SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE 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 MANAGMENT OF ALAMEDA COUNTY, INC., AND CITY OF SAN LEANDRO, a municipal corporation, Real Parties in Interest.	Case No. RG17-858423 [TENTATIVE] ORDER GRANTING PETITION FOR WRIT OF MANDATE DATE MARCH 9, 2018 TIME 9:00 AM DEPT 25

The petition by Petitioners Antoinette W. Stein and Arthur R. Boone, III (collectively "Petitioners") for a writ of mandate to direct the 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 GRANTED.

SUMMARY OF FACTS AND CLAIMS

Waste Management of Alameda County ("WMAC") owns and operates the Davis Street Transfer Station at 2615 Davis Street, San Leandro, California (the "DSTS"). (AR 86-87.) In the 1990s, WMAC developed a plan to compost some green waste on site at the facility. (AR 87, 351, 377.)

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

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

1. Food Waste/Organic Recycling Facility (approximately 62,000 square feet). The Recycling Facility would "be capable of receiving and processing between 1,000 to 1,300 tpd of waste from residential and commercial generators" and "[a]n estimated 600 tpd of food and mixed organics [was] expected to be recovered for composting." (AR 21.)

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

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

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

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

1. The Food Waste/Organic Recycling Facility would be renamed the Organic Materials Recovery Facility ("OMRF") and remain approximately 62,000 square feet. The OMRF would be automated. The new facility would be capable of processing up to 300,000 tons per year (1,500 tpd assuming 200 work days per year) of waste and would be expected to recover 600,000 tpy of organics (300 tpd assuming 200 work days per year) for composting. (AR 380-381.)
2. Food Waste/Organics/Green Waste Compost Facility would be divided into the Organics Materials Composting Facility (135,000 sft) and the Organics

Digester Facility (65,000 sft), and would remain a total of approximately 200,000 square feet. (AR 380-382.)

a. The Organics Materials Composting Facility ("OCMF") would process up to 165,000 tpy (550 tpd assuming 300 work days per year[2]). (AR 381.)

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

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

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

Counsel for ACWMA asked twice whether WMAC would include the Digester in its Solid Waste Facility Permit (SWFP) application to the Local Enforcement Authority, the Alameda County Department of Public Health ("LEA"), and/or include the Digester as part of its update to the Conditional Use Permit ("CUP") from the City of San Leandro. (AR 970, 969.) WMAC responded that it would include the Digester in its SWFP application to the LEA and

[2] The OMRF would be open Monday-Saturday. (AR 382.)
[3] The Digester would run 24/7 when it contained materials. (AR 382.)

that the Digester was an approved part of the project description in San Leandro's 2011 IS/ND. (AR 968.)

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

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

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

EVIDENCE CONSIDERED

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

The court DENIES the request of Petitioner Stein for judicial notice of the California Environmental Protection Agency ("CalEPA") report dated February 2017 and the Bay Area Air Quality Management District ("BAAQMD") report dated March 2014. The court has construed the request as a request to augment the record under section 1094.5(e). Petitioner Stein referenced the reports to ACWMA in the administrative process (AR 234), but did not provide copies to ACWMA and did not provide a citation to a general Web site or a specific Web page.

Therefore, the reports were not "submitted to" ACWMA in the administrative process. (*Consolidated Irr. Dist. v. Superior Court* (2012) 205 Cal.App.4th 697, 724-725.)

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

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

The court GRANTS the request of WMAC for judicial notice of the the Alameda County Department of Environmental Health permit dated 8/1/17 for the DSTS and supporting documents and the BAAQMD permit dated 6/14/17 and report. (Exhibits B and D.) Because these documents post-date the ACWMA decision, the court does not augment the administrative record to include them.[4] The court considers these documents for purposes of ACWMA's implied arguments regarding whether it could anticipate the subsequent analysis and permitting processes and whether the CEQA review in those processes mitigated any prejudice from ACWMA's failure to comply with CEQA.

BRIEFS CONSIDERED

The court STRIKES the 10-page single-spaced brief filed by Petitioner Boone as a self-represented litigant on 10/31/17. On 9/20/17, Petitioners Stein and Boone and respondents

[4] "A court may exercise its discretion to augment an administrative record if the evidence is relevant and if it was either improperly excluded during the administrative process or it could 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.)

