiled
24 biomass. When mixed together, these materials made an almost perfect blend of ingredients to
25 make excellent quality compost. (Declaration of Tom Fry ("Fry Dec."), ¶ 13.)

26 Growers of numerous types of crops utilize Community's finished compost to provide
27 nutrients to the soil. Community produces over 300,000 tons of finished compost annually which
28 growers find to be superior to other products and an important and environmentally appropriate

1 alternative to chemical fertilizers. (Fry Dec., ¶ 15; Declaration of Andrew Pandol (“Pandol Dec.”),
2 ¶ 4) The finished compost improves water holding capacity and soil tilth. (*Id.*, at ¶ 22; Pandol Dec.,
3 ¶ 2.) In addition to the soil fertility benefits of adding compost to California soils, a recent study by
4 CalRecycle (participated in by Community) showed the greenhouse gas reduction benefits of adding
5 compost to soils. (Cotton Dec., ¶ 4.)

6 **G. There Has Been No Harm to the Public Interest While the Stay Has Been in**
7 **Effect.**

8 The County speculates, without any admissible evidentiary support, that some ill defined
9 violations will reoccur in the future if the stay is maintained. It is worthy of note that the County
10 failed to show that any particular violations in the past were repeated. Importantly, over the last 51
11 days while the stay has been in place, no new violations have occurred. (Willson Dec., ¶¶ 25-29.)
12 In fact, during the pendency of the stay, Community has been working closely and effectively with
13 all governmental entities which oversee the operation of the Community facility including Kern
14 County Division of Environmental Health, Regional Water Quality Control Board, Cal-OSHA, and
15 the San Joaquin Air Pollution Control District. (*Id.*)

16 **III. Respondent’s Contentions are Misleading and Without Merit.**

17 **A. Many Statements in Respondent’s Supporting Declarations are Inadmissible.**

18 Respondent submitted six declarations in support of its opposition. However, each of the
19 declarations contains numerous inadmissible statements including but not limited to improper non-
20 expert conclusions, improper legal conclusions which must be made by the court, improper hearsay
21 statements, statements without foundation and not based upon personal knowledge and
22 argumentative over-generalized clearly biased statements of opinion. Petitioners have submitted
23 objections to the declarations concurrently herewith.

24 **B. Respondent’s Opposition Contains Numerous Misleading Statements.**

25 Numerous statements in Respondent’s opposition brief are based on inaccurate or faulty
26 assumptions. For example, much of the analysis in the Declaration of Teri A. Bjorn is based upon
27 the faulty premise that the draft 2005 lease between Community, the Fry Family Trust and the
28 LPUD is the operative lease for the compost facility. In fact, the 2005 draft lease was never signed

1 and is not the operative lease. The rights and obligations between the LPUD and Community are set
2 forth in a 1993 lease. (Peake Dec., ¶ 6.) Additionally, numerous assertions in the Opposition
3 declarations are completely erroneous, irrelevant and or lacking in foundation.

4 For example:

- 5 • The Opposition concludes that two workers at the compost facility died from H2S
6 exposure. This non-expert conclusion is not based on any objective evidence and is
7 not supported by properly authenticated and supported expert opinion. To the
8 contrary, this speculation as to the cause of deaths is merely a hypothesis that has
9 not been confirmed by investigative findings and scientific data. (Declaration of
10 Fred C. Gillett (“Gillett Dec.”), ¶ 15; Frederick Dec., ¶¶ 37-41.)
- 11 • The Opposition speculates that the Kern County Board of Supervisors is a “pro-
12 business” body and “it is possible that the Board of Supervisors might have been
13 receptive” to a request for an extension of time to close the facility. This self-
14 serving statement as to the Board of Supervisors’ “pro-business” mindset is
15 speculative, dependent on the type of business considered and irrelevant to the
16 issues. (One might as easily conclude that the Board is biased against non-Kern
17 County business which seeks to recycle in Kern County.) Regardless of whether the
18 Board of Supervisors “might” be willing to extend the time to close the facility
19 under the revocation, the fact remains that the CUP was revoked without sufficient
20 legal justification and the action of the County was improper.
- 21 • The Opposition argues that since Community has “a history of land use violations”,
22 Community “will continue to commit land use violations and other regulatory
23 violations during the pendency of any stay.” Highlighting the faulty speculation of
24 this assertion is the fact that during the pendance of the stay, which was ordered on
25 November 29, 2011, there have been no new alleged violations. To the contrary,
26 during the stay Community has received notification that it is in compliance with all
27 rules and regulations that several state agencies enforce in their oversight of the
28 facility. (Wilson Dec., ¶¶ 25-31.)

- 1 • The Opposition argues that the deaths of two workers created an “emergency”
2 circumstance that created a “clear and imminent danger” and caused the County to
3 revoke the CUP. In fact, the deaths of the workers was not relied upon as a stated
4 basis for the County’s decision. Indeed, at least two Supervisors expressly stated
5 that the deaths and the Cal/OSHA investigation were not a proper basis for
6 revocation of the CUP. (Smith Dec. (1/19/12), Exs B & C.)

