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Management Authority

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

ANTOINETTE W. STEIN, an individual,
and ARTHUR R. BOONE, III, an
individual,

Petitioners,

v.

ALAMEDA COUNTY WASTE
MANAGEMENT AUTHORITY, a public
entity,

Respondent.

WASTE MANAGEMENT OF
ALAMEDA COUNTY, INC., and CITY
OF SAN LEANDRO, a municipal
corporation,

Real Parties in Interest

Case No. RG17858423

[PROPOSED] JUDGMENT

CRC 3.1312

Assigned for all purposes to Hon. Ronni
MacLaren; Dept. 25

Action Filed: April 28, 2017

1 On March 9, 2018, the Honorable Ronni MacLaren in Department 25 of the Alameda
2 Superior Court held a hearing on the Petition for Writ of Mandate brought by Antoinette W.
3 Stein (“Stein”) and Arthur R. Boone, III (“Boone”) in the above-captioned action. Samir J.
4 Abdelnour and Sean G. Herman appeared as counsel for Petitioner Stein, Petitioner Boone
5 appeared in pro per, Tamara Galanter and Edward Schexnayder appeared as counsel for
6 Respondent Alameda County Waste Management Authority, and Andrea Leisy appeared as
7 counsel for Real Party In Interest Waste Management of Alameda County. The Court having
8 reviewed the record of proceedings in this matter, the briefs and papers submitted, and the
9 arguments of counsel, and for the reasons described in the Court’s Order dated March 20, 2018
10 and attached hereto as Exhibit A, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED
11 THAT:

12 1. The Petition for Writ of Mandate is DENIED.

13 2. Judgment denying the Petition and all arguments made and relief sought therein is
14 entered in favor of Respondent and Real Party in Interest and against Petitioners.

15 3. Costs are awarded to Respondent and Real Party in Interest, as the prevailing
16 parties, and against Petitioners, to the extent provided by applicable law and in an amount to be
17 determined upon the filing of a timely memorandum of costs.

18
19 DATED: _____, 2018
20
21

22 _____
23 Hon. Ronni MacClaren
24 Judge of the Superior Court
25
26
27
28

1 APPROVED AS TO FORM

2
3 DATED: March ____, 2018

HANSON BRIDGETT LLP

4
5
6
7 By: _____

Michael J. Van Zandt

8 Samir J. Abdelnour

9 Sean G. Herman

10 Attorneys for Petitioner Antoinette W. Stein

11
12 DATED: March ____, 2018

13
14
15 _____
Arthur R. Boone, III

16 Petitioner *In Pro Per*

17
18
19 DATED: March ____, 2018

REMY MOOSE MANLEY LLP

20
21
22 _____
Andrea K. Leisy

23 Christina L. Berglund

24 Attorneys for Real Party in Interest
25 Waste Management of Alameda County
26
27
28

1 **PROOF OF SERVICE**

2 ***Stein et al. v. Waste Management of Alameda County et al.***
3 **Case No. RG17858423**
4 **Superior Court of Alameda County**

5 At the time of service, I was over 18 years of age and **not a party to this action**. I am
6 employed in the City and County of San Francisco, State of California. My business address is
7 396 Hayes Street, San Francisco, CA 94102.

8 On March 26, 2018, I served true copies of the following document(s) described as:

9 **[PROPOSED] JUDGMENT**

10 on the parties in this action as follows:

11 **SEE ATTACHED SERVICE LIST**

12 **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the
13 persons at the addresses listed in the Service List and placed the envelope for collection and
14 mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly &
15 Weinberger LLP's practice for collecting and processing correspondence for mailing. On the
16 same day that the correspondence is placed for collection and mailing, it is deposited in the
17 ordinary course of business with the United States Postal Service, in a sealed envelope with
18 postage fully prepaid.

19 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the
20 document(s) to be sent from e-mail address Breckenridge@smwlaw.com to the persons at the e-
21 mail addresses listed in the Service List. I did not receive, within a reasonable time after the
22 transmission, any electronic message or other indication that the transmission was unsuccessful.

23 I declare under penalty of perjury under the laws of the State of California that the
24 foregoing is true and correct.

25 Executed on March 26, 2018, at San Francisco, California.

26
27 _____
28 Sara L. Breckenridge

SERVICE LIST
Stein et al. v. Waste Management of Alameda County et al.
Case No. RG17858423
Superior Court of Alameda County

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Attorneys for Real Party in Interest
Waste Management of Alameda Countv

EXHIBIT A



20643703

ENDORSED
FILED
ALAMEDA COUNTY

MAR 20 2018

CLERK OF THE SUPERIOR COURT

By ASL DeputySUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDAANTOINETTE W. STEIN, an individual, and
ARTHUR R. BOONE, III, an individual,

Petitioners,

v.

ALAMEDA COUNTY WASTE
MANAGEMENT AUTHORITY, a public
entity,

Respondent.

Case No. RG17-858423

ORDER DENYING PETITION FOR WRIT
OF MANDATE

DATE: MARCH 9, 2018

TIME: 9:00 AM

DEPT: 25

WASTE MANAGMENT OF ALAMEDA
COUNTY, INC., AND CITY OF SAN
LEANDRO, a municipal corporation,

Real Parties in Interest.

The petition by Petitioners Antoinette W. Stein and Arthur R. Boone, III (collectively "Petitioners") for a writ of mandate to direct Respondent Alameda County Waste Management Authority ("ACWMA") to vacate Ordinance 2017-02 came on regularly for hearing on March 9, 2018 in Department 25 of this Court, Judge Ronni B. MacLaren presiding. The court having considered the pleadings and arguments submitted in support of and in opposition to the petition, it is hereby ORDERED: The petition for a writ of mandate is DENIED.

1
2 SUMMARY OF FACTS AND CLAIMS

3 Real Party in Interest Waste Management of Alameda County (“WMAC”) owns and
4 operates the Davis Street Transfer Station at 2615 Davis Street, San Leandro, California (the
5 “DSTS”). (AR 86-87.) In the 1990s, WMAC developed a plan to compost green waste onsite at
6 the facility. (AR 87, 351, 377.)

7 On 2/19/98, Real Party in Interest City of San Leandro approved an Initial Study, adopted
8 a Mitigated Negative Declaration, approved the Master Plan, and issued a permit for the DSTS
9 (the “1998 IS/MND”). (AR 5, 1208, 1466-1477.) Under the 1998 IS/MND, the facility was
10 permitted to accept up to 5,600 tons per day of waste and to develop a composting facility on the
11 west side of the 53-acre DSTS property. (AR 1466-1477.)

12 On 1/4/11, the City of San Leandro approved an Initial Study, adopted a Negative
13 Declaration, and issued a permit for the construction of buildings and installation of equipment
14 for composting and waste diversion at the DSTS (the “2011 IS/ND”).¹ (AR 15-71, 1464.) The
15 improvements were:
16

- 17 1. Food Waste/Organic Recycling Facility (approximately 62,000 square feet).
18

19 The Recycling Facility would “be capable of receiving and processing
20 between 1,000 to 1,300 tpd of waste from residential and commercial
21 generators” and “[a]n estimated 600 tpd of food and mixed organics [was]
22 expected to be recovered for composting.” (AR 21.)
23
24

25 ¹ The 2010 IS/ND referred to in the papers filed by Petitioner Stein is the same document
26 as the 2011 IS/ND referred to herein. The document was prepared in 2010 and adopted by the
City of San Leandro in 2011.