ACWMA and WMAC filed a stipulation stating that no later than 10/31/17 Petitioners would file an opening brief not to exceed 25 pages. The court entered the stipulation as an order. Petitioner Boone's separate brief is not permitted by the stipulation. Petitioner Boone is bound by the stipulation and order filed on 9/20/17 even though on 11/1/17 Petitioner Boone filed a notice of substitution of counsel stating that he became self-represented effective 10/30/17. (Code Civ. Proc., secs. 284, 285.) A party cannot avoid the commitments and agreements made on his or her behalf through an attorney or agent by terminating the attorney-client or principal-agent relationship. (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765 ["trial court has broad discretion … to refuse to consider papers served and filed" contrary to a rule of court]; see also *People v. Clark* (1992) 3 Cal.4th 41, 173 ["Motions and briefs of parties represented by counsel must be filed by such counsel."].)

The court DENIES the application of the Measure D Committee filed on 12/4/17 for leave to file an amicus brief. First, Petitioner Boone paid for preparation of the amicus brief. (Application, p. 2:18-19.) The court will not permit a party to exceed page limits by enlisting a third party to file an amicus brief. Second, the amicus brief asserts that ACWMA violated the language and intent of Measure D, codified as the Alameda County Waste Reduction and Recycling Act of 1990. The petition asserts two causes of action under CEQA and does not assert that ACWMA violated Measure D. "Courts generally do not consider new issues raised in amicus briefs. Instead, '[i]t is a general rule that an amicus curiae accepts a case as he or she finds it,' and '[a]micus curiae may not 'launch out upon a juridical expedition of its own unrelated to the actual appellate record.'" (*People v. Hannon* (2016) 5 Cal.App.5th 94, 105.) The court will not consider the amicus brief because it raises a new claim and improperly expands the scope of the case.

REGULATORY OVERVIEW

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

1. In 1998, San Leandro made a discretionary approval of the use permit for the Master Plan for the DSTS. The CEQA document was the 1998 IS/ND. (AR 1482-1512.) WMAC then built various facilities at the DSTS. (AR 18-20.)
2. In 2011, San Leandro made a discretionary approval of Master Plan improvements regarding the DSTS. The CEQA document was the 2011 IS/ND. (AR 15-71.)
3. In 2017, ACWMA made the discretionary Conformance Decision stating that the DSTS project was in conformance with the CoIWMP's planned goal of supporting composting and its siting criteria of using existing facilities for composting. (AR 384.) The CEQA document was the finding under Public Resources Code section 21166. (AR 5-14.) ACWMA amended the CoIWMP to add the project at the DSTS to the CoIWMP's list of System Components. (AR 8-9.)[5] Condition of Approval 5 was that the facilities would be constructed and operated in compliance with the assumptions in the 2011 IS/ND. (AR 13.)
4. The LEA, the Alameda County Department of Environmental Health, was required to make a discretionary decision to approve a SWFP for the OMCF. (AR 111, 384.) It did so after the ACWMA decision. (ACWMA RJN, Exh B.)

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

5. BAAQMD was required to make a discretionary decision to approve an "Authority to Construct" and "Permit to Operate" the OMRF. (AR 111, 384.) It did so after the ACWMA decision. (ACWMA RJN, Exh D.)

San Leandro was the "lead" agency, and after San Leandro approved the 2011 IS/ND, then ACWMA became the "responsible" agency because under its "conformance procedure" it was authorized to conduct the next discretionary approval and was therefore required to conduct any subsequent environmental study. (AR 1268, 1363, 1407.) (14 CCR sec. 15052(a)(2) [shift in lead agency designation]; 14 CCR sec. 15162(c) [subsequent environmental review].)

ADEQUACY OF THE ADMINISTRATIVE PROCESS AND ADMINISTRATIVE EXHAUSTION

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

Petitioners can only raise issues that were adequately raised in the administrative proceedings. (*Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 920.) ACWMA does not argue that Petitioners failed to exhaust their administrative remedies.

SUMMARY OF ISSUES AND CONCLUSIONS

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

The court first addresses whether the 2011 IS/ND retained informational value for the 2017 Conformance Decision. (*Friends of the College of San Mateo Gardens v. San Mateo*

County Community College District (2016) 1 Cal.5th 937.) (*Friends of the College I*). The court finds substantial evidence to support ACWMA's finding.

