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February 18, 2014

**VIA EMAIL**

Chairperson Karen Mitchoff  
Members of the Board of Supervisors  
Contra Costa County  
651 Pine Street, First Floor  
Martinez, CA 94553-1293

Re: **Board Meeting of February 25, 2014: Concern regarding operation of  
Keller Canyon Landfill and levy of fees supporting community programs**

Honorable Chairperson Mitchoff and Members of the Board:

As you know, our office represents Contra Costa Waste Services, Inc., ("CCWS") and Mt. Diablo Recology, LLC ("MDR"), who have submitted proposals to the Central Contra Costa Solid Waste Authority ("CCCSWA," or "Authority"), seeking new franchise agreements. As you also are aware, our clients are competing for the new franchise agreements with Allied Waste Services, Inc., d.b.a. Republic Services ("Republic"), the owners and operators of the County's only landfill, Keller Canyon.<sup>1</sup> On February 11, 2014, we submitted a letter pointing out Republic's reporting obligations under three separate entitlements and asking the County to look into potential issues regarding the operation of Keller Canyon, including disposal fees the landfill may charge in light of allegations brought by the California Composting Coalition and California's unfair competition law. Since our last correspondence, we have more fully reviewed the questions raised by the Coalition. We have learned of some additional issues the County should investigate. Public information suggests Republic may be operating Keller Canyon in a way that deprives the County, local cities, and the State of governmental fees, where these fees support waste reduction and community programs such as the Keller Canyon Landfill Mitigation Fund. This latter fund, for instance, supports violence prevention programs for at-risk youth, youth sports programs, art and multi-cultural events for elementary schools, and literacy programs.<sup>2</sup>

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<sup>1</sup> Keller Canyon is operated by a subsidiary of Republic.

<sup>2</sup> See List of Keller Canyon Mitigation Fund recipients for 2013-2014, available at <http://www.co.contra-costa.ca.us/DocumentCenter/View/27429>.

The California Compost Coalition has provided us with a number of public documents filed with CalRecycle. We believe these documents raise a fair question as to whether Keller Canyon is using proper materials as alternative daily cover ("ADC").<sup>3</sup> What does ADC have to do with surcharges and the funding of community programs? Whereas the landfill may levy, and then submit to the County and other public agencies, various surcharges when it accepts waste for disposal, it appears that the County may not collect surcharges on the landfill's acceptance of ADC. Therefore, to the extent that Keller Canyon has accepted improper materials as ADC, and has failed to levy and remit the proper surcharge to the County and other public agencies that should have been assessed on such materials, then various public programs have been shorted. We have reviewed the Authority's documents, and believe (from an examination of documents in the public record) that there is a fair possibility that a shortfall in public funding of between \$209,000 and \$2.3 million<sup>4</sup> may have occurred since 2005 alone. We respectfully request that the County investigate this issue.

What follows is a summary of (1) how we understand the County and other public agencies assess surcharges on the disposal of waste; and (2) the public documents we have reviewed addressing ADC, and potentially indicating that between 11,000 and 203,000 tons of materials have been improperly counted as ADC at Keller Canyon.

1. **Structure and Amount of Surcharges Levied on Waste.**

We understand that, whenever a company disposes of a ton of solid waste at Keller Canyon, the following surcharges are levied:

- **An Assembly Bill 1220 Fee of \$1.40 per ton.** Assembly Bill ("AB") 1220 requires that solid waste facilities (e.g., landfills) submit a quarterly fee to the State Board of Equalization. The fees are used, in part, to provide grants to cities, counties, or other local agencies for specified local programs.
- **A County Lead Enforcement Agency ("LEA") Fee of \$1.25 per ton.** We understand the County LEA collects this fee to support its enforcement operations and other programs.

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<sup>3</sup> As you know, ADC refers to layers of certain materials that landfill operators place over regular garbage at the end of each day, so as to prevent rats and birds and other vector from reaching the garbage. ADC also helps prevent the escape of methane gas and other greenhouse gases.

<sup>4</sup> This figure accounts for potentially unprocessed green waste, which should not qualify as solid waste. Accounting for only comingled food and green waste a concept discussed below, the pertinent figure would be \$1.3 million.

- **A Contra Costa County AB 939 Fee of \$0.15 per ton.** AB 939, in part, authorized the levy of fees to pay the actual costs of preparing, adopting, and implementing integrated waste management plans. We assume this surcharge supports such plans.
- **A Road Mitigation Fee of \$1.00 per ton.** We assume this surcharge funds the improvement of roads that have deteriorated due to the hauling of waste along County roads.
- **A Contra Costa County Franchise Fee, amounting to 25 percent of net revenue for all fees (Including this surcharge).** We are not clear to what purpose this surcharge is used, but assume it includes the Keller Canyon Mitigation Fund.