1 2. Food Waste/Organics/Green Waste Compost Facility (approximately 200,000
2 square feet). The Compost Facility would “process approximately 1,000 tpd
3 of food and green wastes along with other mixed organics” and “[b]etween
4 250 and 350 tpd [would] be composted on site, and the rest of the material
5 [would] be shipped for composting off site.” (AR 21.) The anaerobic process
6 would take place in an enclosed tunnel. (AR 27-28.) The resulting methane
7 gas would be a renewable energy source. (AR 27-28.) The resulting liquid
8 percolate would be recycled as part of the compost process. (AR 21-22.)
9

10 On 12/20/16, WMAC submitted an application to ACWMA requesting a finding that
11 proposed changes to the DSTS were in conformity with the Countywide Integrated Waste
12 Management Plan (“CoIWMP”). (AR 408-409.)

13 On 1/10/17, WMAC submitted a revised application to ACWMA requesting a finding
14 that proposed changes to the DSTS were in conformity with the CoIWMP. (AR 379-407.) The
15 proposed changes were:

- 16 1. The Food Waste/Organic Recycling Facility would be renamed the Organic
17 Materials Recovery Facility (“OMRF”) and remain approximately 62,000
18 square feet. The OMRF would be automated. The new facility would be
19 capable of processing up to 300,000 tons per year (1,500 tpd assuming 200
20 work days per year) of waste and would be expected to recover 600,000 tpy of
21 organics (300 tpd assuming 200 work days per year)² for composting. (AR
22 380-381.)
23
24
25

26 ² The OMRF would be open Monday-Saturday. (AR 382.)

1 2. Food Waste/Organics/Green Waste Compost Facility would be divided into
2 the Organics Materials Composting Facility (135,000 sft) and the Organics
3 Digester Facility (65,000 sft), and would remain a total of approximately
4 200,000 square feet. (AR 380-382.)

5 a. The Organics Materials Composting Facility (“OCMF”) would process up
6 to 165,000 tpy (550 tpd assuming 300 work days per year). (AR 381.)

7 b. The Organics Digester Facility (“Digester”) would process up to an
8 additional 40,000 tpy of organic materials (133 tpd assuming 300
9 digesting days per year).³ (AR 382.)

10
11 Between 1/10/16 and 2/1/17, ACWMA staff made inquiries to WMAC’s consultant
12 regarding the compost process and product. (AR 632, 968-973.)

13 On 1/27/17, ACWMA staff asked WMAC to identify changes between the 2011 IS/ND
14 and the proposed 2017 project. (AR 972.) On 1/30/17, WMAC’s consultant provided
15 information about the 2011 IS/ND and stated, “A very important component of the [2011] IS/ND
16 is that the proposed project will result in no net increase to traffic at the Davis Street facility.
17 This project will only further process tons that already come to the property.” (AR 670-671.)
18 On 1/30/17, WMAC also sent a letter stating that the Compost Facility described in the 2011
19 IS/ND included both anaerobic and aerobic operations and that there were no changes in the
20 facility types and building sizes. (AR 377-378.)

21
22 Counsel for ACWMA asked twice whether WMAC would include the Digester in its
23 Solid Waste Facility Permit (SWFP) application to the Local Enforcement Authority, the
24 Alameda County Department of Environmental Health (“LEA”), and/or include the Digester as
25

26 ³ The Digester would run 24/7 when it contained materials. (AR 382.)

1 part of its update to the Conditional Use Permit (“CUP”) from the City of San Leandro. (AR
2 970, 969.) WMAC responded that it would include the Digester in its SWFP application to the
3 LEA and that the Digester was an approved part of the project description in San Leandro’s 2011
4 IS/ND. (AR 968.)

5 On 2/9/17, the Local Task Force held a meeting. The 2/9/17 ACWMA staff report
6 expressly analyzed the need for further review under the California Environmental Quality Act
7 (“CEQA”) and concluded that (1) there had been no changes to the project, and (2) further
8 CEQA review was not required. (AR 107-112.)

9 On 2/22/17, ACWMA held its first meeting. Petitioners attended and objected. WMAC
10 further explained the project.

11 On 3/22/17, ACWMA held its second meeting. Petitioners again objected and WMAC
12 again explained. ACWMA adopted Ordinance 2017-02, which (1) found no further CEQA
13 review was required, (2) amended the CoIWMP, and (3) found that the project was in
14 conformance with CoIWMP as amended (the “2017 Conformance Decision”). (AR 5-14.)
15
16

17 EVIDENCE CONSIDERED

18 The petition is for a writ of administrative mandate under Code of Civil Procedure
19 section 1094.5, and therefore the court’s review is limited to the administrative record. The court
20 has considered the administrative record lodged with the court.
21

22 The court DENIES the request of Petitioner Stein for judicial notice of the California
23 Environmental Protection Agency (“CalEPA”) report dated February 2017 and the Bay Area Air
24 Quality Management District (“BAAQMD”) report dated March 2014. The court has construed
25
26

1 the request for judicial notice as a request to augment the record under section 1094.5(e).⁴
2 Petitioner Stein referenced the reports to ACWMA in the administrative process (AR 234), but
3 did not provide copies to ACWMA and did not provide a citation to a general Web site or a
4 specific Web page. Therefore, the reports were not “submitted to” ACWMA in the
5 administrative process. (*Consolidated Irr. Dist. v. Superior Court* (2012) 205 Cal.App.4th 697,
6 724-725.)

7 The court DENIES the request of WMAC for judicial notice of the California Air
8 Resources Board (“CARB”) 2017 Climate Change Scoping Plan. (Exhibit A.) This post-dates
9 the ACWMA decision.
10

11 The court GRANTS the request of WMAC for judicial notice of the Alameda County
12 Department of Environmental Health permit dated 5/18/04 for the DSTS and augments the
13 record with the document. (Exhibit C.) This pre-dates the ACWMA decision and was part of
14 the project history.

15 The court GRANTS the request of WMAC for judicial notice of the the Alameda County
16 Department of Environmental Health permit dated 8/1/17 for the DSTS and supporting
17 documents and the BAAQMD permit dated 6/14/17 and report. (Exhibits B and D.) Because
18 these documents post-date the ACWMA decision, the court does not augment the administrative
19 record to include them. The court considers these documents for purposes of ACWMA’s
20 implied arguments regarding whether it could anticipate the subsequent analysis and permitting
21 processes and whether the CEQA review in those processes mitigated any prejudice from
22 ACWMA’s failure to comply with CEQA.
23

24

⁴ “A court may exercise its discretion to augment an administrative record if the evidence is
25 relevant and if it was either improperly excluded during the administrative process or it could
26 not, in the exercise of reasonable diligence, have been presented before the administrative
decision was made.” (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1144.)

1 BRIEFS CONSIDERED

2 The court STRIKES the 10-page single-spaced brief filed on 10/31/17 by Petitioner
3 Boone as a self- represented litigant. On 9/20/17, the parties filed a stipulation stating that no
4 later than 10/31/17 Petitioners would file an opening brief not to exceed 25 pages. The court
5 entered the stipulation as an order. Petitioner Boone’s separate brief is not permitted by the
6 stipulation. Petitioner Boone is bound by the stipulation and order filed on 9/20/17 even though
7 he filed a Substitution of Attorney on 11/1/17 stating that he was self-represented. (Code Civ.
8 Proc., secs. 284, 285.) A party cannot avoid the commitments and agreements made on his or
9 her behalf through an attorney or agent by terminating the attorney-client or principal-agent
10 relationship. (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765 [“trial court has broad
11 discretion ... to refuse to consider papers served and filed” contrary to a rule of court]; see also
12 *People v. Clark* (1992) 3 Cal.4th 41, 173 [“Motions and briefs of parties represented by counsel
13 must be filed by such counsel.”].)

