MILES LAW GROUP

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A PROFESSIONAL CORPORATION
LAND USE • ENVIRONMENT • ENTITLEMENT

smiles@mileslawgroup.com

February 13, 2012

VIA HAND DELIVERY

Honorable Andrea Alarcón
All Commissioners
City of Los Angeles
Department of Public Works
200 N. Spring St.
Los Angeles, CA 90012

Date: 4/10/12
Submitted in NO Haz WASTE Committee
Council File No: 10-1797
Item No.: 1
Deputy: ~~Adam R. Lid~~

Re: Department of Public Works – Bureau of Sanitation Board Report No. 1, February 13, 2012

Honorable Board President Alarcón:

This Office respectfully writes on behalf of several stakeholders – including environmental interests and environmentally-minded businesses, community activists, and several medium to small waste haulers and recyclers ("Stakeholders") with regard to the Bureau of Sanitation Board Report referenced above (the "Board Report"). These Stakeholders, many small businesses that have provided generations of quality service to Los Angeles residents, will be directly impacted should the recommendations of the Board Report be approved without a hard look at the mandatory requirements of the California Environmental Quality Act (Cal. Pub. Res. Code § 21000 et seq.; "CEQA") that apply to the City of Los Angeles before committing to a "project" under CEQA. Moreover, Stakeholders have several legal concerns with regard to the Board of Public Works' authority concerning waste franchises, including potential violations of the City of Los Angeles Municipal Code.

The Board Report asks that the Board of Public Works ("Board") take action to direct the Bureau of Sanitation to draft exclusive franchise agreements for the collection of solid waste from commercial, industrial, institutional, and multifamily properties in eleven collection areas. The Board Report chooses an exclusive franchise design with only one hauler per collection area. The proposed exclusive franchise will involve over 100,000 commercial accounts, 660,000 apartment units, and total approximately two million tons of waste. The Board Report selects this specific franchise design and forecloses alternatives including a non-exclusive franchise at this early stage with no competent environmental analysis whatsoever.

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This action violates CEQA. Before approving the Board Report, the Board must study this chosen alternative under CEQA, and an Environmental Impact Report ("EIR") is necessary.

Submitted herewith to be included in the record are expert comments of Matt Hagemann, P.G., C.Hg. that demonstrate a fair argument of significant, unanalyzed environmental impacts of the proposed franchise in the Staff Report. Attached to Mr. Hagemann's letter for the record are the January 23, 2012 HF&H Consultants LLC "City of Los Angeles Solid Waste Franchise Assessment Final Report" (the "HF&H Report"), the AECOM January 2012 Report titled " Economic Impact Analysis Waste Hauling Policy Framework in the City of Los Angeles" (the "AECOM Report"), the Los Angeles County Disposal Association February 2012 Report titled "An Open Franchise System for Waste Collection and Recycling in Los Angeles: The Key to Cost Control and Quality Service" (the "LACDA Report"), as well as the City of San Jose CEQA Initial Study dated May 2011 for "Commercial Collection System Redesign."

I. The Board Selects and Precommits to an Exclusive Waste Hauling Franchise Of Specific Design Without Conducting Environmental Analysis

Stakeholders believe that the Board Report, and the actions set forth therein, constitute a precommitment to an exclusive waste hauling arrangement prior to conducting any environmental analysis that is required by CEQA. CEQA requires the City of Los Angeles (the "City") to prepare and "certify the completion of, an environmental impact report on any project which they *propose to carry out or approve* that may have a significant effect on the environment." (Cal. Pub. Res. Code § 21100(a); *see also* Pub. Res. Code § 21151." "'Approval' means the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (CEQA Guidelines § 15352(a).)

Postponing the preparation of an EIR until after the City has committed to an exclusive waste hauling arrangement undermines CEQA's goal of transparency in environmental decisionmaking. Besides informing the decision makers themselves, the EIR is intended "to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action." (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86.)