7 **C. The County’s Contention that Extension of the Stay is Against the Public**
8 **Interest is Unsupported by any Admissible Evidence.**

9 **1. Alleged Land Use Violations are Unrelated to the Compost Facility.**

10 The County details several alleged land use violations over a several year period. The
11 County exaggerates the seriousness of the alleged violations and fails to clarify which alleged
12 violations occurred on the CUP property. The County improperly seeks to use alleged land use
13 violations on parcels other than the CUP property as a legal basis to revoke the CUP for the CUP
14 property. Additionally, none of the alleged land use violations constituted violations of the terms
15 and conditions of the CUP. Finally, almost all of the alleged violations were fully abated prior to
16 the November 15, 2011 hearing, and none of them adversely affected the health or safety of the
17 community. As discussed in more detail below, the County failed to present any evidence that
18 alleged violations, such as stockpiling plastics and or gypsum wallboard, created any past or present
19 threat to health and safety.

20 For example, the County contends that a 2007 concrete crushing operation was “at the
21 CRRR site.” The County uses somewhat imprecise language to disguise the fact that the concrete
22 stockpile was not located on the CUP compost facility, but was on adjacent property outside the area
23 governed by the CUP. (Wilson Dec., ¶ 46.)

24 The County also references an accumulation of gypsum wall board in 2007. Although this
25 wallboard was on the CUP property, and recognizing that Community continues to contend that
26 gypsum wallboard is an appropriate amendment and conforming use, it is important to note that the
27 stockpiles of concrete and gypsum wallboard were fully abated by 2008. Although Community
28 disputed the allegations, fines were paid in an attempt to work with the County and to avoid further

1 legal expenses. (Wilson Dec., ¶ 54.) Nevertheless, the concrete was recycled by crushing and using
2 it on Fry Trust farm roads. (Wilson Dec., ¶ 46.) The gypsum wallboard was recycled by separating
3 out the paper and using the gypsum as a well recognized soil amendment on Fry Family Trust farm
4 property. (Wilson Dec., ¶ 56.)

5 In 2010 the County noted that all prior land use violations had been fully abated and
6 Community was in complete compliance with the CUP. Planning Department staff therefore
7 recommended that the Board of Supervisors adopt a negative declaration modifying the CUP.
8 (Wilson Dec., ¶ 66.)

9 The County comments extensively on alleged land use violations on parcels distant from the
10 CUP property and unrelated to the composting operations. These alleged land use violations focus
11 on: 1) an accumulation of plastics; 2) plastics shredding machinery; and 3) concrete crushing. The
12 accumulation of plastics on non-CUP property occurred due to Community's anticipation of the
13 approval of a plastics recycling facility in Arvin.

14 The plastics located on non-CUP property, consisted of irrigation piping and plastic sheeting
15 used by local farms to cover fruits and vegetables. The plastics had nothing to do with the
16 composting operation on the CUP property and were never a threat to health and safety. (Wilson
17 Dec., ¶ 74.)

18 Expanding recycling of plastics, as in all emergent recycling operations, requires testing of
19 new procedures and machinery. Maintaining some confidentiality of new processes is necessary to
20 protect capital investment and to encourage research and development. To this end, plastics
21 shredding machinery was temporarily erected on a parcel adjacent to the compost facility, not upon
22 the CUP property. This machinery was operated as a test to see whether the machinery would
23 properly wash and shred plastics typically used in farming operations in Kern County. The
24 machinery was operated for only a few days and was dismantled and removed from the property
25 before the November 15, 2011 hearing. Again, there existed no threat to public safety from this
26 operation and potential recycling of plastics is completely unrelated to the CUP for the composting
27 facility. (Wilson Dec., ¶ 87.)

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1 Finally, the Fry Family Trust had a good faith belief that it was permitted to crush concrete
2 for use on its farm roads. The San Joaquin Valley Air Pollution Control District specifically
3 authorized Community to use crushed concrete on roads as a method to control dust. In any event,
4 the practice was conducted on property not governed by the CUP and completely unrelated to the
5 compost operation which does not incorporate use concrete, crushed or otherwise. (Wilson Dec., ¶
6 85.)

7 **2. Hazardous Materials Issues are Irrelevant to This Proceeding.**

8 The County contends that Community's facility has been out of compliance with certain
9 regulations dealing with handling of hazardous materials. (See, Declaration of Vicky Furnish.) It is
10 important to note that the Orders to Correct issued regarding hazardous materials handling are
11 administrative and the County does not contend that any of the alleged violations pose a risk to
12 health and safety. More importantly, these hazardous materials issues were never noticed as part of
13 the November 15, 2011 hearing, nor did they serve as a basis for the revocation of the CUP as
14 expressed in the resolution adopted by the Board of Supervisors. (Smith Dec. (1/19/12), Exs. A and
15 B.)