14
15 As stated in a separate order issued on 2/23/18, the court DENIES the application of the
16 Measure D Committee filed on 12/4/17 for leave to file an amicus brief. First, Petitioner Boone
17 paid for preparation of the amicus brief. (Application, p. 2:18-19.) The court will not permit a
18 party to exceed page limits by enlisting a third party to file an amicus brief. Second, the amicus
19 brief asserts that ACWMA violated the language and intent of Measure D, codified as the
20 Alameda County Waste Reduction and Recycling Act of 1990. The petition, however, asserts
21 two causes of action under CEQA and does not assert that ACWMA violated Measure D.
22 “Courts generally do not consider new issues raised in amicus briefs. Instead, ‘[i]t is a general
23 rule that an amicus curiae accepts a case as he or she finds it,’ and ‘[a]micus curiae may not
24 ‘launch out upon a juridical expedition of its own unrelated to the actual appellate record.’”
25
26

1 (*People v. Hannon* (2016) 5 Cal.App.5th 94, 105.) The court will not consider the amicus brief
2 because it raises a new claim and improperly expands the scope of the case.
3

4 REGULATORY OVERVIEW

5 The regulatory, and environmental, review of the WMAC project at the DSTS extends
6 over a period of time and involves different public agencies with different responsibilities for
7 environmental review and discretionary approvals. As the court understands it, there are several
8 relevant stages:
9

- 10 1. In 1998, the City of San Leandro made a discretionary approval of the use permit for the
11 Master Plan for the DSTS. The CEQA document was the 1998 IS/ND. (AR 1482-1512.)
12 WMAC then built various facilities at the DSTS. (AR 18-20.)
- 13 2. In 2011, the City of San Leandro made a discretionary approval of Master Plan
14 improvements regarding the DSTS. The CEQA document was the 2011 IS/ND. (AR 15-
15 71.)
- 16 3. In 2017, ACWMA made the discretionary Conformance Decision stating that the DSTS
17 project was in conformance with the CoIWMP's planned goal of supporting composting
18 and its siting criteria of using existing facilities for composting. (AR 384.) The CEQA
19 document was the finding under Public Resources Code section 21166. (AR 5-14.)
20 ACWMA amended the CoIWMP to add the project at the DSTS to the CoIWMP's list of
21 System Components. (AR 8-9.)⁵ Condition of Approval No. 5 was that the facilities
22
23
24

25 ⁵ The CoIWMP sets out the requirement that ACWMA make a finding that a proposed
26 waste management facility is in conformity with the CoIWMP and the procedure that ACWMA
must follow when making conformance findings. (AR 1406-1411.)

1 would be constructed and operated in compliance with the assumptions in the 2011
2 IS/ND. (AR 13.)

- 3 4. The LEA, the Alameda County Department of Environmental Health, was required to
4 make a discretionary decision to approve a SWFP for the OMCf. (AR 111, 384.) It did
5 so after the ACWMA decision. (ACWMA RJN, Exh B.)
- 6 5. BAAQMD was required to make a discretionary decision to approve an “Authority to
7 Construct” and “Permit to Operate” the OMRf. (AR 111, 384.) It did so after the
8 ACWMA decision. (ACWMA RJN, Exh D.)
- 9

10
11 The City of San Leandro was the “lead agency,” and ACWMA was a “responsible
12 agency” that could rely on the the 2011 IS/ND approved by the City. As a “responsible agency,”
13 ACWMA was responsible for considering only the aspects of the project that were subject to its
14 jurisdiction. (*Riverwatch v. Olivenhain Mun. Water Dist.* (2009) 170 Cal.App.4th 1186, 1201-
15 1202.) If, however, ACWMA found that there was a substantial change in the project or new
16 information that required subsequent review under Public Resources Code section 21166 and 14
17 CCR section 15162(a), then ACWMA assumed the role of “lead agency” and ACWMA’s
18 responsibility for considering environmental impacts was not limited to the matters over which it
19 had direct regulatory control. (AR 1268, 1363, 1407.) (14 CCR sec. 15052(a)(2) [shift in lead
20 agency designation]; 14 CCR sec. 15162(c) [subsequent environmental review].)

21 //

22 //

23 //

24 //

25 //

1 ADEQUACY OF THE ADMINISTRATIVE PROCESS AND ADMINISTRATIVE
2 EXHAUSTION

3 ACWMA was required to make public disclosures and to hold public meetings. (AR
4 1410.) Petitioner Stein does not assert any inadequacies in the process.

5 Petitioners can only raise issues that were adequately raised in the administrative
6 proceedings. (*Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th
7 911, 920.) ACWMA does not argue that Petitioners failed to exhaust their administrative
8 remedies regarding the claims raised in Petitioner Stein's opening brief. However, ACWMA
9 does argue that Petitioners failed to exhaust their administrative remedies regarding the percolate
10 liquid claims raised in Petitioner Stein's supplemental brief.
11

12
13 SUMMARY OF ISSUES AND CONCLUSIONS

14 Petitioners' claims are all based on Public Resources Code section 21166 and the related
15 case law.

16 The court first addresses whether the 2011 IS/ND retained informational value for the
17 2017 Conformance Decision. (*Friends of the College of San Mateo Gardens v. San Mateo*
18 *County Community College District* (2016) 1 Cal.5th 937) (*Friends of the College I*). As
19 explained below, the court finds substantial evidence to support ACWMA's finding that the 2011
20 IS/ND retained informational value.
21

22 The court then addresses whether under Public Resources Code section 21166 the
23 changes to the project in the 2017 Conformance Decision and/or new information require
24 additional environmental review. (*Friends of the College I, supra*; see also *Friends of the*
25
26

1 *College of San Mateo Gardens v. San Mateo County Community College District* (2017) 11
2 Cal.App.5th 596, 606-607 (*Friends of the College II*).

3 In the claim under section 21166(a) regarding substantial changes to the project,
4 Petitioner Stein identifies the following changes: (1) change in the volume of material processed
5 onsite; (2) change in the volume of material composted and digested onsite (POB at 17; PRB at
6 6-10); (3) change in the sorting process (POB at 17; PRB at 6, 11-13); (4) change in the digestion
7 process (POB at 17); (5) change in the storage of methane (POB at 17; PRB at 18-19); and (6)
8 change in the storage of percolate (POB at 17; PRB at 18-19). (Statement of Issues filed 8/7/17.)
9

10 In the claim under section 21166(c) regarding new information, Petitioner Stein identifies
11 two reports that she asserts comprise new information: (1) the BAAQMD report dated March
12 2014 and (2) the CalEPA report dated February 2017. (PRB at 14-16.)

13 As explained below, the court finds that Petitioners have not identified substantial
14 evidence that supports a fair argument that the changes or the new information require additional
15 environmental review.
16

17 ARGUMENTS NOT RELEVANT TO THE CASE 18

19 Petitioner Stein and ACWMA both make certain arguments that are not relevant. In the
20 interest of clarity, the court identifies these arguments and sets them aside.

21 Petitioner Stein suggests that CEQA required ACWMA to conduct further investigation
22 and ACWMA failed to conduct further investigation. (POB at 16:2-4; PRB at 5-6.) “CEQA
23 does not require a lead agency to conduct every test or perform all research, study, and
24 experimentation recommended or demanded by commentors.” (14 CCR sec. 15204(a).) CEQA
25
26

1 case law does, however, address how the court should deal with a limited factual record.