Oddly enough, while many years have transpired as the City investigated options available to its solid waste operations (See, e.g., HF&H Report at pp. 7, 8), the City has neglected its obligations under CEQA to conduct timely and meaningful environmental analysis. Although the HF&H Report claims to address both environmental and financial objectives, the Report is devoid of any true environmental analysis that could possibly justify the continued deferral of environmental analysis that is reflected in the Board Report. For example, of the seventeen (17) Findings set forth in the HF&H Report at pp. 1 and 2, only Finding 9 addresses potential environmental impacts by stating, in a conclusory fashion, that: "An exclusive franchise system would result in the fewest number of commercial refuse vehicles, and minimize the environmental footprint of solid waste operations by decreasing truck traffic, vehicle emissions, pavement impacts, and noise."

Finding 9 concludes that an exclusive franchise system would minimize the environmental footprint of solid waste operations without conducting any analysis of how vehicular miles would be reduced. This is the type of analysis that is required at the earliest feasible time for a public project and well before that analysis is conducted merely as a foregone conclusion that an exclusive franchise system is the only option. For example, why eleven collection areas and one exclusive hauler, as described in the Board Report? For example, why not more collection areas and multiple haulers per area, or a non-exclusive franchise? The exclusive franchise must be studied in an EIR, along with the possible alternatives, before it is selected over the others.

Simply put, an initial study must be conducted for the five options analyzed in the HF&H Report (and other possible options not addressed by the HF&H Report). (HF&H Report, p. 11.) To select one specific franchise alternative while continuing to defer environmental analysis, as depicted in the Board Report, is a patent violation of CEQA.

In the seminal decision of *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, the California Supreme Court addressed the proper timing for CEQA compliance within the context of a private project approval by a lead agency. Addressing an "earliest commitment" standard for approval of a private project, the Supreme Court "emphasized the practical over the formal in deciding whether CEQA review can be postponed, insisting it be done early enough to serve, realistically, as a meaningful contribution to public decisions."

The Supreme Court also looked to the CEQA Guidelines governing the time for

CEQA compliance, which provides:

> "Choosing the precise time for CEQA compliance involves a balancing of competing factors. EIRs and negative declarations should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment. (1) With public projects, at the **earliest feasible time**, project sponsors shall incorporate environmental considerations into project conceptualization, design, and planning. CEQA compliance should be completed prior to acquisition of a site for a public project. (2) To implement the above principles, public agencies shall not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of CEQA compliance. For example, agencies shall not: … (B) Otherwise take any action which gives impetus to a planned or foreseeable project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project."
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> (CEQA Guidelines § 15004(b), Emphasis added; See, also, *Cedar Fair LLP v. City of Santa Clara* (2011) 194 Cal. App. 4th 1150, 1162-63.)

The facts reflected in the Board Report are clear – the City committed to an exclusive waste hauling operation on a City-wide basis prior to conducting environmental analysis for this project. The Board Report asks that the City foreclose four of the five alternatives set forth in the HF&H Report – alternatives that would ordinarily be part of CEQA review of a public project. Before the City has considered the preparation of an initial study to determine what potential environmental impacts may be associated with the reformation of waste hauling operations on a City-wide basis or even held as much as a scoping meeting, the Board Report asks the City to commit to an exclusive waste hauling operation and engage in *post hoc* environmental analysis for that commitment. This out-of-sequence decision-making process, conducted without a scintilla of environmental analysis, is an egregious violation of CEQA where public projects require the incorporation of environmental considerations at the **earliest feasible time**—not after-the-fact. (CEQA Guidelines § 15004(b).)

"A fundamental purpose of an EIR is to provide decision makers with information they can use in deciding *whether* to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved." (*Save Tara*, 45 Cal.4th at 134; emphasis in original.) No information has been provided to the decision makers (or the public) that can be used to decide whether to approve any option to the City's waste hauling operations, let alone an exclusive option. The HF&H Report and Board Report do nothing more than show the City's commitment to a preordained outcome and fail to address potential environmental effects associated with an exclusive waste hauling franchise.

II. A Fair Argument of Significant Impacts Exists From an Exclusive Franchise

"The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.)

The EIR is the "heart" of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.) CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") except in certain very limited circumstances. A negative declaration may be prepared instead of an EIR only when a lead agency determines that a project "would not have a significant effect on the environment." (Id., § 21080(c).) Such a determination may be made only if "[t]here is no substantial evidence in light of the whole record before the lead agency" that such an impact may occur. (*Id.*, § 21080(c)(1).)