16 **3. No Violations of Cal/OSHA Standards or Orders Have Been Issued.**

17 Without expert technical support for its conclusions, the County claims that two workers
18 died at the Community facility after exposure to Hydrogen Sulfide gas on October 12, 2011. The
19 matter is currently under investigation by Cal/OSHA, Cal/OSHA has not issued any findings and no
20 citations have been issued. (Declaration of Fred C. Gillett ("Gillett Dec."), ¶ 13.) The County is not
21 involved in the investigation and has no investigatory or regulatory jurisdiction. (Gillett Dec., ¶ 9.)

22 The County also claims that Community violated an Order Prohibiting Use ("OPU") issued
23 by Cal/OSHA November 2, 2011. Nonetheless, no notices of violation have been issued and
24 Community contends that the OPU was not violated. (Gillett Dec., ¶ 31.) Despite the unofficial and
25 premature hearsay statements of Cal-OSHA employee Ellen Widess, there was no "entry" into the
26 storm drain system by Community's contractor Advanced Sewer Technologies ("AST") (a division
27 of Roto-Rooter). Rather, AST performed the task of cleaning out certain parts of the storm drain
28 system in accord with customary and best practices in the industry. (Gillett Dec., ¶¶ 25-30.)

1 Importantly, the OPU has now been lifted by Cal/OSHA and a procedure has been put in place for
2 cleaning the storm drains in the future. (Gillett Dec., ¶ 32, Ex. E.) The County acted precipitously
3 without investigation, proper data gathering and analysis and without jurisdiction when it usurped
4 Cal-OSHA's jurisdiction by revoking Community's CUP based upon alleged Cal-OSHA violations.
5 The County attempts to argue that alleged violation of Cal-OSHA regulations constituted a violation
6 of the CUP. However, the County fails to show that any alleged violation of a Cal/OSHA order was
7 a violation of the terms or conditions of the CUP. The County argues that condition 19 provides that
8 Community must maintain compliance with Cal/OSHA requirements. However, the County
9 conveniently omits with ellipsis, limiting language of the condition to alter its meaning incorrectly
10 so that it appears to support the County's claim. (Opp. 8:22-24). The full text of condition 19 states:
11 "*Prior to Commencement of operations*, the applicant shall obtain all permits and comply with any
12 requirements of the Regional Water Quality Control Board, and any other responsible federal, State,
13 or local agency." (Emphasis supplied.) This condition was only meant to apply to activities that
14 Community must undertake *prior to commencement* of plant operations. In fact, the CUP clearly
15 sets forth conditions which must be met "*Prior to Commencement of operations*" from those
16 conditions which do not arise until after commencement of operations. (See conditions of the CUP
17 attached as Exhibit A, page 5 of the 11/21/11 Wilson Dec.) Condition 19 was patently never
18 intended to require complete compliance with all "requirements" of other supervising agencies after
19 operations commenced. The plain language of condition 19 does not support the County's argument
20 that the violation of a Cal-OSHA standard or order could be a proper basis for revocation of the
21 CUP. The County's omission of the "*Prior to Commencement of operations*" language highlights
22 the County's biased attempt to create a basis for revocation of the CUP where

23 **4. The County's Assertion that Community Will Not Follow Conditions in**
24 **the Future is Unsupported, Speculative and Improper.**

25 The County argues that Community has disregarded land use ordinances in the past and will
26 likely do so in the future. The County, in its biased view, reasons that since Community cannot be
27 trusted to follow land use ordinances, revocation of the CUP was appropriate. The County's
28 reasoning is legally inappropriate and seriously flawed.

1 The legal requirements for revoking a CUP make clear that the County's reliance on prior
2 alleged land use violations cannot serve as a basis for revocation of the CUP. Revoking a CUP in
3 compliance with due process requires: (1) *adequate notice* to the permittee; (2) *a fair hearing* whose
4 procedures satisfy due process; (3) *evidence* that substantially supports a finding of revocation; and
5 (4) either a permittee's *non-compliance with reasonable terms* or conditions expressed in the permit
6 granted, or a compelling public necessity. *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85
7 Cal.App.2d 776, 795-796. The land use violations alleged by the County are unrelated to the CUP
8 property. Other than the previously abated gypsum wallboard issue in 2007, the County has not
9 shown any land use violations on the CUP property. **Moreover, there existed no violations of the**
10 **terms and conditions of the CUP at the time of the hearing since the prior alleged violations**
11 **long since had been abated.** (Wilson Dec., ¶ 85.)

12 Finally, there existed no compelling public necessity to revoke the CUP. Community has
13 not demonstrated a lack of compliance with the numerous ordinances and regulations governing the
14 compost facility. Community's record of compliance with the CUP itself is excellent. Community
15 has demonstrated a consistent record of compliance with the numerous state agencies that have
16 oversee its compost operations on the CUP property.