2 *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311, states:

3 While a fair argument of environmental impact must be based on substantial
4 evidence, mechanical application of this rule would defeat the purpose of CEQA
5 where the local agency has failed to undertake an adequate initial study. The
6 agency should not be allowed to hide behind its own failure to gather relevant
7 data. ... CEQA places the burden of environmental investigation on government
8 rather than the public. If the local agency has failed to study an area of possible
9 environmental impact, a fair argument may be based on the limited facts in the
10 record. Deficiencies in the record may actually enlarge the scope of fair argument
11 by lending a logical plausibility to a wider range of inferences.

12 (See also *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 725 [“An absence of
13 evidence in the record on a particular issue does not automatically invalidate a negative
14 declaration.”]; *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (2005)
15 127 Cal.App.4th 1544, 1597-98 [application of *Sundstrom*].) Any failure to investigate does not
16 support a separate cause of action but rather “[e]nlarge[s] the scope of fair argument by lending a
17 logical plausibility to a wider range of inferences.” (*Sundstrom v. County of Mendocino, supra*,
18 202 Cal.App.3d at p. 311.)

19 Petitioner Stein argues that ACWMA violated CEQA’s requirement that the project have
20 an “accurate, stable and finite project description.” (PRB at 10-11, 13, 18, 19; *County of Inyo v.*
21 *City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193.) This is a re-framing of the “change in
22 the volume of material composted and digested on site” argument to a “failure to have a clear
23 project description” argument. The court will not consider an argument raised for the first time
24 in reply. In addition, the court finds the project description was adequate. (AR 79-80 [CoIWMP
25 amendment].)

26 Petitioner Stein argues that ACWMA violated CEQA’s disclosure requirements by
making “post-hoc” explanations of its actions. (PRB at 8-10, 13-14, 19.) CEQA does not permit

1 “post-approval environmental review” because if that “were allowed, EIR's would likely become
2 nothing more than post hoc rationalizations to support action already taken.” (*Laurel Heights*
3 *Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 394.) CEQA
4 does, however, permit implied findings. (*Friends of the College I, supra*, 1 Cal.5th at p. 951 [“a
5 determination—whether implicit or explicit”]; *Berkeley Hillside Preservation v. City of Berkeley*
6 (2015) 60 Cal.4th 1086, 1114 [“implied finding in the notice of exemption”]; *San Francisco*
7 *Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012, 1022-1023 [“an
8 implied finding”].) A party to a CEQA lawsuit can cite to the administrative record and identify
9 support for implied findings.
10

11 ACWMA argues that the project has a wide range of benefits that outweigh the project’s
12 environmental impacts. (ROB at 17.) Any such benefits are immaterial to the section 21166
13 analysis of whether ACWMA was required to undertake additional environmental analysis. If
14 ACWMA had conducted an environmental review and if it found adverse environmental impacts
15 that it could not mitigate, then it could weigh those against the project’s benefits and could
16 determine whether the benefits constituted an overriding public interest. The weighing analysis
17 is an environmental review analysis and is not relevant when a public agency has decided not to
18 conduct further environmental review.
19
20

21 THE ACWMA DETERMINATION THAT THE 2011 IS/ND RETAINED INFORMATIONAL
22 VALUE FOR THE 2017 RESOLUTION

23 CEQA requires public agencies to undertake environmental review before making
24 decisions. A public agency can comply with CEQA by approving a negative declaration, a
25 mitigated negative declaration, or environmental impact report. If there are subsequent changes
26

1 to the project, then the public agency must determine whether to conduct subsequent
2 environmental review.

3 The first step in this process is to determine the continuing usefulness of the earlier
4 CEQA review. *Friends of the College I* holds that the public agency must make a
5 “determination—whether implicit or explicit—that the original environmental document retains
6 some informational value.” (1 Cal.5th at p. 951.) The inquiry “is a predominantly factual
7 question ... for the agency to answer in the first instance, drawing on its particular expertise.”
8 (*Id.* at p. 953.) The Court emphasized that “occasions when a court finds no substantial evidence
9 to support an agency's decision to proceed under CEQA's subsequent review provisions will be
10 rare, and rightly so; ‘a court should tread with extraordinary care’ before reversing an agency's
11 determination, whether implicit or explicit, that its initial environmental document retains some
12 relevance to the decisionmaking process.” (*Id.* at p. 951.)

14 ACWMA made an implicit finding that the 2011 IS/ND retains some informational
15 value. ACWMA compared the 2011 IS/ND with the 2017 proposed Conformance Finding and
16 reached this implicit conclusion. The court has independently compared the 2011 IS/ND and the
17 2017 Conformance Decision and finds that substantial evidence supports this conclusion.
18 Specifically:
19

- 20 1. The footprint of the buildings remains substantially the same. (AR 377-378.)
- 21 2. The volume of compost to be processed and sorted remains substantially the same.
22 (AR 21, 380-381.)
- 23 3. The volume of compost to be produced onsite might have changed.
- 24 4. The composting process remains substantially the same. (AR 377-378.)
- 25 5. The anaerobic digestion process remains substantially the same. (AR 377-378.)
26

1 ACWMA's decision to rely on the 2011 IS/ND was supported by substantial evidence and it
2 properly then moved to the section 21166 evaluation of whether CEQA permitted or required
3 further environmental review.

4
5 THE ACWMA DETERMINATION THAT FURTHER ENVIRONMENTAL REVIEW WAS
6 NOT REQUIRED UNDER PUBLIC RESOURCES CODE SECTION 21166

7 Standard of Review

8
9 When the original CEQA document has continuing informational value, then the
10 public agency must determine whether any proposed changes in the project, changes in
11 the circumstances, or changes in available information are so substantial that CEQA
12 requires additional environmental review. Public Resources Code section 21166 states:

13 When an environmental impact report has been prepared for a project pursuant to
14 this division, no subsequent or supplemental environmental impact report shall be
15 required by the lead agency or by any responsible agency, unless one or more of
the following events occurs:

16 (a) Substantial changes are proposed in the project which will require major
17 revisions of the environmental impact report.

18 (b) Substantial changes occur with respect to the circumstances under which the
19 project is being undertaken which will require major revisions in the
environmental impact report.

20 (c) New information, which was not known and could not have been known at the
21 time the environmental impact report was certified as complete, becomes
available.

22
23 (See also 14 CCR sec. 15162(a).)

24 If the initial CEQA review was an environmental impact report ("EIR"), then the interests
25 of finality are favored over the policy of favoring public comment and environmental
26 examination. (*Melom v. City of Madera* (2010) 183 Cal.App.4th 41, 48-49.) Therefore, if the

1 public agency has already prepared an EIR, then the court reviews the public agency's
2 subsequent review determination for substantial evidence. (*Friends of the College I, supra*, 1
3 Cal.5th at p. 953.)