A negative declaration is improper, and an EIR is required, whenever substantial evidence in the record supports a "fair argument" that significant impacts may occur, even if other substantial evidence supports the opposite conclusion. (*Mejia v. Los Angeles* (2005) 130 Cal.App.4th 322; *Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903.) "Substantial evidence includes ... expert opinion." (Pub. Res. Code § 21080(e)(1); CEQA Guidelines § 15064(f)(5).)

As discussed below, expert Matt Hagemann P.G., C.Hg. has submitted evidence herewith that establishes a fair argument that the exclusive franchise selected in the

Board Report may have significant adverse environmental impacts. An EIR is therefore required.

Mr. Hagemann opines:

> "We have concluded that there is a fair argument that this selected franchise design will negatively impact air quality, odorous emissions and traffic in the Northeast San Fernando Valley neighborhoods of Los Angeles, particularly Sun Valley, where truck trips will be concentrated . . .
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> The issue of waste destination (ie., where is the waste transferred to and disposed of) is significant. The Board Report does not meaningfully address the fact that disposal and transfer locations obviously will not exist within each of the proposed eleven collection areas, no matter how delineated. To the contrary, within the City of Los Angeles these disposal and transfer facilities are concentrated in the Northeast San Fernando Valley, as noted above . . .
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> We acknowledge that the Board Report states that truck trips will be reduced but there are absolutely no specifics provided in the Board Report that substantiate this claim. For example, the Board Report cites to and relies upon the new commercial collection program that is starting in San Jose (a City with approximately only 10% of the waste volume of Los Angeles). However, the San Jose CEQA Initial Study and Appendix A dated May 2011 (see attached Exhibit E) found that there would be an increase in both truck trips and vehicle miles under the proposed program there as a result of consolidating waste haulers . . .
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> Yet, none of this has been studied for the City of Los Angeles in the Board Report, even as the Board takes action to precommit and select a specific exclusive franchise design . . .
>
> We have concluded based on the data in the Board Report, the

HF&H Report (pp. 4-11), the AECOM Report (pp. 11-25) and LACDA Report (pp. 4-6), the potential excess waste transfer and disposal flow to destinations in the Northeast San Fernando Valley could approach about 268,000 tons. Each refuse collection truck typically hauls 20 tons; as a result this amounts to approximately 13,400 trucks, or 26,800 truck trips, annually. There is a fair argument that this will have significant, unmitigated and unstudied impacts, particularly since the proposed action is foreclosing a non-exclusive approach including smaller haulers that leads to a more equitable pattern of disposal destination. The increase in truck trips to these facilities will result in an increase in traffic, air emissions and other impacts, particularly in the Northeast San Fernando Valley . . .

All this must be studied in the case of the City of Los Angeles before any decision on the eleven exclusive collection areas is made and before foreclosing a non-exclusive franchise option. In this circumstance, the Board Report selects a specific franchise design and forecloses alternatives including a non-exclusive franchise at this early stage with no competent environmental analysis. . . .

An EIR should be prepared that addresses these issues. Before action on any specific franchise design is selected, the EIR should study all alternatives, properly disclose these impacts and provide mitigation measures that can reduce these impacts to less than significant levels."

See Hagemann letter dated February 10, 2012 with emphasis in original.

III. The City's Municipal Code Precludes the Action in the Board Report

The exclusive franchise to be selected violates the plain language of the Los Angeles Municipal Code. It violates Municipal Code sections 66.08.04, 66.32 and 66.32.4 set forth with emphasis below. We attach hereto the relevant legislative history for these Code sections as Exhibit A. As such, the proposed action is contrary to law:

L.A.M.C. § 66.08.4. FRANCHISE TERMS AND CONDITIONS.

(a) All franchises granted to persons pursuant to this division shall be non-exclusive.

L.A.M.C. § 66.32. PURPOSE AND DEFINITIONS.

In order to meet AB 939 diversion goals and the City of Los Angeles' diversion goal of 70 percent by the year 2020, private solid waste haulers and recyclers shall register with the City and display a permit decal and number issued by the City through the Department of Public Works, Bureau of Sanitation. Waste haulers shall pay an AB 939 compliance fee as set forth in this section and in sections 66.32.1 through 66.32.8 based on gross receipts of solid waste collected. Among the various purposes of this program is the goal of maintaining an open and competitive market for all companies providing solid waste and disposal services in the City.

