

FILED
SUPERIOR COURT, METROPOLITAN DIVISION
COUNTY OF KERN

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COUNTY OF KERN

JAN 19 2012

TERRY McNALLY, CLERK
BY _____ DEPUTY

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15 Attorneys for Petitioner and Plaintiff and Real Party in Interest,
LAMONT PUBLIC UTILITY DISTRICT

16 [*LAMONT PUBLIC UTILITY DISTRICT IS A SPECIAL DISTRICT AND A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA,
17 EXEMPT FROM PAYMENT OF COURT FILING FEES PURSUANT TO GOVERNMENT CODE SECTION 6103]

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

20 * * *

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

CASE NO. S-1500-CV-275272-EB
Complaint filed: 11/22/11
DECLARATION OF MARK SMITH IN
SUPPORT OF PETITIONERS' REPLY TO
RESPONDENT'S OPPOSITION TO EX
PARTE APPLICATION FOR STAY OF
ADMISTRATIVE ORDER REVOKING
CONDITIONAL USE PERMIT
[CCP §1094.5(g)]

COPY

1 I, T. MARK SMITH, declare as follows:

2 1. I am a partner of Clifford & Brown, PC, counsel of record for Petitioner
3 Community Recycling & Resource Recovery, Inc. in the above entitled matter. I make this
4 Declaration in support of Petitioners' Reply to Respondent's Opposition to Ex Parte Application
5 for Administrative Order Staying Revocation of Conditional Use Permit. I have personal
6 knowledge of the facts set forth herein and, if called, could and would competently testify thereto.

7 2. Attached hereto as Exhibit "A" is a true and correct copy of the Notice of Public
8 Hearing before the Kern County Board of Supervisors concerning revocation, suspension or
9 modification proceedings of Community's Conditional Use Permit. This Notice of Public Hearing
10 is dated November 1, 2011.

11 3. Attached hereto as Exhibit "B" is a true and correct copy of Resolution No. 2011-
12 325 of the Kern County Board of Supervisors purporting to revoke Community's Conditional Use
13 Permit.

14 4. Attached hereto as Exhibit "C" is a true and correct copy of excerpts of a Certified
15 Shorthand Reporter's Transcription of the Revocation Proceedings held before the Kern County
16 Board of Supervisors on November 15, 2011.

17 I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th
18 day of January, 2012, in Bakersfield, California.

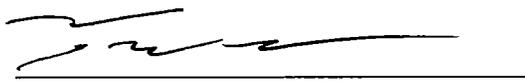
19
20 
21 T. MARK SMITH

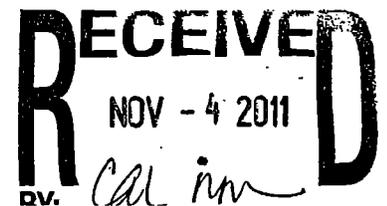
EXHIBIT “A”

**NOTICE OF PUBLIC HEARING BEFORE THE
KERN COUNTY BOARD OF SUPERVISORS**

REVOCATION, SUSPENSION or MODIFICATION PROCEEDINGS

A public hearing will be held before the Board of Supervisors of the County of Kern on **November 15, 2011**, at 2:00 p.m., at the Chambers of the Board of Supervisors, First Floor, Kern County Administrative Center, 1115 Truxtun Avenue, Bakersfield, California, to consider the following request:

1. The application and proceedings are designated as: Revocation, Suspension or Modification of Conditional Use Permit Case No. 27, Map No. 143
2. The name of the applicant is: Kern County Planning and Community Development Department (Permit Holder: Community Recycling and Resource Recovery, Inc. by WZI, Inc.) (PP09210)
3. The approximate location of the property subject to said proposal is: 1261 North Wheeler Ridge Road, approximately two miles south of the unincorporated community of Lamont
4. The request to be considered is: Revocation, Suspension or Modification of Conditional Use Permit 27, Map 143 (Resolution 72-93; approved July 8, 1993; modified on March 11, 1999, and May 25, 2000) pursuant to Section 19.102.020 (a, b, c, d), due to violations of the conditions of approval and Zoning Ordinance which include, but are not limited to:
 - Receiving residential food waste from the City of McFarland, City of Arvin, City of Los Angeles, and City of San Fernando Valley which were outside the permitted waste streams;
 - Stockpiling of concrete and operation of concrete crusher on site and stockpiling gypsum wallboard on site without a conditional use permit in 2007;
 - Use of biomass ash as an amendment in the composting operation outside the permitted waste streams, 2008;
 - Stockpiling of plastic irrigation pipe and bales of plastic onsite in February 2011, without a conditional use permit;
 - Noncompliance with Section 19.102.020(b) of Title 19 –Kern County Zoning Ordinance as the property subject to the conditional use permit was used and maintained in violation of Cal OSHA requirements for worker safety;
 - Noncompliance with Section 19.102.020(c) of Title 19 – Kern County Zoning Ordinance as the use on the property has been so exercised as to be detrimental to the public health or safety or as to constitute a nuisance, including but not limited to violations of Cal OSHA requirements;
 - Noncompliance with Board direction on August 9, 2011, to remain in compliance with all land use laws and proceed with processing an Environmental Impact Report (EIR) subject to Section 19.114.020.C.; and,
 - Any other good cause appearing at the hearing.