4 In contrast, if the initial CEQA review was a negative declaration or a mitigated negative
5 declaration, then the public agency has not conducted a thorough environmental review and the
6 court reviews the public agency's subsequent review determination for whether the record
7 contains evidence that the changes to the project might have a significant environmental impact
8 not previously considered. (*Friends of the College I, supra*, 1 Cal.5th at p. 958; see also *Friends*
9 *of the College II, supra*, 11 Cal.App.5th at pp. 606-607.) The court reviews a public agency's
10 findings regarding the existence of "substantial changes" that will involve "new significant
11 environmental effects or a substantial increase in the severity of previously identified significant
12 effects" under 14 CCR sec. 15162(a)(1) using the "fair argument test." *Friends of the College II,*
13 *supra*, 11 Cal.App.5th at pp. 606-607.) Under the fair argument test, if a lead agency is
14 presented with a fair argument that a project may have a significant effect on the environment,
15 the lead agency must prepare an EIR even though it may also be presented with other substantial
16 evidence that the project will not have a significant effect. (*No Oil, Inc. v. City of Los Angeles*
17 (1974) 13 Cal. 3d 68.) (See also 14 CCR sec. 15064(f)(1).)⁶

18
19
20 The court has considered, and rejects, the idea that when a negative declaration is at issue
21 the court reviews a public agency's finding of "substantial changes" under the substantial
22 evidence test and the finding of "significant environmental effects" under the fair argument test.
23 The use of the substantial evidence test for part one of a two-part test would be a "loophole"

24
25 ⁶ *City of Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465, is not relevant to
26 the court's analysis in this case because it concerns the adequacy of an EIR under the substantial
evidence test and not the adequacy of a negative declaration under the fair argument test.

1 because it would permit a public agency to base its decision on the “substantial changes” prong
2 and avoid the more exacting “significant environmental effects” prong. This is the type of
3 “loophole” that *Friends of the College I, supra*, 1 Cal.5th at 957, states does not exist.

4 Under the fair argument test, the court is focused on whether there is a fair argument that
5 the proposed changes in the project will lead to significant environmental effects. In other
6 words, the court is focused on the incremental effect of the proposed changes and is not
7 reviewing the project as a whole. (*Snarled Traffic Obstructs Progress v. City & County of San*
8 *Francisco* (1999) 74 Cal.App.4th 793, 801-801.)

9 In applying the fair argument test, the court reviews the administrative record for
10 substantial evidence of a fair argument. Not all evidence is substantial. (*Parker Shattuck*
11 *Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 782-786 [“a suggestion to
12 investigate further is not evidence, much less substantial evidence, of an adverse impact”];
13 *Citizen Action To Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 756 [“speculative
14 possibilities are not substantial evidence of environmental impact”].)

15
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18 SUBSTANTIAL CHANGE IN THE PROJECT – VOLUME OF MATERIAL TO BE (1)
19 PROCESSED ONSITE AND (2) COMPOSTED AND DIGESTED ONSITE

20 Petitioner Stein asserts that the 2017 DSTS changes will triple the amount of material to
21 be anaerobically digested and composted onsite. (POB 17; PRB 6-11.)

22 WMAC and ACWMA’s presentation of information was not as clear as it could have
23 been. The information in the 2011 IS/ND and the 2017 Conformance Decision did not
24 consistently identify the total capacity of the facility, the total amount delivered to the facility,
25 the amount sorted at the facility, the amount of non-compost waste processed at the facility, the
26

1 capacity for onsite composting, the amount of composting input, and the amount of composting
2 output. In addition, the 2011 IS/ND used tons per day as the unit of measurement and the 2017
3 Conformance Decision used tons per year. This complicated the analysis of whether there was a
4 significant change in the project.

5 The 2011 IS/ND stated the facility “will process approximately 1,000 tpd of food and
6 green wastes” of which “[b]etween 250-350 tpd will be composted on site, and the rest of the
7 material will be shipped for composting off site.” (AR 21.)

8 WMAC’s application for the 2017 Conformance Decision states:
9

10 1. “The OMRF is designed to process 100 tons per hour of municipal solid waste
11 (‘MSW’). Initially, the OMRF will process MSW generated by the City of Oakland in the
12 amount of 150,000 tons per year (‘TPY’) running on a single shift per day, however the
13 throughput may increase to an annual tonnage of 300,000 TPY dependent on demand from other
14 WMAC customers for processing of MSW.” (AR 380-381.)

15 2. “The combined daily peak capacity of the Composting and Digester facilities will
16 be 1,000 tons per day, with a maximum annual throughput of 205,000 TPY.” (AR 381.)

17 3. “Annual average expected capacity of the Composting facility is up to 165,000
18 TPY.” (AR 381.)

19 4. “The Digester facility will be an anaerobic process which will occur in a 65,000
20 square foot building. This facility will be capable of processing up to an additional 40,000 TPY
21 of organic materials including the organic fraction from the OMRF, green waste, and source
22 separated food waste.” (AR 382.)
23

24 The court finds there is no substantial evidence of a change in the total tons per day to be
25 *processed* onsite. The 2011 IS/ND permitted 1,000 tpd and the 2017 Conformance Decision
26

1 states the facility will start at 150,000 tpy and might increase up to 300,000 tpy. Assuming 300
2 work days per year,⁷ that means the facility might process up to 1,000 tpd.

3 A change in the descriptions from a combined number measured in tons per day to two
4 separate numbers measured in tons per year caused some confusion in the administrative process.
5 At the hearing on 3/22/17, WMAC employee Shawn Tacklitt explained that the 2011 IS/ND
6 permitted the facility to process 1,000 tons per day and that in the 2017 application “[w]hat’s
7 being described is subsets of that thousand tons. That’s where the confusion is occurring.” (AR
8 244.) Tacklitt later stated “there’s no change in volume, no change in volume type.” (AR 245.)
9

10 The court finds there is substantial evidence of a change in the total tons per day to be
11 *composted and digested* onsite. The 2011 IS/ND stated that “[b]etween 250-350 tpd will be
12 composted on site.” (AR 21.)

13 Petitioner Stein correctly notes that the 2017 Conformance Decision approves facilities
14 that have a “combined daily peak capacity” of 1,000 tons per day, which is far in excess of the
15 350 tpd permitted by the 2011 IS/ND. (AR 381.) Breaking it down, the 2017 Conformance
16 Decision states that the OMCF would process “up to 165,000 TPY” (550 tpd assuming 300 work
17 days per year) (AR 381) and the Digester would process “up to an additional 40,000 TPY of
18 organic materials” (133 tpd assuming 300 digesting days per year⁸) (AR 382). This suggests a
19 capacity of 685 tpd, which is also in excess of 350 tpd.
20

21 The court’s order of 2/23/18 asked the parties to identify, by page number in the
22 administrative record, any evidence where ACWMA or WMAC indicated that although the 2017
23 proposed project for the DSTS had a composting and digesting capacity of 1,000 tpd, it would
24

25 ⁷ The OMRF would be open Monday-Saturday. (AR 382)

26 ⁸ The Digester would run 24/7 when it contains materials. (AR 382.)

1 not exceed 350 tpd. ACWMA's supplemental briefing focuses on the following language in the
2 2011 IS/ND:

3 "[T]he Food Waste/Organics/Green Waste/Composting Facility will process
4 approximately 1,000 tpd of food and green wastes along with other mixed
5 organics will be processed. Between 250-350 tpd will be composted on site, and
6 the rest of the material will be shipped for composting off site."

7 (AR 21.) ACWMA reads this as meaning that the 2011 IS/ND described a process where
8 approximately 1,000 tpd of compostable material was the input into the onsite compost process
9 and between 250-350 tpd of compost was the end product of the onsite compost process.
10

11 ACWMA then asserts that the project did not change because the 2011 IS/ND permitted 1,000
12 tpd of input and the 2017 Conformance Decision approves a "combined daily peak capacity" of
13 1,000 tpd. (AR 381.)