17 Since its inception in 1994 the Community facility has been subject to inspection by
18 Kern County Environmental Health as the Local Enforcement Agency for CalRecycle on a
19 monthly basis. (Wilson Dec., ¶ 25.) While most of the inspections show no violations, on
20 occasion there have been issues that required correction. Within the last year there have been
21 over 50 inspections with no violations issued. Kern County Environmental Health also inspects
22 each time an odor complaint is received. To date the odor complaints have not resulted in any of
23 the complaints being verified. (*Id.*)

24 The San Joaquin Valley Air Pollution Control District makes routine inspections of the
25 facility on an annual basis. (Wilson Dec., ¶ 26.) Occasionally, during the last 18 years of
26 operation there have been notices to comply or routine violations issued which were promptly
27 remedied. This is not unusual for a facility of this size. No violations have been issued within
28 the recent years. The Air District also responds to odor complaints due to nuisance regulations.

1 While citizen complaints have been received, the Air District has not confirmed that any of the
2 complaints were related to the Community facility. (*Id.*) The Air District also conducted air
3 emission sampling at the boundary of the facility and did not document any significant volumes
4 of toxic substances nor did they identify any unusual substances. (*Id.*)

5 At each permitting activity the Air District has conducted health risk assessments where
6 appropriate and found that there was no significant health risk to the public at the site boundary
7 from the activities on the site. (*Id.*)

8 The Central Valley Regional Water Quality Control Board routinely inspects the facility
9 on an annual basis and receives semiannual ground water monitoring reports. Recent
10 inspections have not shown any violations. (Wilson Dec., ¶ 27.)

11 CalRecycle routinely conducts annual inspections of the facility. Recent inspections
12 have not shown any violations. (Wilson Dec., ¶ 28.)

13 All of the agencies listed above have direct regulatory authority to close the facility if
14 they consider the activities are a threat to public health and safety. (Wilson Dec., ¶ 29.)

15 **D. Community Has Exhausted its Administrative Remedies.**

16 The County mis-applies the law and its own zoning ordinance trying to argue that
17 Community has not yet exhausted its administrative remedies. The County argues that Kern County
18 Ordinance Code § 114.020(C) “allows a party, whose property has been found in violation and who
19 has no permit, to seek a permit by complying with the requirements” of the ordinance. (Declaration
20 of Lorelei H. Oviatt, 10:2-3.) The County argues that even though Community’s CUP had been
21 revoked, it could have submitted an application for a new CUP on the same property if it fulfilled
22 the requirements of the ordinance.

23 The Board of Supervisors’ decision revoking Community’s CUP was final when it was
24 rendered on November 15, 2011. The Board’s decision required nothing of petitioners other than
25 their immediate compliance. The County does not contend that any ordinance provides for
26 reconsideration or re-hearing of the Board’s decision. Accordingly, Petitioners’ administrative
27 remedies had been exhausted and its only appeal was by way of Writ of Mandate. See, *Lindell v.*

1 *Board of Permit Appeals* (1943) 23 Cal.2d 303, 317 (absent ordinance for reconsideration or re-
2 hearing, the administrative decision is final when rendered).

3 Submission of an application for a wholly new CUP was not required for petitioners to
4 exhaust their administrative remedies. In this action, Petitioners do not seek the remedy of
5 obtaining a new CUP with different terms and conditions. Rather, petitioners seek the remedy of
6 overturning the Board's decision due to the Board's improper actions. Petitioners seek to re-instate
7 the existing CUP with its terms and conditions, not to seek a new CUP. Community has operated
8 under the CUP initially issued in 1993 and has made capital investments in reliance on that CUP and
9 its terms. Community's and LPUD's lease arrangement is based on the ability to operate under the
10 CUP issued in 1993. The Board's decision was final and Petitioners are entitled to immediate
11 judicial review of the Board's action.

12 **IV. Community is Likely to Prevail on the Merits, But Probable Success on The Merits is**
13 **Not a Legally Required Showing to Grant or Maintain a Stay.**

14 **A. Showing Probable Success on the Merits is Not Required Under the Statutory**
15 **Authority.**

16 Cal. *Civ. Proc.* § 1094.5(g) only requires the Court to determine if a continued stay would
17 be against the public interest. No analysis as to whether the petitioners are likely to prevail on the
18 merits is called for under the statute. Matters before local agencies are not subject to the protections
19 under the Administrative Procedures Act ("APA"). Stays of administrative actions subject to the
20 APA are governed by Cal. *Code of Civ. Proc.* § 1094.5(h) which provides that the petitioner must
21 make a showing of a likelihood of prevailing on the merits. Section 1094.5(g) does not contain this
22 requirement and reveals an intention by the legislature to limit the inquiry to whether the stay would
23 be against the public interest. The County seeks to have the Court prejudge the issues against
24 Petitioners before review of the voluminous administrative record and the evidence and without
25 hearing on the merits of the Petition.