CUP 27, Map 143

Community Recycling & Resource Recovery, Inc.

Figure 4 - Site Plan



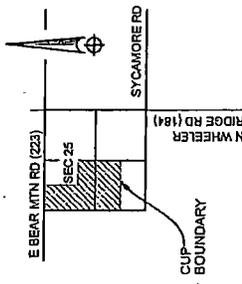
OWNER & SUBDIVIDER

OWNER: LAMONT PUBLIC UTILITY DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA

SUBDIVIDER: COMMUNITY RECYCLING AND RESOURCE RECOVERY, INC.

VICINITY MAP

SCALE: NONE



STATISTICS

TOTAL PROJECT AREA:
EXISTING LAND USE:
GENERAL PLAN:

190.0 GROSS ACRES
AGRICULTURE
EXTENSIVE AGRICULTURAL (B.3)
INTENSIVE AGRICULTURE (B.1)
OTHER FACILITIES (3.3)

EXISTING ZONE:

A.A-1

PROPOSED ZONE:

A.A-1

PROPOSED WATER SUPPLY:

WELL

PROPOSED SEWAGE DISPOSAL:

SEPTIC

APN:

185-350-53 AND 54

PHASING:

NONE

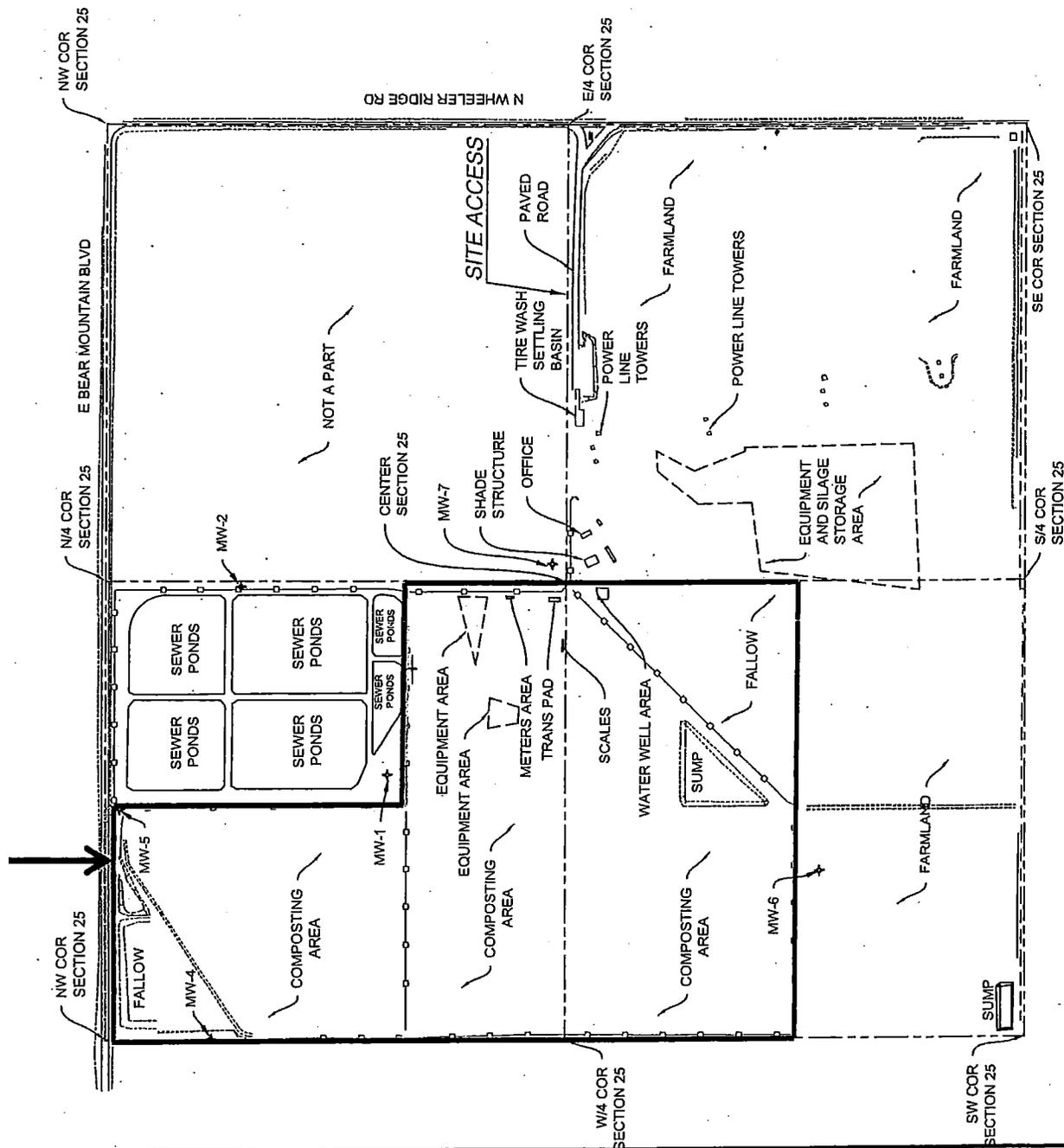
LEGEND

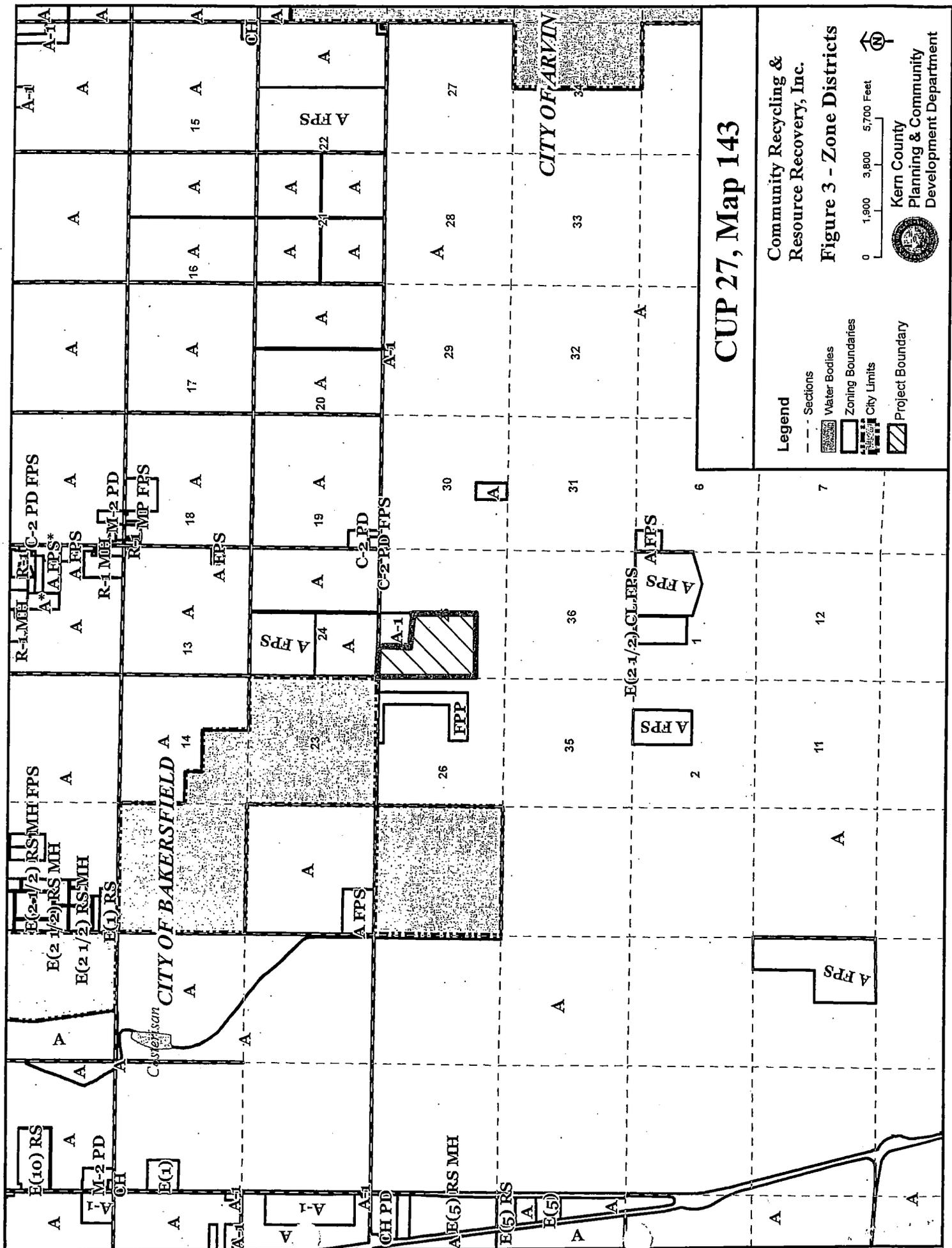
—○— FENCELINE