L.A.M.C. § 66.32.4. COMPLIANCE PERMIT TERMS AND CONDITIONS.

(a) The City shall not limit the number of AB 939 Compliance Permits issued.

When interpreting this language, the court will give these words "their plain, usual, ordinary and commonsense meaning." *Tucker v. Grossmont Union High School District* (2008) 168 Cal.App.4th 640, 645. "[A]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void." *Ocean Park Assn. v. Santa Monica Rent Control Bd.* (2004) 114 Cal.App.4th 1050, 1064. Here, the terms "non-exclusive," "open and competitive" and "shall not limit" in the Los Angeles Municipal Code do not and cannot mean "exclusive." This Staff Report selects an exclusive franchise. This inconsistency with the Los Angeles Municipal Code cannot be ignored or merely explained away. As such, the proposed action is contrary to law.

IV. All Franchise Decisions Must be Approved by the City Council

Pursuant to the Los Angeles City Charter Section 390, this Board Report and all subsequent decisions on any franchise must be approved by the City Council. The Board does not have authority to make franchise decisions on its own. As Charter Section 390 provides:

> "(a) Granting of Franchises. The City may grant franchises for fixed terms, permits or privileges (Franchises) for the construction and operation of plants or works necessary or convenient for furnishing the City and its inhabitants with transportation, communication, terminal facilities, water, light, heat, power, refrigeration, storage, or any other public utility or service (Public Utility Service). The Council may prescribe the terms and conditions of the grant, and shall prescribe by ordinance the procedure for making these grants, subject to the limitations provided in the Charter and applicable law."

V. The Board Report Must Be Reviewed by the City Council's Budget and Finance Committee

As noted above, the AECOM Report is replete with data on the economic and budgetary impacts on the City of Los Angeles of the proposed action in the Staff Report to select an exclusive franchise. This proposed action must be reviewed by the City Council's Budget and Finance Committee. Pursuant to City Admin. Code Section 2.8, "It shall be the duty of each such committee to be fully informed of the business of the City included within the division to which it is assigned, and to report to the Council such information or recommendations concerning the business of such divisions as shall be necessary to enable the Council properly to legislate for such division."

Here, as set forth in City Resolution 11-1529-S3 dated January 27, 2012, these matters are the purview of the Budget and Finance Committee of the City Council whose duty is "overseeing the functions of government" including:

> "The City Budget in its entirety; expenditure of City funds; levying of taxes and fees, except City business taxes; receipt of City funds; City Attorney

liability report; refunds; claims; approval of City bond issues and other financing mechanisms which have a direct impact on the City's General Fund . . ."

Accordingly, the Board Report must be reviewed by the City Council's Budget and Finance Committee.

VI. Mailing List Request

This Office hereby respectfully requests that the City send by mail and electronic mail to the address below notice of any and all actions or hearings or related to activities undertaken, authorized, approved, permitted, licensed, or certified by the Board, Bureau of Sanitation or City concerning the Board Report or a solid waste collection franchise, including but not limited to the following:

- Notice of any public hearing in connection with the Project as required by California Planning and Zoning Law pursuant to Government Code § 65091.
- Any and all notices prepared pursuant to the California Environmental Quality Act including, but not limited to:
- Notices of any public hearing.
- Notice of approval and/or determination to carry out a project, prepared pursuant to Pub. Res. Code § 21152 or any other provision of law.
- Notice of exemption from CEQA prepared pursuant to Pub. Res. Code § 21152 or any other provision of law.

This Office is requesting notices of CEQA actions and notices of any approvals or public hearings to be held under any provision of Title 7 of the California Government Code governing California Planning and Zoning Law, as well as the City of Los Angeles Municipal Code. This request is filed pursuant to Pub. Res. Code §§ 21092.2, and 21167(f) and Government Code § 65092, which require local agencies to mail such notices to any person who has filed a written request for them with the clerk of the agency's governing body.

In sum, for all these reasons, if the Board of Public Works acts to precommit and select the proposed exclusive franchise design, my clients will have no choice but to pursue all available legal remedies.

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Thank you for consideration of this letter. Please do not hesitate to contact us if you have any questions.