The court then addresses whether under Public Resources Code section 21166 the changes to the project in the 2017 Conformance Decision and/or new information require additional environmental review. (*Friends of the College I, supra*; see also *Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (2017) 11 Cal.App.5th 596, 606-607 (*Friends of the College II*)).

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

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

The court finds that Petitioners have not identified substantial evidence that the changes or the new information require additional environmental review.

ARGUMENTS NOT RELEVANT TO THE CASE

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

Petitioner Stein suggests that CEQA required ACWMA to conduct further investigation and ACWMA failed to conduct further investigation. (POB at 16:2-4; PRB art 5-6.) "CEQA does not require a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commentors." (14 CCR sec. 15204(a).) CEQA case law does, however, addresses how the court should deal with a limited factual record. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311, states:

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

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

Petitioner Stein argues that ACWMA violated CEQA's requirement that the project have an "accurate, stable and finite project description." (PRB at 10-11, 13, 18, 19; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193.) This is a re-framing of the "change in the volume of material composted and digested on site" argument as a "failure to have a clear project description" argument. The court will not consider an argument raised for the first time

in reply. In addition, the court finds the project description was adequate. (AR 79-80 [CoIWMP amendment].)

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

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

THE ACWMA DECISION THAT THE 2011 NEGATIVE DECLARATION RETAINED INFORMATIONAL VALUE FOR THE 2017 RESOLUTION.

CEQA requires public agencies to undertake environmental review before making decisions. A public agency can comply with CEQA by approving a negative declaration, a mitigated negative declaration, or environmental impact report. If there are subsequent changes to the project, then the public agency must determine whether to conduct subsequent environmental review.

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

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

1. The footprint of the buildings remains substantially the same. (AR 377-378.)

2. The volume of compost to be processed and sorted remains substantially the same. (AR 21, 380-381.)

3. The volume of compost to be produced on site might have changed.

4. The composting process remains substantially the same. (AR 377-378.)

5. The anaerobic digestion process remains substantially the same. (AR 377-378.)

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

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

STANDARD OF REVIEW

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

> When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:
>
> (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
>
> (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.

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

(See also 14 CCR sec. 15162.)

If the initial CEQA review was an environmental impact report ("EIR"), then the interests of finality are favored over the policy of favoring public comment and environmental examination. (*Melom v. City of Madera* (2010) 183 Cal.App.4th 41, 48-49.) Therefore, if the public agency has already conducted an EIR, then the court reviews the public agency's subsequent review determination for substantial evidence. (*Friends of the College I, supra,*1 Cal.5th at p. 953.)

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

[6] *City of Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465, is not relevant to 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.

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

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

SUBSTANTIAL CHANGE IN THE PROJECT – VOLUME OF MATERIAL TO BE (1) PROCESSED ON SITE AND (2) COMPOSTED AND DIGESTED ON SITE

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

WMAC and ACWMA's presentation of information could have been clearer. The information in the 2011 IS/ND and the 2017 Conformance Decision did not consistently identify the total capacity of the facility, the total amount delivered to the facility, the amount sorted at the facility, the amount of non-compost waste processed at the facility, the capacity for onsite composting, the amount of composting input, and the amount of composting output. In addition, the 2011 IS/ND used tons per day as the unit of measurement and the 2017

Conformance Decision used tons per year. This complicated the analysis of whether there was a significant change in the project.

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

WMAC's application for the 2017 Conformance Decision states:

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

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

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

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

There is no substantial evidence of a change in the total tons per day to be *processed* on site. The 2011 IS/ND permitted 1,000 tpd and the 2017 Conformance Decision states the

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

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

There is substantial evidence of a change in the total tons per day to be *composted and digested* on site. The 2011 IS/ND stated that "[b]etween 250-350 tpd will be composted on site." (AR 21.)