— SECTION LINE

—○— MONITORING WELL

CUP Boundary





CUP 27, Map 143

Community Recycling &
Resource Recovery, Inc.

Figure 3 - Zone Districts

0 1,900 3,800 5,700 Feet

Kern County
Planning & Community
Development Department

- Legend**
- - - Sections
 - Water Bodies
 - Zoning Boundaries
 - City Limits
 - Project Boundary

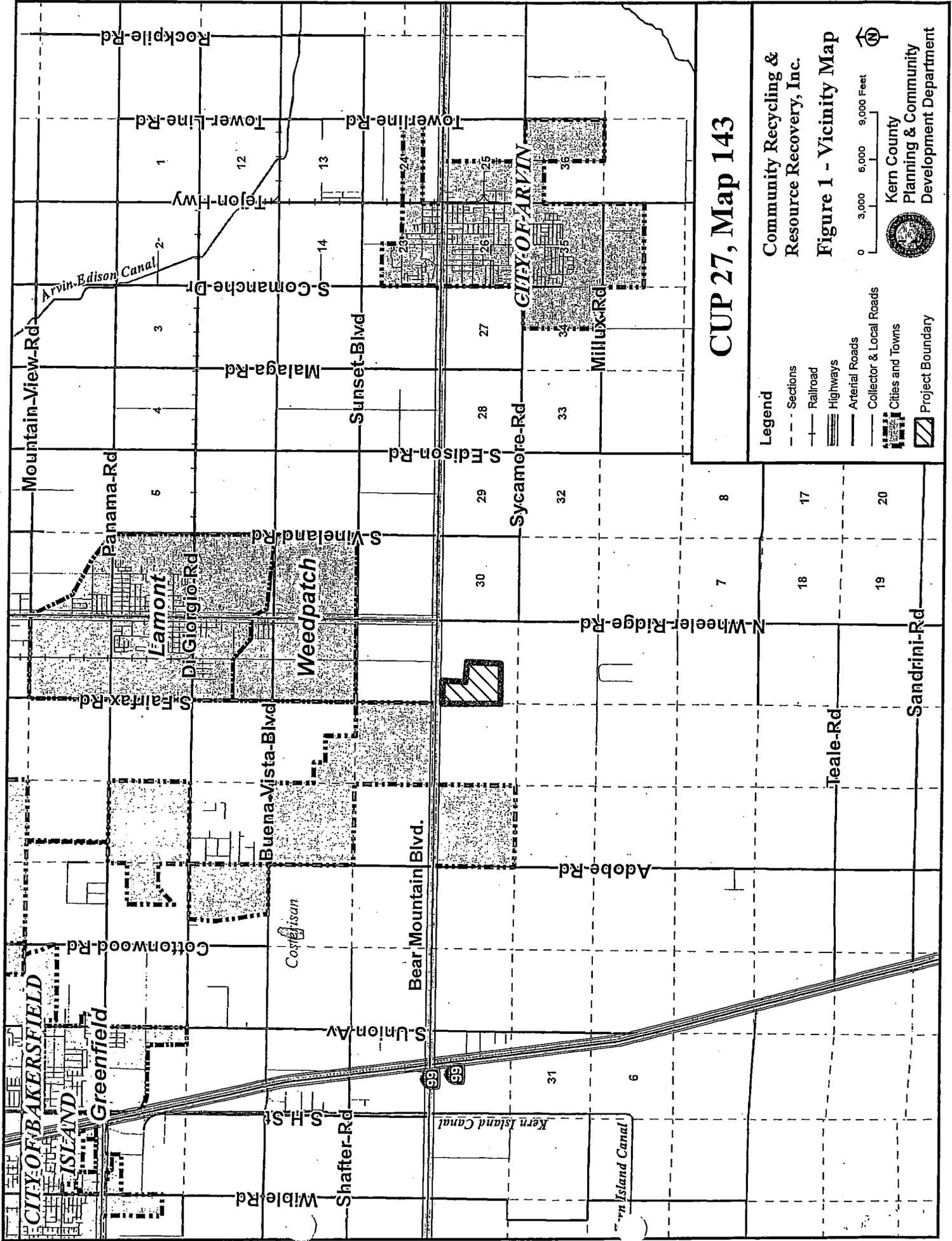


EXHIBIT “B”