26 Nonetheless, as demonstrated below it is clear that Petitioners are likely to prevail on the
27 merits.

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1 **B. The Revocation is Not Supported by the Weight of the Evidence.**

2 On review of the revocation of a fundamental vested right, the trial court must exercise its
3 “independent judgment” on the evidence and find an abuse of discretion if the findings are not
4 supported by the weight of the evidence. *Goat Hill Tavern v. City of Costa Mesa*, (1992) 6
5 Cal.App.4th 1519, 1525. Moreover, the Court must review whether the County utilized the least
6 restrictive means necessary to address the alleged non-compliance. “[I]n order to justify the
7 interference with the constitutional right to carry on a lawful business it must be clear that the public
8 interests require such interference and that the means employed are reasonably necessary to
9 accomplish the purpose and are not unduly oppressive on individuals.” *Korean American Legal*
10 *Advocacy Foundation v. City of Los Angeles* (1994) 23 Cal.App.4th 376, 392. Thus, the Court must
11 engage in a two-step process in analyzing the revocation decision. First, the Court must analyze
12 whether Community failed to comply with reasonable terms of the CUP or whether a nuisance
13 existed on the CUP property. *Id.* Second, the Court must examine whether the County exercised the
14 least restrictive means to address the alleged violation or nuisance. *Id.* The revocation fails on both
15 counts.

16 The County argues that Community’s conduct somehow constitutes a public nuisance.
17 However, the County has wholly failed to describe a particularized nuisance condition on the CUP
18 property. The County contends that Community’s alleged “bad business practices” or “flagrant
19 disregard of laws” constitute a nuisance. The County argues that the alleged pattern of activity
20 “culminated in the deaths” of the two workers.

21 The County failed to prove any “bad business practices” or “flagrant disregard of laws”.
22 Even disregarding the failure of proof, the County’s logical leap defies reason. The County offers
23 no evidence or authority that a generalized “bad business practice” constitutes a nuisance within the
24 meaning of the law. *Civil Code* § 3479 defines a nuisance as a condition that is: (1) injurious to
25 health; (2) indecent or offensive to the senses; (3) obstruction to the free use of property; (4)
26 obstruction of free passage. Putting aside whether the unsupported alleged land use violations
27 constituted a “bad business practice,” the County offers no evidence as to the cause of the workers’
28 deaths or any connection to alleged land use violations. For example, no evidence was presented by

1 the County proving that there is any factual or legal nexus between having wallboard on the
2 property and the deaths. Likewise, there was no proof that having plastic on property not governed
3 by the CUP caused the deaths.

4 Cal/OSHA is the regulatory agency with investigative and jurisdictional authority over the
5 October 12, 2011 worker deaths. (Gillett Dec., ¶ 9.) The County lacks access to any evidence of
6 the cause of the worker deaths. Yet in a remarkable disregard of due process rights, the County
7 somehow concludes that the deaths were caused by Community's "bad business practices." The
8 County's effort to connect alleged land use violations on property owned by the Fry Family Trust to
9 some undefined "bad conduct" on the CUP property that allegedly caused the worker deaths, is not
10 supported by the administrative record. Furthermore, the notion that generalized "bad business
11 practices" without causing a single defined effect can constitute a nuisance, is not supported by any
12 authority or evidence.

13 The County finds no assistance in its own zoning ordinance. The County argues that its own
14 zoning ordinance can be used to define any zoning violation as a public nuisance. This argument is
15 unavailing for two reasons. First, the County can point to no violation of a zoning ordinance on the
16 CUP property that had not been abated long ago. Second, the County's zoning ordinance purporting
17 to broaden the statutory definition of nuisance is pre-empted by state law. Any local ordinance that
18 is in conflict with a state law is preempted. *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061,
19 1065. Further, "[a] conflict exists if the local legislation duplicates, contradicts, or enters an area
20 fully occupied by general law, either expressly or by legislative implication." *Id.* at 1067.

21 There is strong evidence manifesting the state's intention to occupy the field defining a
22 nuisance. Cal. *Civ. Code* § 3479 expressly defines a nuisance under California law. California
23 cities are given specific authority to define public nuisances. In contrast to California cities, the
24 legislature gave counties no authority to define nuisances under its own ordinance code. See Cal.
25 *Govt. Code* §§ 23000 - 33205. The County's effort to define a nuisance significantly more broadly
26 than the legislature, is improper and ineffective. Since there existed no public nuisance on the CUP
27 property, the revocation action is invalid.

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1 **C. Petitioners Were Deprived of Due Process.**

2 Certainly, a trial court may issue a writ of administrative mandate where an agency has (1)
3 acted in excess of its jurisdiction, (2) deprived the petitioner of a fair hearing, or (3) committed a
4 prejudicial abuse of discretion. Cal. Code of Civ. Proc. § 1094.5(b). "Abuse of discretion is
5 established if the [agency] has not proceeded in a manner required by law, the order or decision is
6 not supported by the findings, or the findings are not supported by the evidence." *Id.* The issue of
7 whether an agency's decision was procedurally unfair is one of law. *Clark v. City of Hermosa*
8 *Beach* (1996) 48 Cal.App.4th 1152, 1169. "The action of such an administrative board exercising
9 adjudicatory functions when based upon information of which the parties were not apprised and
10 which they had no opportunity to controvert amounts to a denial of a hearing." *English v. City of*
11 *Long Beach* (1950) 35 Cal.2d 155, 158. "A hearing requires that the party be apprised of the
12 evidence against him so that he may have an opportunity to refute, test, and explain it, and the
13 requirement of a hearing necessarily contemplates a decision in light of the evidence there
14 introduced. . . ."