Very truly yours,

MILES • LAW GROUP, P.C.

By: Stephen M. Miles

Attachs:
Legislative History Los Angeles Municipal Code sections 66.08.04, 66.32 and 66.32.4

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> All this must be studied in the case of the City of Los Angeles before any decision on the eleven exclusive collection areas is made and before foreclosing a non-exclusive franchise option. In this circumstance, the Board Report selects a specific franchise design and forecloses alternatives including a non-exclusive franchise at this early stage with no competent environmental analysis. . . .
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> An EIR should be prepared that addresses these issues. Before action on any specific franchise design is selected, the EIR should study all alternatives, properly disclose these impacts and provide mitigation measures that can reduce these impacts to less than significant levels."
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> *See Hagemann letter dated February 10, 2012 with emphasis in original.*

III. The City's Municipal Code Precludes the Action in the Board Report

The exclusive franchise to be selected violates the plain language of the Los Angeles Municipal Code. It violates Municipal Code sections 66.08.04, 66.32 and 66.32.4 set forth with emphasis below. We attach hereto the relevant legislative history for these Code sections as Exhibit A. As such, the proposed action is contrary to law:

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L.A.M.C. § 66.08.4. FRANCHISE TERMS AND CONDITIONS.

(a) All franchises granted to persons pursuant to this division shall be non-exclusive.

L.A.M.C. § 66.32. PURPOSE AND DEFINITIONS.

In order to meet AB 939 diversion goals and the City of Los Angeles' diversion goal of 70 percent by the year 2020, private solid waste haulers and recyclers shall register with the City and display a permit decal and number issued by the City through the Department of Public Works, Bureau of Sanitation. Waste haulers shall pay an AB 939 compliance fee as set forth in this section and in sections 66.32.1 through 66.32.8 based on gross receipts of solid waste collected. Among the various purposes of this program is the goal of maintaining an open and competitive market for all companies providing solid waste and disposal services in the City.

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(a) The City shall not limit the number of AB 939 Compliance Permits issued.

When interpreting this language, the court will give these words "their plain, usual, ordinary and commonsense meaning." *Tucker v. Grossmont Union High School District* (2008) 168 Cal.App.4th 640, 645. "[A]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void." *Ocean Park Assn. v. Santa Monica Rent Control Bd.* (2004) 114 Cal.App.4th 1050, 1064. Here, the terms "non-exclusive," "open and competitive" and "shall not limit" in the Los Angeles Municipal Code do not and cannot mean "exclusive." This Staff Report selects an exclusive franchise. This inconsistency with the Los Angeles Municipal Code cannot be ignored or merely explained away. As such, the proposed action is contrary to law.

IV. All Franchise Decisions Must be Approved by the City Council

Pursuant to the Los Angeles City Charter Section 390, this Board Report and all subsequent decisions on any franchise must be approved by the City Council. The Board does not have authority to make franchise decisions on its own. As Charter Section 390 provides:

> "(a) Granting of Franchises. The City may grant franchises for fixed terms, permits or privileges (Franchises) for the construction and operation of plants or works necessary or convenient for furnishing the City and its inhabitants with transportation, communication, terminal facilities, water, light, heat, power, refrigeration, storage, or any other public utility or service (Public Utility Service). The Council may prescribe the terms and conditions of the grant, and shall prescribe by ordinance the procedure for making these grants, subject to the limitations provided in the Charter and applicable law."

V. The Board Report Must Be Reviewed by the City Council's Budget and Finance Committee

As noted above, the AECOM Report is replete with data on the economic and budgetary impacts on the City of Los Angeles of the proposed action in the Staff Report to select an exclusive franchise. This proposed action must be reviewed by the City Council's Budget and Finance Committee. Pursuant to City Admin. Code Section 2.8, "It shall be the duty of each such committee to be fully informed of the business of the City included within the division to which it is assigned, and to report to the Council such information or recommendations concerning the business of such divisions as shall be necessary to enable the Council properly to legislate for such division."

Here, as set forth in City Resolution 11-1529-S3 dated January 27, 2012, these matters are the purview of the Budget and Finance Committee of the City Council whose duty is "overseeing the functions of government" including:

> "The City Budget in its entirety; expenditure of City funds; levying of taxes and fees, except City business taxes; receipt of City funds; City Attorney

liability report; refunds; claims; approval of City bond issues and other financing mechanisms which have a direct impact on the City's General Fund . . ."