**BEFORE THE BOARD OF SUPERVISORS
COUNTY OF KERN, STATE OF CALIFORNIA**

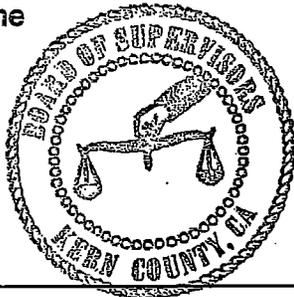
In the matter of:

Resolution No. 2011-325

**CONDITIONAL USE PERMIT NO. 27
MAP NO. 143; REVOKE FOR VIOLATIONS;
COMMUNITY RECYCLING AND RESOURCE
RECOVERY, INC. AND LAMONT PUBLIC
UTILITIES DISTRICT**

I, **KATHLEEN KRAUSE**, Clerk of the Board of Supervisors of the County of Kern, State of California, do hereby certify that the following resolution, on motion of Supervisor Goh, seconded by Supervisor Scrivner, was duly passed and adopted by said Board of Supervisors at an official meeting hereof this 15th day of November, 2011, by the following vote, to wit:

AYES: McQuiston, Scrivner, Maggard, Watson, Goh
NOES: None
ABSENT: None



KATHLEEN KRAUSE
Clerk of the Board of Supervisors
County of Kern, State of California

Karen L. Winn
Deputy Clerk

RESOLUTION

Section 1. WHEREAS:

(a) Pursuant to the California Government Code, Title 7, Sections 65000, et seq. (known as the Planning and Zoning Law), the Kern County Board of Supervisors has adopted the Official Land Use and Zoning Ordinance for the County of Kern (Ordinance Code Sections 19.02.010, et seq.), herein called the Zoning Ordinance; and

#2011-325

(b) The Zoning Ordinance establishes various classes of zones, prescribes land uses and regulations for the various zones, and adopts zoning maps for the purpose of dividing the County into zones and showing the zone boundaries; and

(c) The Zoning Ordinance regulates the use of buildings, structures, and land, as between agriculture, industry, business, residence, and other purposes, and other uses more specifically set forth in Section 65850 of said Government Code; and

(d) The Kern County Planning and Community Development Department has alleged violations of the Conditional Use Permit and related directives, instructions, orders, and operating conditions imposed from time to time by the Board of Supervisors and other Kern County agencies on the location and related to the business regulated by Conditional Use Permit 27 Map No. 143 (CUP), issued for property owned by the Lamont Public Utilities District (PUD) and for the uses engaged in by Community Recycling and Resource Recovery, Inc. (CRRR) on approximately 190 acres generally located at 1261 North Wheeler Ridge Road, two miles south of the unincorporated community of Lamont, for which an official Zoning Map has been adopted under Section 7297.365 of said Ordinance Code and for which precise land use and zoning regulations are in effect; and

(e) Said CUP and applicable related conditions, directives, instructions, and orders were made at various times heretofore pursuant to provisions of Section 19.104.040 of said Ordinance Code, other statutes and regulations, and under the exercise of the County's general police powers related to administration of such permits and land uses; and

(f) County staff have provided this Board with evidence in the form of staff reports, comments and documents, together with comments and documents received by staff and this Board from others relating to violations of the express and implied terms of the CUP, and related directives, instructions, orders, and operating conditions imposed from time to time by the Board of Supervisors and other Kern County agencies; and

(g) The Clerk of this Board has caused notice to be duly given of a public hearing in this matter in accordance with law, including Section 19.104.060 and the related Section 19.102.210 of the Zoning Ordinance as evidenced by the affidavit of publication and the affidavit of mailing on file with the Clerk of this Board for the most recent notices, and this hearing continues hearings conducted under earlier notices given for related hearings including the May 25, 2010, hearing and thereafter until today, related to the many previous violation hearings and violation reports considered by this Board related to this CUP and land uses on this property;

(h) Environmental impacts relating to today's actions were considered by the Planning and Community Development Department and this Board in relation to the consideration of this matter, including the applicability of categorical exemptions

pursuant to CEQA Guidelines, both under Section 15321 relating to regulatory agency actions and under Section 15301 relating to minor alteration of existing facilities involving no expansion of uses; and

(i) The regulatory action alternatives were explained by the Director of the Planning and Community Development Department during said hearing, and this Board has considered all of the testimony presented during said hearing and the recommendations of the Planning Department, and said public hearing having been concluded.