15 The evidence will show that petitioners did not have a fair opportunity to refute the evidence
16 presented at the hearing. The majority of the evidence presented was contained in an Addendum
17 Staff Report provided to Petitioners only at the very commencement of the hearing. Indeed, the
18 County's contention that Community violated the OPU was first introduced in the County's
19 Addendum. The administrative record is voluminous, over 40,000 pages. In support of revocation,
20 the County relies on proceedings, events and alleged violations that occurred nearly five years
21 earlier. Petitioners could not procedurally have been expected to refute allegations of land use
22 violations which had long been abated, or which were not related to the CUP property, in the limited
23 time provided to respond.

24 The County incredulously contends that the two-hour time period between the
25 commencement of the meeting and the beginning of the hearing on Community land use issues was
26 ample time to prepare to address the issues raised in the Addendum Staff Report. (Bjorn Dec., 4:20-
27 26.) This argument is risible. Due process required an adequate opportunity to prepare a response
28 to these new factual allegations and purported bases for revocation. A two hour time period before

1 the beginning of a hearing while sitting in the audience at a crowded public meeting, cannot be said
2 to be sufficient notice of the allegations and an opportunity to prepare a response.

3 **D. Petitioners are Likely to Prevail on the CEQA Claims.**

4 **1. The County Cannot Rely on a Statutory Exemption From Complying**
5 **With CEQA.**

6 The County contends for the first time in its Opposition, that while the revocation of the
7 CUP was a “project” under CEQA, it was statutorily exempt from complying with CEQA. The
8 County correctly recognizes that a statutory exemption may initially obviate the need to comply
9 with CEQA to deal with an emergency situation. The particular statutory exemption relied upon by
10 the County in the Opposition, derives from the need to “prevent or mitigate an emergency.” (14
11 Cal. Code Reg. § 15269(c).)

12 The County contends that the workers’ deaths and the condition that caused the deaths
13 constituted an “emergency”. Remarkably, the County also contends that Community’s alleged
14 violation of the OPU also created an emergency circumstance. The emergency exemption has been
15 limited in the CEQA Guidelines and in case law to events that involve **clear and immediate**
16 **danger and demand immediate action.** There was no immediate threat to life at the Community
17 facility to justify revocation or to justify the County’s failure to comply with CEQA. If there had
18 been a clear and immediate danger regarding the storm drain where the two workers died, which
19 demanded immediate action, Cal/OSHA had the power to shut down the facility. Cal/OSHA did not
20 do so because there was no immediate danger. Cal/OSHA also had the power to close the facility
21 following alleged violations of the OPU. Once again, it did not do so because no immediate danger
22 was presented by a professional operator such as AST cleaning the drains with appropriate
23 safeguards in place.

24 The fact that no immediate danger was, or is, presented related to the storm drains, is further
25 evidenced by the fact that the OPU related to clean-out of the storm drain system has been lifted.
26 (Gillett Dec., ¶ 32, Ex. E.) A Storm Drain Clean-Out Plan has been adopted by Community and
27 approved by Cal/OSHA. (*Id.*) One can easily infer that Cal-OSHA would not have lifted the OPU,
28 and the clean out procedure approved, if there had been an emergency consisting of a clear and

1 immediate danger. Accordingly, the County has failed to present any competent evidence that a
2 statutory exemption applies which would excuse the County from complying with CEQA.

3 The cases cited by the County for the position that the revocation falls under the statutory
4 exemption for “emergency” situations do not support the County’s position. Other than the *Western*
5 case, the cases relied upon by the County and discussed below, do not involve an alleged statutory
6 exemption based upon an emergency presenting **clear and immediate danger demanding**
7 **immediate action**, which is the statutory exemption claimed by the County. *San Lorenzo Valley*
8 *Community Associates, etc. v San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th
9 1385 deals with categorical exemptions, not statutory exemptions. In that case, the court found that
10 there was a specific categorical exemption for a school board determination to close a public school.
11 *Del Cerro Mobile Estates v City of Placentia* (2011) 197 Cal.App.4th 173, involved a specific
12 statutory exemption from CEQA for railroad grade crossings, which was not asserted until the
13 approval was challenged in court. The court noted that the legislature had carved out a very specific
14 statutory exception to CEQA which was not subject to judicial review. In *Santa Barbara County*
15 *Flower & Nursery Growers Association v. County of Santa Barbara* (2004), 121 Cal.App.4th 864,
16 the court concluded that the California Coastal Act of 1976 and CEQA empower the Coastal
17 Commission to approve limited coastal permit amendments pursuant to a regulatory program that is
18 statutorily exempt from the EIR requirements of CEQA. In *Western Municipal Water District v.*
19 *Superior Court* (1986) 187 Cal.App.3d 1004, while holding that an “emergency” exemption may
20 qualify a decision to issue a permit for a sea wall as exempt from CEQA compliance, the court
21 found that a reviewing court on petition for mandate must determine if there exists substantial
22 evidence in the record to support an agency finding of an emergency.