14 The court finds there is substantial evidence in the administrative record to support a fair
15 argument that the project as considered by ACWMA in 2017 did not limit the onsite composting
16 to 350 tpd. There is no support in the administrative record for ACWMA's distinction between
17 input into the onsite compost process and the end product of the onsite compost process. To the
18 contrary, the statement that "[b]etween 250-350 tpd will be composted on site, and the rest of the
19 material will be shipped for composting off site" strongly suggests that that the 250-350 tpd to be
20 composted onsite was the input because it goes on to state "and the rest of the material will be
21 shipped for composting off site." Furthermore, the record reflects that at the time of the
22 Conformance Decision in 2017, ACWMA was considering a project that would "potentially
23 constitute the largest, highest capacity, most automated, highest recovery, and most integrated
24 organics recovery facility in the world." (AR 108.) The description as "largest, highest
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1 capacity” certainly suggests that the facility as proposed in 2017 was going to compost more
2 waste onsite than the facility as approved in the 2011 IS/ND.

3 ACWMA and WMAC reasonably point to Condition No. 5 of the 2017 Conformance
4 Decision, which requires WMAC to construct and operate the DSTS in compliance with the
5 assumptions in the 2011 IS/ND (AR 13), which in turn limits composting and digesting to 350
6 tpd (AR 21), and to Condition No. 8, which requires WMAC to comply with all the conditions in
7 the 2011 IS/ND. These were presented to the public (AR 84, 112) and were considered by the
8 ACWMA Board (AR 6). These general statements appear to be inconsistent with the more
9 specific statements suggesting that the facility as considered in 2017 would compost more waste
10 onsite than the facility as considered in 2011. Applying the fair argument standard, the court
11 gives effect to the more specific statements.
12

13 ACWMA’s 2017 Conformance Decision related only to whether the DSTS was in
14 conformance with the CoIWMP. The expected subsequent decision by the LEA regarding the
15 SWFP more directly concerned the operation of the Composting and Digesting facilities,
16 including the total daily volume at the Composting and Digesting facilities.
17

18 Applying the fair argument standard, and assuming that the volume of the composting
19 and digesting onsite increases from 350 tpd to 1,000 tpd, the court finds there is no substantial
20 evidence that the increase in volume would have a significant environmental impact. Regarding
21 water quality, the 2011 IS/ND states: “The proposed Project includes tanks to store the percolate
22 liquid, which is then used as makeup to initialize the compost process forming a closed loop
23 system. Any excess water will be conveyed to the sanitary sewer.” (AR 45.) A significant
24 increase in the tons per day of onsite composting on its face presents a fair argument that there
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1 will be a corresponding increase in the percolate liquid, which would then lead to an increase in
2 the water to “be conveyed to the sanitary sewer.”

3 There is, however, no fair argument that an increase in the volume of water conveyed to
4 the sanitary sewer might have a significant environmental effect. First, “percolate liquid” and
5 “water” are not synonymous, and it is water that would be conveyed to the sewer. The 2011
6 IS/ND states that the percolate liquid is “collected and stored in tanks” and is “then recycled as
7 part of the compost process.” (AR 22.) The 2011 IS/ND also states that the percolate liquid is
8 part of a “closed loop system.” (AR 45.) Second, the water would be conveyed to the sanitary
9 sewer, and would therefore be treated in a waste water plant. The San Leandro Water Pollution
10 Control Plant is 0.25 miles to the north of the facility. (AR 56.) If the water were not conveyed
11 to a sanitary sewer, and were instead treated as storm water, then it would be subject to the
12 specific requirements for storm water treatment in the 2011 IS/ND. (AR 44-45, 54-55.) Third,
13 Petitioner Stein did not raise the issue that “[a]ny excess water will be conveyed to the sanitary
14 sewer” in the administrative process, and she therefore failed to exhaust her administrative
15 remedies on this issue. The requirement that parties exhaust administrative remedies is an
16 integral part of the CEQA process. (Pub Res. Code, sec. 21177(a); *Tahoe Vista Concerned*
17 *Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 589-591.)⁹ Petitioner Stein’s letter of
18 3/22/17 raised issues regarding the storage of percolate liquid, but it did not address the
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21
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23 ⁹ The exhaustion of administrative remedies is an issue separate from Petitioner Stein’s
24 failure to raise the issue in this case until the order of 2/23/18 permitted and requested
25 simultaneous supplemental briefs. Although the court generally does not consider arguments
26 raised for the first time on reply, the court has considered the argument regarding conveyance of
percolate liquid to the sanitary sewer because the water quality issue was raised in the earlier
briefing and the court expressly requested the supplemental briefing.

1 possibility that percolate liquid or water might be conveyed to the sanitary sewer or treated as
2 storm water and might as a result have an effect on water quality. (AR 439-446.)

3 Petitioner Stein also argues that the increase in the volume of liquid will have an
4 environmental effect because there is no mention of the percolate liquid storage tanks. As
5 discussed below, the number and location of the storage tanks does not change from 2011 to
6 2017. The storage of the liquid in the tanks has no environmental effect – it is the release that
7 has a potential environmental effect.

8 Regarding air quality, a significant increase in the tons per day of onsite composting on
9 its face appears to present a fair argument that there will be a corresponding effect on air quality.
10 But, as discussed below, the composting and digesting onsite will take place in enclosed facilities
11 with filters, and therefore any effect on air quality is speculative. (AR 274, 324-325.)

12 Regarding vehicle traffic, the total volume of waste processed will not increase above 1,000 tpd
13 and thus the possible increase in the volume of composted and digested material would not
14 increase vehicle traffic. (AR 285.) Petitioner’s air quality and vehicle traffic concerns are
15 speculative and not supported by evidence.
16

17 The court cannot find that events occurring after a public agency’s decision are
18 substantial evidence in support of that decision, nor can the court infer that the public agency
19 violated CEQA because another public agency took a subsequent remedial action regarding the
20 same project. (Evid Code, sec. 1151.) That said, after the ACWMA decision, the LEA issued
21 the 8/4/17 SWFP which states that the OMCF has a “pre-treatment processing system” with
22 “maximum peak tonnage” of 1,000 tpd, “in vessel composting lanes” with processing capacity of
23 250 tpd, a “compost refining processing system” with design capacity maximum of 250 tpd, and
24 an “anaerobic digester” capable of processing 250 to 325 tons every 2 to 3 working days.
25
26

1 (ACWMA RJN, Exh B, page 20.) This indicates total capacity of well over 350 tpd. The LEA
2 stated that based on public comments, it added a condition “to limit the amount of composting to
3 a maximum of 350 tpd to correlate with the amount identified in the environmental documents
4 (250-350 tpd) adopted for the project.” (ACWMA RJN, Exh B, page 26.) The LEA decision
5 included an express condition that states “OMCF is limited to producing 350 tons of compost per
6 day.” (ACWMA RJN, Exh B, page 17 [Condition q].)

7 The court gives no effect to the LEA’s SWFP for two reasons. First, the LEA permit
8 post-dates the 2017 Conformance Decision, and thus could not have affected ACWMA’s 2017
9 Conformance Decision. Second, CEQA is designed to further “informed decisionmaking and
10 informed public participation.” (*City of Hayward v. Board of Trustees of the California State*
11 *University* (2015) 242 Cal.App.4th 833, 839.) If, as here, one public agency failed to comply
12 with CEQA, that failure of informed decisionmaking and informed public participation is not
13 excused or mitigated because another public agency complied with CEQA in a subsequent
14 permit approval regarding the same project.
15
16

17 SUBSTANTIAL CHANGE IN THE PROJECT – CHANGE IN THE SORTING PROCESS 18

19 Petitioner Stein asserts that the 2017 changes to the DSTS changed the sorting process by
20 replacing a hand-sorting process with an automated process. (PRB at 11-12) The court finds
21 that there was a change in the sorting process, but that it would not require additional
22 environmental review.