Section 2. NOW, THEREFORE, BE IT HEREBY RESOLVED by the Board of Supervisors of the County of Kern, State of California, as follows:

1. This Board finds the facts recited herein are true, further finds that this Board has jurisdiction to consider, approve, and adopt the subject of this Resolution, has provided due process to all interests involved, and hereby incorporates and makes all the findings recommended by Staff, whether verbally or in their written reports pertaining hereto.

2. This Board finds and determines that the applicable provisions of the California Environmental Quality Act of 1970, the State CEQA Guidelines and the Kern County Guidelines have been duly observed in conjunction with said hearing and the considerations of this matter and all of the previous proceedings related hereto.

3. This Board hereby finds this action is categorically exempt under Sections 15321 and 15301 of the State CEQA Guidelines. Additionally, it can be seen with certainty there is no possibility that the action to be considered at this hearing may have a significant effect on the environment and, therefore, under the provisions of Section 15061 of the State CEQA Guidelines such action is not covered by the requirements of CEQA, concerning the evaluation of projects and the preparation and review of environmental documents.

4. In connection with this matter, this Board hereby makes the following specific findings:

(a) Specific terms and conditions of the conditional use permit and related directives, instructions and orders and operating conditions imposed from time to time by the Board of Supervisors and other Kern County agencies have not been complied with on multiple occasions over multiple years, including, but not limited to: (1) receiving residential food waste from the City of McFarland, City of Arvin, City of Los Angeles, and City of San Fernando Valley which were outside the permitted waste streams; (2) stockpiling of concrete and operation of concrete crusher on site and stockpiling gypsum wallboard on site without a conditional use permit in 2007; and (3) use of biomass ash as an amendment in the composting operation outside the permitted waste streams in 2008.

(b) Community Recycling and Resource Recovery, Inc., has operated the composting facility in violation of Section 19.102.020 of the Kern County Zoning Ordinance because of violation of State regulations and Cal/OSHA requirements for worker safety.

(c) The use on the property has been so exercised as to be detrimental to the public health or safety or as to constitute a nuisance, including but not limited to violations of Cal/OSHA requirements (see attached Exhibit "A"), unpermitted stockpiling of concrete and gypsum wallboard on site, unpermitted operation of a concrete crusher and wallboard crushing on site and unpermitted storage and use of untested biomass ash as an amendment on site.

(d) Community Recycling and Resource Recovery, Inc. has operated the composting facility in noncompliance with your Board's direction on August 9, 2011, to remain in compliance with all land use laws and proceed with processing an Environmental Impact Report (EIR) generally subject to the processes in Section 19.114.020.C.

(e) Revocation of Conditional Use Permit 27, Map 143 is warranted due to the applicant/ operator's historical noncompliance with the adopted conditions of approval set forth in Resolution 72-93 (as modified in 1999 and 2000) and related directives, instructions, orders, and operating conditions imposed from time to time by the Board of Supervisors and other Kern County agencies.

(f) A public hearing notice expressing your Board's intent to consider revocation, suspension, or modification of the conditional use permit was provided to the applicant/operator at least ten days prior to the hearing date at which the action was to be considered. This meets the requirements of Section 19.104.060 and 19.102.210 of the Zoning Ordinance. Coupled with the many previous violations hearings and status reports, the applicant/operator was sufficiently notified of this proposed action.

(g) The applicant/operator was afforded a reasonable time to present a response to inquiries by your Board and rebuttal of comments made by County Staff and Board members.

(h) The revocation of Conditional Use Permit No. 27, Map 143 does not constitute a significant effect on the environment and therefore is categorically exempt pursuant to CEQA Section 15301. This exemption applies to the operation, repair, maintenance, permitting, leasing, or minor alteration of existing public or private structures or facilities involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. Revocation of the conditional use permit will remove the facility and will not permit any expansion of the use and only address operations and alterations to the facilities.