23 The instant case is distinguishable from these cases on two important grounds. First, the
24 cases cited by the County deal with situations where there were either very specific, non- emergency
25 based, statutory exemptions for the actions in question (school closures, railroad grade crossings), or
26 the agency had made a specific finding that an emergency existed justifying action. In the instant
27 action, the Board of Supervisors never even discussed whether an “emergency” situation existed due
28 to the deaths occurring on the property. Indeed, one Supervisor appropriately and specifically

1 declined to rely on the deaths as a ground for the revocation of the CUP, and conceded that the
2 deaths were within the purview of Cal/OSHA which was, and still is, conducting an investigation.
3 (See exhibit C to Declaration of T. Mark Smith, Partial Transcript of Board of Supervisors Hearing,
4 November 15, 2011, p. 226-227.) Further, as set forth in *Western Municipal Water District, supra*,
5 the reviewing court must determine if there is any substantial evidence in the record to support an
6 agency finding of an emergency. There is no substantial evidence in the administrative record
7 showing any emergency presenting **clear and immediate danger demanding immediate action** to
8 revoke the Community CUP.

9 Second, the Resolutions adopted by the Board of Supervisors do not in any way purport to
10 rely on the existence of an “emergency,” and rely only a purported categorical exemption with no
11 factual support. (Smith Dec., Ex. B.) The Resolutions do not reference the deaths as a basis for the
12 revocation.

13 The County now seeks *ex post facto* to create a finding of an “emergency” where none
14 existed and where no emergency was relied upon in the Resolution to support the revocation. Now,
15 after the revocation decision, in the absence of any findings of emergency at the hearing or reflected
16 in the Resolution, the County seeks to create a so-called emergency to satisfy a statutory basis for an
17 exemption from CEQA. The County cannot now properly claim that it based its decision on an
18 emergency. The self-serving alleged emergency basis for a claim of exemption from CEQA, was
19 manufactured after the fact in an attempt to get around the County’s failure to properly address
20 CEQA issues at the hearing.

21 **2. The Categorical Exemption Asserted by the County in the Hearing and**
22 **the Resolution is Unavailable Since it is Subject to an Exception.**

23 The County also argues in the Opposition that the revocation was categorically exempt
24 under 14 *Cal. Code Reg. § 15321(a)*. This categorical exemption exempts regulatory enforcement
25 actions. However, this categorical exemption is subject to the exception for **significant effects on**
26 **the environment due to unusual circumstances or cumulative impacts.** (14 *California Code of*
27 *Regulations §15300.2 (a) and (b).*) The County largely concedes that there would be a “reasonable
28 possibility of a significant effect on the environment” resulting from revocation of the CUP. The

1 environmental effects include: (1) immediately depriving LPUD of the ability to recycle excess
2 waste water from its waste water treatment facility; (2) causing LPUD's effluent evaporation ponds
3 to overflow within weeks as its evaporation ponds are not sufficient to handle its daily waste water
4 generation without diverting approximately 1.7 million gallons a day to the Community facility; (3)
5 prohibiting Community, which processes approximately 24% of all organic waste in the State of
6 California, from taking this waste, thereby materially impacting the environment and numerous
7 municipalities and businesses throughout California; (4) prohibiting Community, one of the largest
8 producers of compost in the State of California, from providing high quality compost to numerous
9 agricultural customers throughout the State of California, including County of Kern; and (5) forcing
10 Community to cease processing of more than 120,000 tons of compost materials at the facility
11 intended for recycling to agricultural purposes, and to waste such compost and materials to limited
12 landfill space.

13 Stated in simple terms, a regulatory enforcement action is exempt from CEQA unless the
14 action would pose **significant effects on the environment due to unusual circumstances or**
15 **cumulative impacts**, contrasted with routine enforcement actions which do not have significant
16 environmental ramifications. Closure of a composting facility recycling approximately 1.7 million
17 gallons per day of waste water which will otherwise overflow onto the streets of Lamont is
18 manifestly an unusual circumstance requiring CEQA environmental review. Likewise, closing a
19 composting facility which takes approximately 24% of all organic waste in the State of California
20 and which other municipalities rely upon to reach State-mandated recycling requirements, poses
21 significant effects on the environment and is subject to CEQA review.

22 Many of the environmental effects of revocation have been deemed *per se* to be
23 "significant" under CEQA. As noted in the case *Azusa Land Reclamation Co. v. Main San Gabriel*
24 *Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1189:

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1 “Appendix G to the CEQA Guidelines [fn omitted] provides that “a project will
2 normally have a significant effect on the environment if it will: . . . (g) Contaminate
3 a public water supply; (h) Substantially degrade or deplete groundwater resources;
4 (i) Interfere substantially with groundwater recharge; . . . (v) **Create a potential
5 public health hazard . . .**” These potential effects are, therefore, plainly the sort of
6 “physical change[s] in the environment” that CEQA is designed to address.”
7 Emphasis added.]