Accordingly, the Board Report must be reviewed by the City Council's Budget and Finance Committee.

VI. Mailing List Request

This Office hereby respectfully requests that the City send by mail and electronic mail to the address below notice of any and all actions or hearings or related to activities undertaken, authorized, approved, permitted, licensed, or certified by the Board, Bureau of Sanitation or City concerning the Board Report or a solid waste collection franchise, including but not limited to the following:

- Notice of any public hearing in connection with the Project as required by California Planning and Zoning Law pursuant to Government Code § 65091.
- Any and all notices prepared pursuant to the California Environmental Quality Act including, but not limited to:
- Notices of any public hearing.
- Notice of approval and/or determination to carry out a project, prepared pursuant to Pub. Res. Code § 21152 or any other provision of law.
- Notice of exemption from CEQA prepared pursuant to Pub. Res. Code § 21152 or any other provision of law.

This Office is requesting notices of CEQA actions and notices of any approvals or public hearings to be held under any provision of Title 7 of the California Government Code governing California Planning and Zoning Law, as well as the City of Los Angeles Municipal Code. This request is filed pursuant to Pub. Res. Code §§ 21092.2, and 21167(f) and Government Code § 65092, which require local agencies to mail such notices to any person who has filed a written request for them with the clerk of the agency's governing body.

In sum, for all these reasons, if the Board of Public Works acts to precommit and select the proposed exclusive franchise design, my clients will have no choice but to pursue all available legal remedies.

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Thank you for consideration of this letter. Please do not hesitate to contact us if you have any questions.

Very truly yours,

MILES • LAW GROUP, P.C.

By: Stephen M. Miles

Attachs:
Legislative History Los Angeles Municipal Code sections 66.08.04, 66.32 and 66.32.4

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smiles@mileslawgroup.com

February 13, 2012

VIA HAND DELIVERY

Honorable Andrea Alarcón
All Commissioners
City of Los Angeles
Department of Public Works
200 N. Spring St.
Los Angeles, CA 90012

Re: Department of Public Works – Bureau of Sanitation Board Report No. 1, February 13, 2012

Honorable Board President Alarcón:

This Office respectfully writes on behalf of several stakeholders – including environmental interests and environmentally-minded businesses, community activists, and several medium to small waste haulers and recyclers ("Stakeholders") with regard to the Bureau of Sanitation Board Report referenced above (the "Board Report"). These Stakeholders, many small businesses that have provided generations of quality service to Los Angeles residents, will be directly impacted should the recommendations of the Board Report be approved without a hard look at the mandatory requirements of the California Environmental Quality Act (Cal. Pub. Res. Code § 21000 et seq.; "CEQA") that apply to the City of Los Angeles before committing to a "project" under CEQA. Moreover, Stakeholders have several legal concerns with regard to the Board of Public Works' authority concerning waste franchises, including potential violations of the City of Los Angeles Municipal Code.

The Board Report asks that the Board of Public Works ("Board") take action to direct the Bureau of Sanitation to draft exclusive franchise agreements for the collection of solid waste from commercial, industrial, institutional, and multifamily properties in eleven collection areas. The Board Report chooses an exclusive franchise design with only one hauler per collection area. The proposed exclusive franchise will involve over 100,000 commercial accounts, 660,000 apartment units, and total approximately two million tons of waste. The Board Report selects this specific franchise design and forecloses alternatives including a non-exclusive franchise at this early stage with no competent environmental analysis whatsoever.

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This action violates CEQA. Before approving the Board Report, the Board must study this chosen alternative under CEQA, and an Environmental Impact Report ("EIR") is necessary.

Submitted herewith to be included in the record are expert comments of Matt Hagemann, P.G., C.Hg. that demonstrate a fair argument of significant, unanalyzed environmental impacts of the proposed franchise in the Staff Report. Attached to Mr. Hagemann's letter for the record are the January 23, 2012 HF&H Consultants LLC "City of Los Angeles Solid Waste Franchise Assessment Final Report" (the "HF&H Report"), the AECOM January 2012 Report titled " Economic Impact Analysis Waste Hauling Policy Framework in the City of Los Angeles" (the "AECOM Report"), the Los Angeles County Disposal Association February 2012 Report titled "An Open Franchise System for Waste Collection and Recycling in Los Angeles: The Key to Cost Control and Quality Service" (the "LACDA Report"), as well as the City of San Jose CEQA Initial Study dated May 2011 for "Commercial Collection System Redesign."