Petitioner Stein correctly notes that the 2017 Conformance Decision approves facilities that have a "combined daily peak capacity" of 1,000 tons per day, which is far in excess of the 350 tpd permitted by the 2011 IS/ND. (AR 381.) Breaking it down, the 2017 Conformance Decision states that the OMCF would process "up to 165,000 TPY (550 tpd assuming 300 work days per year[8]) (AR 381) and the Digester would process up "to an additional 40,000 TPY of organic materials" (133 tpd assuming 300 digesting days per year[9]) (AR 382). This suggests a capacity of 685 tpd, which is also in excess of 350 tpd.

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

[7] The OMRF would be open Monday-Saturday. (AR 382)
[8] The OMRF would be open Monday-Saturday. (AR 382)
[9] The Digester would run 24/7 when it contains materials. (AR 382.)

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

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

(AR 21.) ACWMA reads this as meaning that the 2011 IS/ND described a process where approximately 1,000 tpd of compostable material was the input into the onsite compost process and between 250-350 tpd of compost was the end product of the onsite compost process. ACWMA then asserts that the project did not change because the 2011 IS/ND permitted 1,000 tpd of input and the 2017 Conformance Decision approves a "combined daily peak capacity" of 1,000 tpd. (AR 381.)

There is substantial evidence in the administrative record to support a fair argument that the project as considered by ACWMA in 2017 did not limit the onsite composting to 350 tpd. There is no support in the administrative record for ACWMA's distinction between input into the onsite compost process and the end product of the onsite compost process. To the contrary, the statement that "[b]etween 250-350 tpd will be composted on site, and the rest of the material will be shipped for composting off site" strongly suggests that that the 250-350 tpd to be composted onsite was the input because it goes on to state "and the rest of the material will be shipped for composting off site." Furthermore, the record reflects that at the time of the Conformance Decision in 2017 ACWMA was considering a project that would "potentially constitute the largest, highest capacity, most automated, highest recovery, and most integrated organics recovery facility in the world." (AR 108.) The description as "largest, highest capacity"

certainly suggests that the facility as proposed in 2017 was going to compost more waste onsite than the facility as approved in the 2011 IS/ND.

The only evidence that the project would be limited to onsite composting of 350 tpd is in Condition 5 of the 2017 Conformance Decision, which requires WMAC to construct and operate the DSTS in compliance with the assumptions in the 2011 IS/ND (AR 13), which in turn limited composting and digesting to 350 tpd (AR 21). There is no indication that the effect of this Condition on the amount of onsite composting was disclosed, discussed, or considered as part of the 2017 Conformance Decision.

ACWMA's 2017 Conformance Decision related only to whether the DSTS was in conformance with the CoIWMP. The expected subsequent decision by the LEA regarding the SWFP much more directly related to the operation of the Composting and Digesting facilities. The LEA and the public comments therefore more directly addressed the total daily volume at the Composting and Digesting facilities.

The court's order of 2/23/18 also asked the parties to address whether in a multi-approval project, each public agency is responsible only for its aspect of the project or whether each agency must address every aspect of CEQA environmental review. After considering the supplemental briefing, the court finds that ACWMA became the lead agency under 14 CCR sec. 15052(a)(2). ACWMA therefore had the obligation to consider whether there had been substantial changes to the project that required supplemental environmental review of any aspect of the project. (Pub. Res. Code sec. 21166; 14 CCR sec. 15162; see also 14 CCR sec. 15162(c).) ACWMA's responsibility for considering environmental impacts was not limited to the matters over which it had direct regulatory control.

Applying the fair argument standard, and assuming that the volume of the composting and digesting onsite increases from 350 tpd to 1,000 tpd, there is substantial evidence that the increase in volume would have a significant environmental impact. Regarding water quality, the 2011 IS/ND states: "The proposed Project includes tanks to store the percolate liquid, which is then used as makeup to initialize the compost process forming a closed loop system. Any excess water will be conveyed to the sanitary sewer." (AR 45.) A significant increase in the tons per day of onsite composting on its face presents a fair argument that there will be a corresponding increase in the percolate liquid, which would then lead to an increase in the percolate liquid to "be conveyed to the sanitary sewer." Assuming that "percolate liquid" and "water" are synonymous, this presents a fair argument regarding an effect on water quality.[10]

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

Regarding air quality, a significant increase in the tons per day of onsite composting on its face appears to present a fair argument that there will be a corresponding effect on air quality. But, as discussed below, the composting and digesting onsite will take place in enclosed facilities