On average, Keller Canyon assesses of disposal fee of approximately \$20 to \$30 per ton of solid waste.<sup>5</sup> Meanwhile, Keller Canyon assesses a disposal fee of between \$14 and \$20 for ADC, and there is no evidence the landfill assesses any surcharge on this material. Our clients have been in the waste management business a long time, and never have heard of such a fee, given that ADC is counted as recyclable material and qualifies for diversion credit.<sup>6</sup>

On this basis, it would appear the County and other public agencies should collect approximately \$8.80 to \$11.30 in surcharges for each ton of solid waste disposed at Keller Canyon. It is not evident that these agencies collect any monies for the disposal of ADC.<sup>7</sup>

Understanding the difference between ADC and solid waste insofar as governmental fees are concerned, it then becomes important to understand how many tons of waste may have been "miscounted" as ADC.

## 2. **Structure and Amount of Surcharges Levied on Waste.**

The California Compost Coalition has provided us with two categories of documents that indicate how much ADC has been received at Keller Canyon: (1) Reports filed by the Authority with CalRecycle; and (2) Reports filed by Republic with CalRecycle. There is some indication that improper materials have been counted as ADC.

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<sup>5</sup> See **Exhibit 1** (Brentwood City Council Agenda Report, p. 2 [Chart comparing solid waste disposal rates at Keller Canyon and other landfills].)

<sup>6</sup> Consider, for instance, that AB 1220, in assessing fees, only contemplates fees for "solid waste."

<sup>7</sup> Even if ADC was surcharged, because the gate rate for its disposal is much less when compared to the base rates for the disposal of solid waste (e.g., \$14 to \$20 for ADC, versus \$20 to \$30 for solid waste), the surcharges would be correspondingly less — e.g., \$7.30 to \$8.80.

i. **ADC Tonnage Received by Keller Canyon.**

The reports to CalRecycle, filed by the Authority, were submitted pursuant to Senate Bill 1016, which requires that a local agency submit an annual report to the state that summarizes its progress in reducing solid waste. Per statute, the state relies upon this report in order to determine whether the agency's integrated waste management plans needs to be revised. (See, e.g., Pub. Res. Code, § 41821 et seq.) Clearly, the reporting requirements are not meant as a purely bureaucratic exercise, and it is reasonable to assume that the Authority's reports accurately represent from where and to where various waste is coming and going.

The reports filed by Republic with CalRecycle appear to have been submitted pursuant to the terms of the landfill's solid waste permit (07-AA-0032).<sup>8</sup> It thus is reasonable to assume that these reports, too, are accurate. We understand that there may be conflicting data in circulation, but ask the Board to give greater weight to information sent to CalRecycle before concerns were raised about ADC use at Keller Canyon.

ADC Reported									
Annual Reports filed by Authority		2005	2006	2007	2008	2009	2010	2011	2012
	CCCSWA					7,481	27,292	20,333	22,785
	Walnut Creek	21,290	21,314	14,067	3,492	3,860	12,909	5,898	6,510
	Danville	11,605	14,448	10,841	2,526	2,788	10,732	11,729	13,059
	Moraga	365	735	648	177	213	848	657	708
	Orinda	535	1,249	832	248	236	1,004	767	873
	Lafayette	1,132	2,615	1,631	475	384	1,799	1,282	1,635
	County						7,974		6,805
	Totals	34,927	40,361	28,019	6,918	7,481	35,266	20,333	29,590
	Totals Lamorinda/WC	23,322	25,913	17,178	4,392	4,693	16,560	8,604	9,726
Reports filed by Republic	CCCSWA					24,817	24,813	19,131	21,485
	Walnut Creek	18,381	13,172	12,511	12,525				
	Danville	11,300	11,611	10,410	9,288				
	Moraga	351	87	561	659				
	Orinda	487	275	654	837				
	Lafayette	999	489	1,274	1,460				
	Totals	31,518	25,634	25,410	24,769	24,817	24,813	19,131	21,485
	Totals Lamorinda/WC	20,218	14,023	15,000	15,481				

<sup>8</sup> See "Facility Summary of ADC by Jurisdiction of Origin" tab, at <http://www.calrecycle.ca.gov/LGCentral/Reports/Viewer.aspx?P=ReportName%3dReportFacilitySummaryByJurisdictionADC%26DisposalFacilityID%3dCa274%26SwisNo%3d>.