I. The Board Selects and Precommits to an Exclusive Waste Hauling Franchise Of Specific Design Without Conducting Environmental Analysis

Stakeholders believe that the Board Report, and the actions set forth therein, constitute a precommitment to an exclusive waste hauling arrangement prior to conducting any environmental analysis that is required by CEQA. CEQA requires the City of Los Angeles (the "City") to prepare and "certify the completion of, an environmental impact report on any project which they *propose to carry out or approve* that may have a significant effect on the environment." (Cal. Pub. Res. Code § 21100(a); *see also* Pub. Res. Code § 21151." "'Approval' means the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (CEQA Guidelines § 15352(a).)

Postponing the preparation of an EIR until after the City has committed to an exclusive waste hauling arrangement undermines CEQA's goal of transparency in environmental decisionmaking. Besides informing the decision makers themselves, the EIR is intended "to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action." (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86.)

Oddly enough, while many years have transpired as the City investigated options available to its solid waste operations (See, e.g., HF&H Report at pp. 7, 8), the City has neglected its obligations under CEQA to conduct timely and meaningful environmental analysis. Although the HF&H Report claims to address both environmental and financial objectives, the Report is devoid of any true environmental analysis that could possibly justify the continued deferral of environmental analysis that is reflected in the Board Report. For example, of the seventeen (17) Findings set forth in the HF&H Report at pp. 1 and 2, only Finding 9 addresses potential environmental impacts by stating, in a conclusory fashion, that: "An exclusive franchise system would result in the fewest number of commercial refuse vehicles, and minimize the environmental footprint of solid waste operations by decreasing truck traffic, vehicle emissions, pavement impacts, and noise."

Finding 9 concludes that an exclusive franchise system would minimize the environmental footprint of solid waste operations without conducting any analysis of how vehicular miles would be reduced. This is the type of analysis that is required at the earliest feasible time for a public project and well before that analysis is conducted merely as a foregone conclusion that an exclusive franchise system is the only option. For example, why eleven collection areas and one exclusive hauler, as described in the Board Report? For example, why not more collection areas and multiple haulers per area, or a non-exclusive franchise? The exclusive franchise must be studied in an EIR, along with the possible alternatives, before it is selected over the others.

Simply put, an initial study must be conducted for the five options analyzed in the HF&H Report (and other possible options not addressed by the HF&H Report). (HF&H Report, p. 11.) To select one specific franchise alternative while continuing to defer environmental analysis, as depicted in the Board Report, is a patent violation of CEQA.

In the seminal decision of *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, the California Supreme Court addressed the proper timing for CEQA compliance within the context of a private project approval by a lead agency. Addressing an "earliest commitment" standard for approval of a private project, the Supreme Court "emphasized the practical over the formal in deciding whether CEQA review can be postponed, insisting it be done early enough to serve, realistically, as a meaningful contribution to public decisions."

The Supreme Court also looked to the CEQA Guidelines governing the time for

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CEQA compliance, which provides:

> "Choosing the precise time for CEQA compliance involves a balancing of competing factors. EIRs and negative declarations should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment. (1) With public projects, at the **earliest feasible time**, project sponsors shall incorporate environmental considerations into project conceptualization, design, and planning. CEQA compliance should be completed prior to acquisition of a site for a public project. (2) To implement the above principles, public agencies shall not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of CEQA compliance. For example, agencies shall not: ... (B) Otherwise take any action which gives impetus to a planned or foreseeable project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project."
>
> (CEQA Guidelines § 15004(b), Emphasis added; See, also, *Cedar Fair LLP v. City of Santa Clara* (2011) 194 Cal. App. 4th 1150, 1162-63.)