[10] The court notes that Petitioner Stein did not raise the issue that "[a]ny excess water will be conveyed to the sanitary sewer" in the opening brief or in the reply brief. The order of 2/23/18 permitted and requested simultaneous supplemental briefs, and it was only in that brief that Petitioner asserted that the conveyance of an increased volume of percolate liquid to the sanitary sewer might cause a significant environmental impact. While the court generally does not consider arguments 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.

with filters, and therefore any effect on air quality is speculative. (AR 274, 324-325.) Regarding vehicle traffic, the total volume of waste processed will not increase above 1,000 tpd and thus the possible increase in the volume of composted and digested material would not increase vehicle traffic. (AR 285.) Petitioner's air quality and vehicle traffic concerns are speculative and not supported by evidence.

The court notes that it cannot find that events occurring after a public agency's decision are substantial evidence in support of that decision, nor can the court infer that the public agency violated CEQA because another public agency took a subsequent remedial action regarding the same project. (Evid Code, sec. 1151.) That said, after the ACWMA decision, the LEA issued the 8/4/17 SWFP which states that the OMCF has a "pre-treatment processing system" with "maximum peak tonnage" of 1,000 tpd, "in vessel composting lanes" with processing capacity of 250 tpd, a "compost refining processing system" with design capacity maximum of 250 tpd, and an "anaerobic digester" capable of processing 250 to 325 tons every 2 to 3 working days. (ACWMA RJN, Exh B, page 20.) This indicates total capacity of well over 350 tpd. The LEA stated that based on public comments, it added a condition "to limit the amount of composting to a maximum of 350 tpd to correlate with the amount identified in the environmental documents (250-350 tpd) adopted for the project." (ACWMA RJN, Exh B, page 26.) The LEA decision included an express condition that states "OMCF is limited to producing 350 tons of compost per day." (ACWMA RJN, Exh B, page 17 [Condition q].)

The court gives no effect to the LEA's SWFP for two reasons. First, the LEA permit post-dates the 2017 Conformance Decision, and thus could not have affected ACWMA's 2017 Conformance Decision. Second, CEQA is designed to further "informed decisionmaking and informed public participation." (*City of Hayward v. Board of Trustees of the California State*

University (2015) 242 Cal.App.4th 833, 839.) If, as here, one public agency failed to comply with CEQA, that failure of informed decisionmaking and informed public participation is not excused or mitigated because another public agency complied with CEQA in a subsequent permit approval regarding the same project.

SUBSTANTIAL CHANGE IN THE PROJECT – CHANGE IN THE SORTING PROCESS

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

The 2011 IS/ND states that the facility will receive only source separated green waste, which would be manually sorted and transferred to the Compost facility to be mixed with other green waste. (AR 15, 18-20.) Under that procedure, household hazardous waste would be identified and removed before anaerobic digestion and composting. (AR 15, 21, 50.)

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

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

The change in the sorting process is possibly material for CEQA purposes to the extent that it "may" result in inorganic and hazardous material in the digestive process, which in turn "may" have an adverse environmental impact. Petitioner has not, however, identified any substantial evidence that hand separation does a better job than the proposed mechanical hydro-pulping process at separating organic from inorganic materials. Petitioner's speculation is not substantial evidence. (*Citizen Action, supra,* 222 Cal.App.3d at p. 756 ["speculative possibilities are not substantial evidence of environmental impact"].) At the 2/9/17 meeting, WMAC employee Shawn Tackitt stated that the mechanical hydro-pulping process is an advanced process designed to separate and remove contaminants before the composting and digestion process. (AR 326-333.)

SUBSTANTIAL CHANGE IN THE PROJECT – CHANGE IN THE COMPOSTING AND DIGESTION PROCESS

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

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

The 2017 Conformance Decision states that the facility will (1) automatically process waste in the OMRF to separate organic and recyclable materials from landfill waste and then

send the organic waste to either (2) the aerobic composting facility or (3) the anaerobic digesting facility. (AR 88-89, 380-382.)

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

1. The Composting facility will be a 135,000 square foot fully-enclosed operation. The building will house the entire composting process, and will be operated under a negative air system with exhaust vented through a biofilter to control potential odors and mitigate emissions from the composting process. (AR 88.)
2. The Digester facility will be an anaerobic process which will occur in a 65,000 square foot building. ... The digester facility will be fully-enclosed allowing for the collection of biomethane from the digestion process.... (AR 89.)