A review of these reports, attached as **Exhibit 2**, shows that Keller Canyon received, between 2005 and 2012, an average of between 21,601 and 25,362 tons of ADC from Authority jurisdictions, depending on whether one adopts the Authority's or Republic's figures. (See **Chart** entitled "ADC Reported," above.)

ii. **ADC improperly counted?**

The next question is, how much, if any, of the materials counted as ADC were improperly counted. We respectfully request that the County investigate this issue, but offer the following comments, formulated after a careful review of public documents:

- ***Mixed Food Waste and Green Waste from Moraga, Orinda, Lafayette, and Walnut Creek.*** Since 2007, the jurisdictions of Moraga, Orinda, and Lafayette (collectively, "Lamorinda") have permitted the mixing of food waste and green waste. The City of Walnut Creek has permitted this practice since 2010.<sup>9</sup> Per Title 27, California Code of Regulations, section 20690(b)(3) and Title 14, California Code of Regulation, section 17852, ADC cannot include unprocessed green material, where green material cannot contain more than 1.0 percent of physical contaminants such as food material. Therefore, it would appear that waste consisting of mixed food and green waste cannot lawfully qualify as ADC. Meanwhile, the above, public reports show that Keller Canyon received about 11,306 tons of ADC from the Lamorinda area from 2008 to 2012, and about 12,408 tons of ADC from Walnut Creek. (See **Chart**, above, and **Attachment 2**.)<sup>10</sup> This combined 23,714 tonnage of ADC does not appear to have qualified, properly, as ADC, representing a potential shortfall in public funding of between \$208,683 and \$267,968. This range does not contemplate the receipt of ADC in year 2013.
- ***Comingling of Food Waste with Green Waste at Martinez Transfer Station.*** Per the photograph below, which is a satellite picture of Republic's transfer station in Martinez, California, it appears that green waste is

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<sup>9</sup> We understand this practice has been occurring per a representation from Authority staff to the California Compost Coalition. This latter group has shared this correspondence with us, a true and accurate copy of which is included as **Attachment 3**.

<sup>10</sup> While ADC from these jurisdictions may have consisted of materials other than "green" waste, there is no evidence of this composition. For instance, per CalRecycle reports, another potential source of ADC — construction and demolition debris — from Authority jurisdictions were recovered as recyclables. (See **Attachment 1**, CalRecycle annual reports (e.g., line item 4060-SP-CAR). In any case, the tonnage of these materials was minimal when compared against green waste generated from these jurisdictions (e.g., in 2011, 78 tons from Lafayette, 85 tons from Moraga, 150 tons from Orinda, and 707 tons from Walnut Creek.)

received and placed in one single area. Insofar as "green waste" from Lamorinda and Walnut Creek, which really consists of mixed food and green waste, are temporarily stored at this location along with green waste from other jurisdictions, it would appear that the comingling of waste streams is occurring, which would taint the tonnages of lawful green waste that is being sent to Keller Canyon.<sup>11</sup> If indeed green waste from the Martinez transfer has been tainted, that would mean that between 99,588 and 115,015 tons of waste generated by Authority jurisdictions has been improperly counted as ADC (representing the sum of tonnage of ADC from all Authority jurisdictions since 2008), which is to make no mention of the comingling that may occur with green waste from other in-County jurisdictions. (See **Chart**, above.) This tonnage represents a potential shortfall in public funding of between \$876,374 and \$1,299,670, which does not account for the receipt of ADC in year 2013.



- **Use of Unprocessed Green Waste as ADC.** Per the aforementioned regulations in Titles 14 and 27 of the California Code of Regulations, as well as the current Franchise Agreement between Republic and the Authority, "ADC includes at least six (6) inches of cover material other than earthen material, placed on the surface of the active face of the refuse fill area at the

<sup>11</sup> Insofar as food and green waste is being comingled, this practice additionally would make for a misrepresentation of diversion reporting, in violation of requirements under AB 939.