8 In ordering an immediate revocation of the CUP, the County also failed to consider the
9 many additional permits and authorizations from other governmental agencies which are necessary
10 to effect an orderly closure of the compost facility. These agencies include the Central Valley
11 Regional Water Quality Control Board, CalRecycle, the California Department of Fish and Game,
12 the United States Fish and Wildlife Service, the San Joaquin Valley Air Pollution Control District,
13 the California Department of Food and Agriculture, and numerous others. Petitioners would be
14 required to do a “clean” closure, returning the property to its agricultural condition prior to
15 construction of the compost facility, which is estimated to require up to five years. In the meantime,
16 the facility would be completely unusable as a composting facility.

17 Finally, in light of current regulations governing such facilities, a new facility probably
18 would not be economically feasible even if such a facility could comply with current environmental
19 regulations. (See Wilson Dec., ¶¶ 18-19.) By immediately revoking the CUP, the County did not
20 even consider issues relating to compliance with these requirements, either in the Board’s immediate
21 revocation of the CUP, or in the Planning Department’s 30-day order to shut down the facility.
22 Such a multiplicity of regulatory compliance requirements and the long period of time necessary to
23 comply with all of such requirements certainly constitutes an “unusual” circumstance requiring
24 CEQA compliance, which clearly was not addressed by the County.

25 The County argues that while these environmental effects are significant, they were not
26 caused by “unusual circumstances” as such circumstances would be expected with the revocation of
27 a permit of this type. The rule of law was stated in *Azusa, supra*. The “unusal circumstances” test
28 “is satisfied where the circumstances of a particular project (i) differ from the general circumstance
of the projects covered by a particular categorical exemption, and (ii) those circumstances create an
environmental risk that does not exist for the general class of exempt projects.” *Azusa, supra*, 52

1 Cal.App.4th at 1207. The significant, broad ranging and detrimental environmental effects itemized
2 above are certainly “unusual” for the revocation of a CUP. The fact remains that the County did not
3 environmentally evaluate the numerous effects the revocation would cause before making its
4 determination. Since there was no immediate threat to justify the County’s precipitous action, the
5 matter should have been carefully studied to determine the environmental effects and the manner in
6 which those effects could be mitigated. By failing to consider these impacts, the County violated
7 CEQA.

8 **V. There is No Basis or Need To Impose Additional Conditions to Maintain the Stay.**

9 The County claims that maintaining the stay should be heavily conditioned. The County
10 proposed two alternative sets of conditions, but fails to justify either. The first set of conditions
11 relates to the modified CUP conditions proposed by the Planning Department prior to the November
12 15, 2011 hearing. The modifications to the current CUP are extensive and overreaching. These
13 modifications would require a substantial evidentiary hearing to determine what conditions would
14 be appropriate, involving unnecessary Court review and expenditure of judicial resources and
15 unnecessary expenditure by Community to implement if required without a hearing. Moreover,
16 implementation of the modifications is unnecessary to ensure the safe operation of the facility. The
17 facility has been operating safely and without incident under the terms of this Court’s Stay Order
18 since November 29, 2011. If any problem or potential threat arises in the future this Court certainly
19 has the power to make appropriate adjustments to the stay on application of any party. In the
20 meantime, this Court should not modify the existing CUP.

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1 The second condition proposed by the County is payment of the fines resulting from alleged
2 land use violations imposed at the November 15, 2011 hearing and the posting of a "substantial
3 bond." The fines that were imposed have nothing to do with the alleged CUP violations. By this
4 proposal, the County seeks to prevail in the companion Petition for Writ of Mandate filed by
5 Community and the Fry Family Trust to contest the fines imposed without litigating the merits of
6 the case. There exists no basis whatsoever to require Community and the Fry Family Trust to waive
7 their rights to contest the fines as a condition of extending the stay.

8 DATED: January 19, 2012

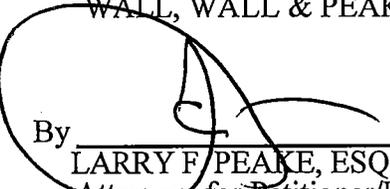
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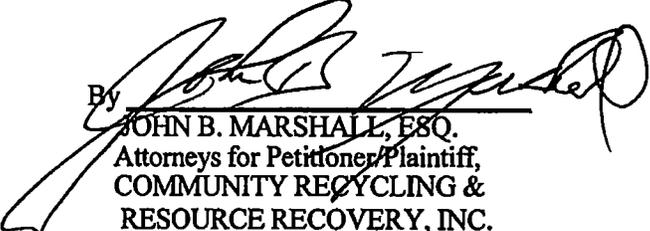
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