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

Regarding air quality effects, both the 2011 IS/ND and the 2017 Conformance Decision require that the composting and digestion take place in closed buildings. At the meetings on 2/9/17 (AR 275-276) and 2/22/17 (AR 234-235), Petitioner Stein, who is an environmental engineer with a PhD in air pollution control (AR 275), expressed concern about odor from the facility, expressed concern about increased volume, identified the CalEPA and BAAQMD reports, and expressed concern that San Leandro is in a high air pollution area. Expressions of concern and requests to conduct further environmental review are not substantial evidence of environmental impact. (*Parker Shattuck ,supra,* 222 Cal.App.4th at pp. 782-786 [“a suggestion

to investigate further is not evidence, much less substantial evidence, of an adverse impact"].) The letter of 3/22/17 makes a conclusory allegation that the proposed project does not address air pollution. (AR 439-446.) At the meetings on 2/9/17 and 2/22/17, WMAC employee Shawn Tackitt explained that the composting and digestion processes each have biofilter systems to treat air exhaust. (AR 266-268, 336-338.) There is no substantial evidence that the change in process may result in an environmental impact regarding local or regional air quality.

Regarding effectiveness and quality of composting and digesting, the ACWMA staff requested and obtained information on similar recovery projects operating elsewhere. (AR 667, 962-963.) The ACWMA staff also obtained confirmation that the anaerobic Digester was approved in the 2011 IS/ND and that WMAC would need to obtain a SWFP for the Digester. (AR 1063, 1071-1072.) There is no substantial evidence that the effectiveness and quality of composting and digesting may result in an environmental impact.

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

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

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

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

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

In addition, ACWMA's 2017 Conformance Decision contains Condition 5, which requires WMAC to construct and operate the DSTS in compliance with the assumptions in the 2011 IS/ND. (AR 13.)

SUBSTANTIAL CHANGE IN THE PROJECT – CHANGE IN THE STORAGE OF PERCOLATE LIQUID

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

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

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

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

SUBSTANTIAL CHANGES WITH RESPECT TO THE PROJECT'S CIRCUMSTANCES

Petitioners have not made any argument that there is substantial evidence that raises a fair argument that "[s]ubstantial changes occur with respect to the circumstances under which the

project is being undertaken which will require major revisions in the environmental impact report." (Pub. Res. Code, sec. 2166(b); 14 CCR sec. 15162.)

SUBSTANTIAL NEW INFORMATION.

The court finds that Petitioners have not identified substantial evidence that raises a fair argument that "[n]ew information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available." (Pub. Res. Code, sec. 2166(c); 14 CCR sec. 15162.)

Petitioner Stein argues that the CalEPA and BAAQD reports were significant new information and that under CEQA, ACWMA was required to consider regional needs and cumulative impacts. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 573 ["The local agency need not, indeed it may not, ignore regional needs and cumulative impacts."]; *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283; 14 CCR secs. 15125, 15206.)[11]

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

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

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

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

Second, and in the alternative, the reports were not information that raised a fair argument that the 2017 DSTS project might case an environmental impact. The court applies the fair argument standard based on the limited information in the administrative record. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.)

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

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

The court is guided by *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, in which a city considered a generic study regarding the impact of paper bags and plastic bags and then adopted a negative declaration regarding an ordinance banning plastic bags. The Court found that the generic study did not have an "evaluation of actual impacts

attributable to the project at hand" and therefore the issues identified in the generic study did not require the city to conduct an EIR. (52 Cal.4th at pp. 171-175.) In a different context, *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1396, states: "CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project. The fact that additional studies might be helpful does not mean that they are required." (See also 14 CCR sec. 15204(a).) CEQA does not require an agency to reopen environmental review when a commentor presents new information that does not relate directly to the proposed project even if it concerns local environmental quality generally.

CONCLUSION

The petition for a writ of mandate is GRANTED**.** The court directs Petitioner to prepare and circulate a proposed judgment and proposed writ and submit them to the court. (CRC rule 3.1312.)

Dated: March __, 2018

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Ronni B. MacLaren
Judge of the Superior Court