end of each operating day to control blowing litter, fires, odor, scavenging and vectors, as defined in Section 20164, Title 27 of the California Code of Regulations." As we discussed in our letter of February 11, 2014, to ensure green waste is less than six inches in diameter, it must be processed. To this end, Term 4.4(F)(3) of the current Franchise Agreement provides that, "[c]ommencing March 1, 2005, CCCSWA has designated the Keller Canyon Landfill as the Processing Facility for Processing as ADC no more than fifty (50) percent of Green Waste and Food Waste Collected by the Recycling, Green Waste and Food Waste Collection Company from the Cities/Towns of Danville, and portions of Walnut Creek and unincorporated central Contra Costa County. The Green Waste and Food Waste will be Transported by the Recycling, Green Waste and Food Waste Collection Company and delivered to Keller Canyon Landfill using Collection vehicles." It is unclear that the Franchise Agreement permits any other facility to function as a processing facility and, as we stated before, while Keller Canyon is designated as the "Processing Facility" for up to 50 percent of ADC from certain areas of the County, and perhaps the sole Processing Facility, it does not appear that any processing has occurred at this location. Meanwhile, Solid Waste Facility Permit O7-AA-0032, which was approved by County LEA, clearly indicates on the first page that Keller Canyon is not permitted to be a "Processing Facility." The appropriate box is unchecked under Item 5(a). If green waste that has been used as ADC has not been processed, and if unprocessed green waste falls within the definition of solid waste, then between 172,808 and 202,895 tons of material may have improperly been counted as ADC since 2005, representing shortfalls in public funding of between \$1,520,710 and \$2,292,714 during that time.<sup>12</sup> This range does not contemplate year 2013 or the years before 2005.

Overall, it appears there is a fair question as to whether the current ADC practices at Keller Canyon are resulting in a shortfall of surcharges that inure to the benefit of the public — anywhere from \$209,000 to \$2.3 million since year 2005. We respectfully request that the County investigate whether these shortfalls are occurring.

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<sup>12</sup> In addition to the terms of the current Franchise Agreement, we respectfully ask that the County investigate whether the landfill tipping fees, as they stand now and as they are proposed, reasonably accommodate the costs of processing ADC. For instance, landfill tipping fees currently range from \$20 to \$30 for solid waste, where as much as \$11.30 of this amount is used to satisfy governmental fee requirements. Our client informs us that the costs of grinding and processing ADC range from \$5 to \$12 per ton, plus additional costs associated with further sorting materials to ensure that some constituents (e.g., wood) are used for better purposes. Accounting for all of these costs, which conservatively would leave about \$6 to \$7 of an original \$30 tipping fee, we ask the County to consider whether this remainder adequately covers the costs associated with operating the landfill.

3. **Unreasonable Tipping Fee Charged at Keller Canyon.**

Separate from the above, we would like to provide the Board with further information regarding our position in the February 11, 2014 letter regarding Republic's potential violation of California's unfair competition law. As a reminder, we believe Republic's decision to charge MDR nearly \$70 per ton in tipping fees, as part of its proposal to the Authority, violates California's unfair competition law because it threatens an incipient violation of antitrust law. (*Cel-Tech Communications, Inc. v. Los Angeles Telephone Company*, 20 Cal. 4th 163, 187 (1999)). Specifically, the exorbitant landfill fees effectively would deny MDR access to Keller Canyon, the only landfill within a reasonable proximity to the area covered by the franchise agreement. This exclusion from Keller Canyon prevents MDR from competing for waste operations.

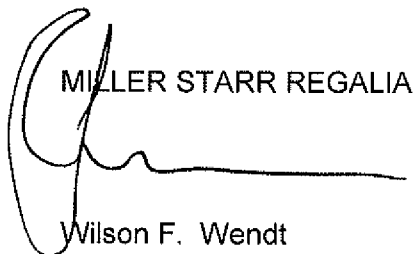
In further support of these claims, we submit that Republic charges entities with which it does *not* compete far lower landfill fees. For example, Republic currently charges the City of Brentwood, a non-competitor, \$29.75 per ton to dispose solid waste at Keller Canyon. (See **Exhibit 1**, p. 2.) This rate stands in stark contrast to the \$69 per ton Republic charges MDR, its only competitor for waste disposal in the area covered by the franchise agreement.

\* \* \*

In light of the above, we respectfully request that the Board consider investigating current ADC practices at Keller Canyon, and how these practices impact the levy of public surcharges that inure to the benefit of various public agencies and their programs, including a myriad of youth-oriented and literacy programs in Contra Costa County. Because we are concerned that local treatment of ADC may be a standard of practice by the operator, we are copying the state so that it may investigate the validity and scope of any ADC, reporting, and fee submittal violations.

Finally, we also ask the Board to continue investigating Republic's unwillingness to offer MDR access to the Keller Canyon Landfill at a reasonable price, and take any corrective action available to it.

Very truly yours,

MILLER STARR REGALIA  
  
Wilson F. Wendt

WFW:sa



Chairperson Karen Mitchoff  
Members of the Board of Supervisors  
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Enclosures

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