(i) The revocation of Conditional Use Permit No. 27, Map 143 does not constitute a significant effect on the environment and is categorically exempt pursuant to CEQA Section 15321. This exemption applies the authority of regulatory agencies to adopt an administrative decision or order to enforce or

revoke a lease, permit, license, certificate, or other entitlement for a use issued, adopted, or prescribed by the regulatory agency or enforcement of a law, general rule, standards, or objective, administered or adopted by the regulatory agency. The Kern County Board of Supervisors holds the authority to revoke the conditional use permit, as specified by Section 19.102.020 of the Kern County Zoning Ordinance; therefore, the revocation action is exempted by CEQA Section 15321. Revocation of the conditional use permit will remove the facility and will not permit any expansion of the use and only address operations and alterations to the facilities.

(j) Recycling operations and support facilities were located outside of the CUP approved area, on land not owned by the operator.

(k) Failure to comply with the terms of the CUP and related directives, instructions and orders and operating conditions imposed from time to time by the Board of Supervisors and other Kern County agencies have saved CRRR money, leading to unfair competition with CRRR's competitors and financial incentive to engage in further noncompliance.

(l) This Board concurs with counsel for CRRR that nuisance is a basis for revocation, and finds that violation of any provision of the Zoning Ordinance or related directives, instructions and orders and operating conditions imposed from time to time by the Board of Supervisors are a nuisance under Section 19.114.090 of the Zoning Ordinance.

(m) There have been repetitive violations of local and state regulations relating to the business plan requirement, involving odors, trash, and flies, which violations, although individually minor, are cumulatively significant violations of local regulations, constituting grounds for revocation under Section 19.102.020.

(n) This Board finds that CRRR lacks credibility as to future conduct and is not trustworthy to follow CUP requirements and related directives, instructions, and orders and operating conditions imposed from time to time by the Board of Supervisors and other Kern County agencies, including failure to actively pursue the EIR that they promised to pursue to induce forbearance from revocation of the CUP by this Board on July 13, 2010. They have been slow to provide a final project description or have not provided funding for the consultant required to prepare the EIR despite demands from staff to do so, even as recently as yesterday. *

5. After careful consideration of all facts and evidence as presented at the hearing, this Board hereby revokes the CUP, on the grounds recited herein in accordance with Section 19.102.020 of the Kern County Ordinance Code.

6. In revoking the requested CUP, this Board finds and determines as follows:

- (a) Multiple terms and conditions of the CUP and related directives, instructions and orders and operating conditions imposed from time to time by the Board of Supervisors and other Kern County agencies;
- (b) That the property subject to the CUP has been used or maintained in violation of applicable statutes, ordinances, laws, or regulations;
- (c) The use for which the CUP was granted has been so exercised as to be detrimental to the public health or safety, including safety of workers on the site, or as to constitute a nuisance.

7. The Clerk of this Board shall cause a Notice of Exemption to be filed with the County Clerk, if requested.

8. The Clerk of this Board shall transmit copies of this Resolution to the following:

- (a) Director, Planning and Community Development Department
- (b) Environmental Health Department
- (c) County Counsel
- (d) Director of Engineering, Survey, and Permit Services
Department
- (e) Community Recycling and Resource Recovery, Inc.
c/o Richard Zimmer, Esq. and T. Mark Smith, Esq.
Clifford and Brown
1430 Truxtun Avenue, Suite 900
Bakersfield, CA 93301
- (f) Lamont Public Utilities District
c/o Larry Peake, Esq.
Wall Wall & Peake
1601 F Street
Bakersfield, CA 93301

BD/kjw
#2093259

COPIES FURNISHED:
<i>See above</i>
<i>12/6/2011 RW</i>

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH1515 CLAY STREET, SUITE 1901
OAKLAND, CA 94612
(510) 286-7000 FAX: (510) 286-7037MAILING ADDRESS:
P. O. Box 420603
San Francisco, CA 94142-0603

November 14, 2011.

To: Kern County Counsel Theresa Goldner

Fr: Ellen Widess, Chief, Division of Occupational Safety and Health, DIR

Re: Order Prohibiting Use Issued to Community Recycling and Recovery, Inc.

You requested information regarding the Division of Occupational Safety and Health's Order Prohibiting Use issued to Community Recycling and Recovery, Inc. following the death of two employees, Armando and Eladio Ramirez on October 12, 2012.