23 The 2011 IS/ND states that the facility will receive only source separated green waste,
24 which would be manually sorted and transferred to the Compost facility to be mixed with other
25
26

1 green waste. (AR 15, 18-20.) Under that procedure, household hazardous waste would be
2 identified and removed before anaerobic digestion and composting. (AR 15, 21, 50.)

3 The 2017 Conformance Decision states that the facility will have a mechanical hydro-
4 pulping process to separate organic and inorganic materials from the waste materials that come
5 to the DSTS. (AR 88.) After separation in the hydro-pulping process, “[t]he organic materials
6 recovered from the OMRF will be directly conveyed to the adjacent Composting and Digester
7 facility buildings for processing.” (AR 88.) The inorganic materials that can be recycled
8 “including aluminum, metals, plastics, and glass will be shipped off-site for recycling.” (AR 88.)
9

10 Applying the fair argument standard, the court finds there is no substantial evidence that
11 the change in the sorting process may have any environmental impact. The change from hand-
12 sorting to mechanical-sorting by itself is immaterial for CEQA purposes.

13 The change in the sorting process is possibly material for CEQA purposes to the extent
14 that it “may” result in inorganic and hazardous material in the digestive process, which in turn
15 “may” have an adverse environmental impact. Petitioner Stein has not, however, identified any
16 substantial evidence that hand separation does a better job than the proposed mechanical hydro-
17 pulping process at separating organic from inorganic materials. Petitioner’s speculation is not
18 substantial evidence. (*Citizen Action, supra*, 222 Cal.App.3d at p. 756 [“speculative possibilities
19 are not substantial evidence of environmental impact”].) At the 2/9/17 meeting, WMAC
20 employee Shawn Tackitt stated that the mechanical hydro-pulping process is an advanced
21 process designed to separate and remove contaminants before the composting and digestion
22 process. (AR 326-333.)
23
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1 SUBSTANTIAL CHANGE IN THE PROJECT – CHANGE IN THE COMPOSTING AND
2 DIGESTION PROCESS

3 Petitioner Stein asserts that the 2017 Conformance Decision changes the composting
4 process by replacing a three-step composting process (AR 21-22, 130-131) with a different
5 process (AR 382). (POB at 17.) The court finds that there was no significant change in the
6 composting and digestion process.

7 The 2011 IS/ND states that the composting will be a three-step composting process
8 consisting of (1) anaerobic digestion in an airtight tunnel, followed by (2) aerobic digestion in a
9 secondary tunnel, followed by (3) processing to separate fine, medium, and large particles. (AR
10 21-22, 130-131.)

11 The 2017 Conformance Decision states that the facility will (1) automatically process
12 waste in the OMRF to separate organic and recyclable materials from landfill waste and then
13 send the organic waste to either (2) the aerobic composting facility or (3) the anaerobic digesting
14 facility. (AR 88-89, 380-382.)

15 The composting and digesting processes described in the 2011 IS/ND and in the 2017
16 Conformance Decision are both in in closed facilities. The staff report for the 2017 decision
17 states:
18
19

- 20 1. “The Composting facility will be a 135,000 square foot fully-enclosed operation. The
21 building will house the entire composting process, and will be operated under a
22 negative air system with exhaust vented through a biofilter to control potential odors
23 and mitigate emissions from the composting process.” (AR 88.)
24
25
26

1 2. “The Digester facility will be an anaerobic process which will occur in a 65,000
2 square foot building. ... The digester facility will be fully-enclosed allowing for the
3 collection of biomethane from the digestion process....” (AR 89.)
4

5 Applying the fair argument standard, the court finds there is no substantial evidence that
6 the change in the composting and digestion process may have any environmental impact.
7

8 Regarding air quality effects, both the 2011 IS/ND and the 2017 Conformance Decision
9 require that the composting and digestion take place in closed buildings. At the meetings on
10 2/9/17 (AR 275-276) and 2/22/17 (AR 234-235), Petitioner Stein, who is an environmental
11 engineer with a PhD in air pollution control (AR 275), expressed concern about odor from the
12 facility, expressed concern about increased volume, identified the CalEPA and BAAQMD
13 reports, and expressed concern that San Leandro is in a high air pollution area. Expressions of
14 concern and requests to conduct further environmental review are not substantial evidence of
15 environmental impact. (*Parker Shattuck, supra*, 222 Cal.App.4th at pp. 782-786 [“a suggestion
16 to investigate further is not evidence, much less substantial evidence, of an adverse impact”].)
17 The letter of 3/22/17 makes a conclusory allegation that the proposed project does not address air
18 pollution. (AR 439-446.) At the meetings on 2/9/17 and 2/22/17, WMAC employee Shawn
19 Tackitt explained that the composting and digestion processes each have biofilter systems to treat
20 air exhaust. (AR 266-268, 336-338.) There is no substantial evidence that the change in process
21 may result in an environmental impact regarding local or regional air quality.
22

23 Regarding effectiveness and quality of composting and digesting, the ACWMA staff
24 requested and obtained information on similar recovery projects operating elsewhere. (AR 667,
25 962-963.) The ACWMA staff also obtained confirmation that the anaerobic Digester was
26

1 approved in the 2011 IS/ND and that WMAC would need to obtain a SWFP for the Digester.
2 (AR 1063, 1071-1072.) There is no substantial evidence that the effectiveness and quality of
3 composting and digesting may result in an environmental impact.
4

5 SUBSTANTIAL CHANGE IN THE PROJECT – CHANGE IN THE STORAGE OF
6 METHANE GAS

7 Petitioner Stein asserts that the 2017 DSTS changes altered the storage of methane gas by
8 omitting reference to the storage tanks at the DSTS. (POB at 19; PRB at 18-19.) Petitioner
9 asserts that the 2017 Conformance Decision does not adequately disclose or discuss the
10 production, collection, storage, and use of methane.
11

12 The 2011 IS/ND states that the anaerobic decomposition will produce methane, which
13 will be collected, stored in onsite tanks, blended with methane from the now closed Oyster Bay
14 Landfill Gas facility, and provide a renewable energy source. (AR 21-22, 27-28.) The map
15 attached to the 2011 IS/ND identifies the methane storage tanks by location. (AR 30, 34.)
16

17 The 2017 Conformance Decision does not address how the facility will manage methane
18 gas. The ACWMA staff report and the CoIWMP amendment both state only that “[t]he digester
19 facility will be fully-enclosed allowing for the collection of biomethane from the digestion
20 process” and “[t]he gas will be either utilized for on-site production of renewable energy to
21 power the Davis Street operations, or utilized as vehicle-grade renewable natural gas to power
22 WMAC’s waste hauling fleet.” (AR 9, 89.) The map presented by WMAC via Powerpoint at
23 the 2/22/17 meeting identifies the methane storage tanks by location, and there is no change in
24 location. (AR 520.)
25
26

1 Applying the fair argument standard, the court finds there is no substantial evidence that
2 any change in the production, collection, storage, or use of methane may have any environmental
3 impact. Petitioner's argument is that the WMAC application, the ACWMA staff report, and the
4 other documents do not set out exactly whether, or how, the production, collection, storage, or
5 use of methane will change. Petitioner has not identified any substantial evidence that there will
6 be a change in the production, collection, storage, or use of methane. Petitioner's speculation
7 about a change is not substantial evidence. (*Citizen Action, supra*, 222 Cal.App.3d at p. 756.)
8 In the absence of any identified change, the project remains the same as described in the 2011
9 IS/ND.
10