The facts reflected in the Board Report are clear – the City committed to an exclusive waste hauling operation on a City-wide basis prior to conducting environmental analysis for this project. The Board Report asks that the City foreclose four of the five alternatives set forth in the HF&H Report – alternatives that would ordinarily be part of CEQA review of a public project. Before the City has considered the preparation of an initial study to determine what potential environmental impacts may be associated with the reformation of waste hauling operations on a City-wide basis or even held as much as a scoping meeting, the Board Report asks the City to commit to an exclusive waste hauling operation and engage in *post hoc* environmental analysis for that commitment. This out-of-sequence decision-making process, conducted without a scintilla of environmental analysis, is an egregious violation of CEQA where public projects require the incorporation of environmental considerations at the **earliest feasible time**—not after-the-fact. (CEQA Guidelines § 15004(b).)

"A fundamental purpose of an EIR is to provide decision makers with information they can use in deciding *whether* to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved." (*Save Tara*, 45 Cal.4th at 134; emphasis in original.) No information has been provided to the decision makers (or the public) that can be used to decide whether to approve any option to the City's waste hauling operations, let alone an exclusive option. The HF&H Report and Board Report do nothing more than show the City's commitment to a preordained outcome and fail to address potential environmental effects associated with an exclusive waste hauling franchise.

II. A Fair Argument of Significant Impacts Exists From an Exclusive Franchise

"The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.)

The EIR is the "heart" of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.) CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report ("EIR") except in certain very limited circumstances. A negative declaration may be prepared instead of an EIR only when a lead agency determines that a project "would not have a significant effect on the environment." (Id., § 21080(c).) Such a determination may be made only if "[t]here is no substantial evidence in light of the whole record before the lead agency" that such an impact may occur. (*Id.*, § 21080(c)(1).)

A negative declaration is improper, and an EIR is required, whenever substantial evidence in the record supports a "fair argument" that significant impacts may occur, even if other substantial evidence supports the opposite conclusion. (*Mejia v. Los Angeles* (2005) 130 Cal.App.4th 322; *Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903.) "Substantial evidence includes ... expert opinion." (Pub. Res. Code § 21080(e)(1); CEQA Guidelines § 15064(f)(5).)

As discussed below, expert Matt Hagemann P.G., C.Hg. has submitted evidence herewith that establishes a fair argument that the exclusive franchise selected in the

Board Report may have significant adverse environmental impacts. An EIR is therefore required.

Mr. Hagemann opines:

> "We have concluded that there is a fair argument that this selected franchise design will negatively impact air quality, odorous emissions and traffic in the Northeast San Fernando Valley neighborhoods of Los Angeles, particularly Sun Valley, where truck trips will be concentrated . . .
>
> The issue of waste destination (ie., where is the waste transferred to and disposed of) is significant. The Board Report does not meaningfully address the fact that disposal and transfer locations obviously will not exist within each of the proposed eleven collection areas, no matter how delineated. To the contrary, within the City of Los Angeles these disposal and transfer facilities are concentrated in the Northeast San Fernando Valley, as noted above . . .
>
> We acknowledge that the Board Report states that truck trips will be reduced but there are absolutely no specifics provided in the Board Report that substantiate this claim. For example, the Board Report cites to and relies upon the new commercial collection program that is starting in San Jose (a City with approximately only 10% of the waste volume of Los Angeles). However, the San Jose CEQA Initial Study and Appendix A dated May 2011 (see attached Exhibit E) found that there would be an increase in both truck trips and vehicle miles under the proposed program there as a result of consolidating waste haulers . . .
>
> Yet, none of this has been studied for the City of Los Angeles in the Board Report, even as the Board takes action to precommit and select a specific exclusive franchise design . . .
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> HF&H Report (pp. 4-11), the AECOM Report (pp. 11-25) and LACDA Report (pp. 4-6), the potential excess waste transfer and disposal flow to destinations in the Northeast San Fernando Valley could approach about 268,000 tons. Each refuse collection truck typically hauls 20 tons; as a result this amounts to approximately 13,400 trucks, or 26,800 truck trips, annually. There is a fair argument that this will have significant, unmitigated and unstudied impacts, particularly since the proposed action is foreclosing a non-exclusive approach including smaller haulers that leads to a more equitable pattern of disposal destination. The increase in truck trips to these facilities will result in an increase in traffic, air emissions and other impacts, particularly in the Northeast San Fernando Valley . . .
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By: Stephen M. Miles

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