Under California Labor Code § 6325, the Division is authorized prohibit entry into dangerous places or prohibit the use of dangerous equipment if, in the Division's opinion, that place or equipment constitutes and imminent hazard to employees. Violation of an Order Prohibiting Use (OPU) is considered a misdemeanor and punishable by a fine of up to \$1000.00 and/or a one year in county jail. (California labor Code § 6326)

On October 14, 2011, the Division of Occupational Safety issued an initial Order Prohibiting Use (OPU) to Community Recycling and Resource Recovery Inc. (CRRR) prohibiting any person from entering "the storm drain cleaning with employees using water hoses." On November 2, 2011, the Division issued an amended OPU prohibiting any person entering the "complete and entire storm drain system where confined spaces are present and **all entries** and openings into the storm drain system including a 6 foot area around each opening." (Emphasis added). The amended OPU was served on CRRR that same day and was applicable to any person seeking to enter the storm drains.

Last week the Division learned, and has been able to confirm, that CRRR contracted with Russell Warner, Inc. dba Roto-Rooter Plumbers, Advanced Sewer Technologies to operate a vacuum truck for the express purpose of removing and clearing mud & debris from assorted manholes throughout the storm drain system subject to the OPU. The evidence thus far collected by the Division indicates that Roto-Rooter did enter into the drain system through various openings on November 5, 7, 9, 10 and 11. These entries are in violation of the OPU described above and the Division is currently investigating whether such entry constitutes a misdemeanor in violation of the California Labor Code.

The Division has made no recommendation for prosecution at this time, but will do so if facts support a criminal recommendation when its investigation is complete. In that case, it will refer CRRR to the Kern County District Attorney.

EXHIBIT A

EXHIBIT “C”

In the Matter of:
Partial Transcript of Hearing Before Kern County Board of
Supervisors

Taped Transcript of Hearing Before Kern County Board of Supervisors
11/15/11

Job #: 2813



(818)988-1900

1 CHAIRMAN MAGGARD: Supervisor Goh, would you
2 like to go next? I know Supervisor McQuiston also wants
3 to make a comment. Supervisor McQuiston?

4 SUPERVISOR MCQUISTON: I'm going to support
5 the revocation. There's a couple of statements I'd like
6 to make. It's -- my decision is not based on anything
7 that has to do with a pending OSHA investigation, and it
8 is indeed tragic the loss of -- of lives on that site.
9 But because that's an ongoing investigation independent
10 of our land use discretionary decisions, it's not the
11 basis of my concurring with the recommendation.

12 My decision is based on simply the compliance
13 with the -- Community Recycling's Conditional Use
14 Permits and/or non-compliance, I should say, and the
15 history we've -- we've looked at. As I noted earlier, I
16 think the record is abundant of their pattern of
17 conduct. It shows a disregard for their CUP as well as
18 the Zoning Ordinance, and at some point in time there
19 has to be an accounting of -- that this type of behavior
20 simply will not and cannot continue forever.

21 As a side note, just as a -- as a comment, I
22 don't think a 46-day clock is going to start. I suspect
23 that Mr. Marshall and Mr. Smith are going to be in a
24 courtroom seeking an injunction, claiming irreparable
25 harm, and that there's going to be some legal

1 maneuvering and challenges made. I don't believe that
2 Community Recycling is going to just stop operations
3 tomorrow. I don't think that the generators of the --
4 the components that come here from Los Angeles and other
5 areas have any other place to take it, and I think
6 there's going to be a legal struggle with this. And
7 until such time as some of that materializes, I just
8 don't think that 46-day clock is going to start
9 tomorrow.

10 I think that there's a willingness by all of
11 the parties Regional Water Quality Control Board,
12 environmental health, our staff engineering, and survey
13 services to find something that -- that will resolve
14 the -- the -- the -- the challenges that are facing the
15 PUD. But for the reasons noted, I will support the
16 revocation.

17 CHAIRMAN MAGGARD: Thank you, Supervisor
18 McQuiston. I'll make a couple comments and then we'll
19 go for a second round. I know that Supervisor Goh and
20 Supervisor Scrivner both want to speak again. Sometimes
21 in spite of the very, very best efforts of very credible
22 people, I -- I think about Mr. Smith, Mr. Etchechury,
23 Mr. Frederick, Ms -- Mrs. Wilson -- in spite of the very
24 best efforts of very qualified people to come to the aid
25 of your client, sometimes your client just -- just can't

1 STATE OF CALIFORNIA)
2 COUNTY OF LOS ANGELES) ss.

3
4 I, JENNIFER GERATY, CSR No. 13350, in and for
5 the State of California, do hereby certify:

6 That said transcript was taken down by me in
7 shorthand at the time and place therein named, and
8 thereafter reduced to typewriting under my direction,
9 and the same is a true, correct and complete transcript
10 of said proceedings;

11 I further certify that I am not interested in
12 the event of the action.

13
14 
15 _____
16 Certified Shorthand Reporter
17 for the State of California
18
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