11 In addition, ACWMA's 2017 Conformance Decision contains Condition Nos. 5 and 8,
12 which require WMAC to construct and operate the DSTS in compliance with the assumptions in
13 the 2011 IS/ND and to comply with the conditions in the 2011 IS/ND. (AR 13.)
14

15 SUBSTANTIAL CHANGE IN THE PROJECT – CHANGE IN THE STORAGE OF
16 PERCOLATE LIQUID
17

18 Petitioner Stein asserts that the 2017 DSTS changes altered the storage of percolate liquid
19 by omitting reference to the storage tanks at the DSTS. (POB at 17; PRB at 18-19.)
20

21 The 2011 IS/ND states that the anaerobic decomposition will result in a percolate liquid,
22 “which is collected and stored in tanks” and “then recycled as part of the compost process.” (AR
23 22.) The map attached to the 2011 IS/ND identifies the percolate storage tanks by location. (AR
24 30, 34.) The 2011 IS/ND explains that the recycling of the percolate protects San Leandro's
25 groundwater. (AR 45.)
26

1 Neither the WMAC application nor the ACWMA staff report addressed how the facility
2 will manage percolate liquid. The map presented by WMAC via Powerpoint at the 2/22/17
3 meeting identifies the percolate liquid storage tanks by location, and there is no change in
4 location. (AR 520.)

5 Applying the fair argument standard, the court finds there is no substantial evidence that
6 any change in the storage of percolate liquid may have any environmental impact. As with the
7 methane, Petitioner's argument is that there was no disclosure or discussion of how the facility
8 will manage percolate liquid. And as with the methane argument, Petitioner's speculation about
9 a change is not substantial evidence, the absence of any identified change means the project
10 remains the same as described in the 2011 IS/ND, and ACWMA's 2017 Conformance Decision
11 at Condition Nos. 5 and 8 requires WMAC to comply with the assumptions and conditions in the
12 2011 IS/ND.
13

14 15 SUBSTANTIAL CHANGES WITH RESPECT TO THE PROJECT'S CIRCUMSTANCES

16 Petitioners have not made any argument that there is substantial evidence that raises a fair
17 argument that "[s]ubstantial changes occur with respect to the circumstances under which the
18 project is being undertaken which will require major revisions in the environmental impact
19 report." (Pub. Res. Code, sec. 21166(b); 14 CCR sec. 15162(a)(2).)
20

21 22 SUBSTANTIAL NEW INFORMATION

23 The court finds that Petitioners have not identified substantial evidence that raises a fair
24 argument that "[n]ew information, which was not known and could not have been known at the
25
26

1 time the environmental impact report was certified as complete, becomes available.” (Pub. Res.
2 Code, sec. 21166(c); 14 CCR sec. 15162(a)(3).)

3 Petitioner Stein argues that the CalEPA and BAAQD reports were significant new
4 information and that under CEQA, ACWMA was required to consider regional needs and
5 cumulative impacts. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553,
6 573 [“The local agency need not, indeed it may not, ignore regional needs and cumulative
7 impacts.”]; *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283; 14 CCR secs.
8 15125, 15206.)¹⁰

9
10 When San Leandro adopted the 2011 IS/ND, it did not have access to the CalEPA and
11 BAAQD reports. The CalEPA report is dated February 2017 and is entitled “Identifying
12 Disadvantaged Communities.” The BAAQD report is dated March 2014 and is entitled
13 “Identifying Areas with Cumulative Impacts from Air Pollution in the San Francisco Bay Area,
14 Version 2.”

15 On 3/22/17, the date of the last hearing and the date that ACWMA was to vote on the
16 DSTS issue, Petitioner Stein referenced the CalEPA and BAAQD reports. (AR 234.)

17 Applying the fair argument standard, the court finds there is no substantial evidence that
18 there was new information that the project as approved by the 2011 IS/ND may cause an
19 environmental impact. First, as a matter of procedure and evidence, the court finds that
20 Petitioner Stein’s reference to the CalEPA and BAAQD reports was too vague to add the reports
21 to the administrative record. (*Consolidated Irr. Dist. v. Superior Court, supra*, 205 Cal.App.4th
22 at pp. 724-725.)
23
24

25 ¹⁰ Under the CoIWMP, ACWMA was required to consider countywide effects and
26 environmental impacts. (AR 1363.) Petitioners have not asserted a claim for violation of the
CoIWMP. Petitioners’ sole claim is under CEQA.

1 Second, and in the alternative, the reports were not information that raised a fair
2 argument that the 2017 DSTS project might cause an environmental impact. The court applies the
3 fair argument standard based on the limited information in the administrative record. (*Sundstrom*
4 *v. County of Mendocino, supra*, 202 Cal.App.3d at p. 311.)

5 The BAAQD report is a Community at Risk Evaluation and indicates that San Leandro is
6 in Pollution Index range 70-80, which means that it is on the high end of the pollution indices.
7 (Report at pp. 24, 32.) The BAAQMD report is a high level report focused on the existence of
8 air pollution by zip code. The report does not discuss causation of air pollution and does not
9 mention the DSTS project.
10

11 The CalEPA report builds on the BAAQMD report (Report at p. 1), and concerns how
12 best to distribute funds from California's cap-and-trade program. The CalEPA report indicates
13 that San Leandro is on the high end of the pollution indices in the Bay Area. (Report at p. 11.)
14 The CalEPA Report is a high level report, does not discuss causation, and does not mention the
15 DSTS project.

16 The court is guided by *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011)
17 52 Cal.4th 155, in which a city considered a generic study regarding the impact of paper bags
18 and plastic bags and then adopted a negative declaration regarding an ordinance banning plastic
19 bags. The Court found that the generic study did not have an "evaluation of actual impacts
20 attributable to the project at hand" and therefore the issues identified in the generic study did not
21 require the city to prepare an EIR. (52 Cal.4th at pp. 171-175.) In a different context,
22 *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1396,
23 states: "CEQA does not require a lead agency to conduct every recommended test and perform
24 all recommended research to evaluate the impacts of a proposed project. The fact that additional
25
26

1 studies might be helpful does not mean that they are required.” (See also 14 CCR sec. 15204(a).)
2 CEQA does not require an agency to reopen environmental review when a commentor presents
3 new information that does not relate directly to the proposed project even if it concerns local
4 environmental quality generally.

5
6 CONCLUSION

7 The petition for a writ of mandate is DENIED. The court directs ACWMA to prepare
8 and circulate a proposed judgment and submit it to the court. (CRC rule 3.1312.)
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11 Dated: March 20, 2018



12 Ronni B. MacLaren
13 Judge of the Superior Court
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CLERK'S CERTIFICATE OF SERVICE BY MAIL
CCP 1013a (3)

CASE NAME: Stein v. Alameda County Waste Management Authority
ACTION NO.: RG17858423

I certify that, I am not a party to the within action. I served the foregoing **ORDER DENYING PETITION FOR WRIT OF MANDATE** by depositing a true copy thereof in the United States mail in Oakland, California in a sealed envelope with postage fully prepaid thereon addressed to:

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I declare under penalty of perjury that the following is true and correct

Executed on March 21, 2018 at Oakland, California.

Chad Finke,
Executive Officer/Clerk

By: Suzanne Grewal
Deputy Clerk