

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION IX

In the matter of	)	U.S. EPA Docket No.
	)	RCRA 09-2015-0011
CLEAN HARBORS	)	
BUTTONWILLOW, L.L.C.,	)	Complainant's Rebuttal Prehearing
	)	Exchange
	)	
	)	
	)	
<u>Respondent.</u>	)	

**Complainant's Rebuttal Prehearing Exchange**

COMPLAINANT, the United States Environmental Protection Agency, Region 9 (EPA), by and through its counsel, in response to the Chief Administrative Law Judge's December 16, 2015 PREHEARING ORDER, and pursuant to Title 40 of the Code of Federal Regulations (40 CFR) §22.19(a), respectfully submits this COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE as follows:

I. **Rebuttal to Respondent's Prehearing Exchange**

A. **Identification of Additional Evidence to Rebut Respondent's Documents in Support of Denial of Factual Allegations Not Admitted**

1. **Rebuttal Witness, US EPA, Region 9**

a. **Kandice Bellamy, Environmental Specialist, Rebuttal Fact Witness**

Complainant may call Kandice Bellamy as a potential rebuttal fact witness. Ms. Bellamy was previously identified as a fact witness in Complainant's Prehearing Exchange. Complainant may also call Ms. Bellamy to testify regarding the potential environmental harm posed by Respondent's storage of treated hazardous waste in piles on and wrapped in plastic at the Buttonwillow facility and how that practice compares to other facilities with which Ms. Bellamy is familiar.

**2. Rebuttal Witness, California Department of Toxic Substances Control.**

a. Nadine Doughman – Hazardous Substances Scientist, Fact Witness

Complainant may call Nadine Doughman as a potential rebuttal fact witness. Ms. Doughman was a Hazardous Substances Scientist at the California Department of Toxic Substances Control (DTSC) from December 1, 2011 to April 27, 2014. Ms. Doughman is currently a Hazardous Substances Engineer at the California DTSC, a position she has held since April 28, 2014. Ms. Doughman's responsibilities include conducting compliance inspections of hazardous waste management facilities, including Respondent's Buttonwillow, CA facility, among numerous others. Ms. Doughman, who works in DTSC's Chatsworth, California office, is expected to testify about inspections of the Buttonwillow facility in which she has participated. She is also expected to testify about DTSC's practices and procedures for performing inspections, including health and safety protocols associated with performing such inspections. Ms. Doughman is also expected to testify about DTSC practices and procedures pertaining to records maintained in DTSC's files regarding inspections of such facilities. She may also authenticate records relating to the Buttonwillow facility that are maintained in DTSC's hazardous waste inspection files.

**3. Other Witnesses.**

Complainant does not, at this time, anticipate the need to call any additional rebuttal witnesses. Complainant respectfully reserves the right, however, to supplement its witness list upon adequate notice to Respondents and the Chief Administrative Law Judge. In addition, Complainant reserves the right to call other witnesses identified by the Respondent or needed in response or rebuttal to Respondent's defenses.

B. **Exhibits.**

An index is provided below that identifies the exhibits included with this Complainant's Rebuttal Prehearing Exchange.<sup>1</sup>

1. **Index to Exhibits Accompanying Complainant's Rebuttal Prehearing Exchange:**

- |       |   |
|-------|---|
| CX-21 | 2009 Resource Conservation and Recovery Act (RCRA) Memorandum of Agreement Between the State of California Department of Toxic Substances Control (DTSC) and the United States Environmental Protection Agency, Region IX |
| CX-22 | DTSC Hazard Appraisal and Recognition Plan Presite Visit Form Approved as of January 14, 2013   |
| CX-23 | Inspection Notes by DTSC Inspector Anne Ekker for Compliance Evaluation Inspection of Clean Harbors Buttonwillow LLC Conducted February 26 and 27, 2013   |

2. **Other Exhibits**

Complainant respectfully reserves the right to supplement its exhibit list upon adequate notice to Respondent and the Chief Administrative Law Judge, if the need arises. In addition, Complainant may request the Court to take official notice of appropriate matters in accordance with 40 CFR § 22.22(f).

C. **Statement and/or Exhibits in Response to Respondent's Documents Identified in Support of its Denial of Allegations**

The following table includes a recitation -- in italics -- of the allegations for which Respondent has identified documents in its Prehearing Exchange, the basis for the denials set

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<sup>1</sup> The Complainant's exhibits accompanying this Rebuttal Prehearing Exchange begin with Exhibit Number CX-21, where the exhibits accompanying Complainant's Initial Prehearing Exchange left off.

forth in Respondent’s Prehearing Exchange – underlined -- and a brief statement by Complainant regarding the evidence upon which it intends to rely in rebutting Respondent’s denials and/or evidence.

<b>Paragraph from Answer</b>	<b>Brief Statement and/or Documents in Response to Documents Identified in Respondent’s Prehearing Exchange Identifying Documents in Support of its Denial of Allegations</b>	<b>Additional Documents in Support of Factual Allegations</b>
¶¶ 8, 30	<p><i>Complainant determined that Respondent violated Sections 3004 and 3005 of RCRA and the federally authorized California regulations adopted thereto.</i></p> <p><u>Respondent denies that it violated Sections 3004 and 3005 of RCRA or the federally authorized California regulations adopted pursuant thereto.</u></p> <p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange, (see, e.g., documents identified with respect to ¶ 30), in Respondent’s Prehearing Exchange and CX-21, to demonstrate that it has determined that the activities alleged constitute violations of the facility’s permit, the federally authorized California hazardous waste management regulations and RCRA.</p>	CX-21
¶¶ 9, 69	<p><i>Section 3008(g) of RCRA authorizes a civil penalty of up to \$37,500 per day for violations of Subtitle C of RCRA occurring after January 12, 2009. Complainant requests the assessment of a civil penalty of up to \$37,500 per day, as appropriate, for each day during which a violation occurred or continued.</i></p> <p><u>Respondent denies that it is subject to civil penalties of any amount or that it can be compelled to cease the temporary waste staging operations that are the subject of the Complaint.</u></p> <p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange and in Respondent’s Prehearing Exchange to demonstrate that that a civil penalty should be</p>	

Paragraph from Answer	Brief Statement and/or Documents in Response to Documents Identified in Respondent's Prehearing Exchange Identifying Documents in Support of its Denial of Allegations	Additional Documents in Support of Factual Allegations
	<p>assessed against Respondent for its violations. In addition, in accordance with 40 CFR §22.19(a)(4), Complainant reserves the right and intends to file a document in this action specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any penalty criteria set forth in RCRA. Complainant intends to file such document by no later than Friday, March 4, 2016.</p>	
<p>¶¶ 16, 32</p>	<p><i>Section 3006 of RCRA provides that authorized state hazardous waste programs are carried out under Subtitle C of RCRA. Therefore, a violation of any requirement of law under an authorized state hazardous waste program is a violation of a requirement of Subtitle C of RCRA. Respondent, in violating the authorized State hazardous waste program requirements, violated RCRA, and therefore is subject to the powers vested in the EPA Administrator by Section 3008 of RCRA.</i></p> <p><u>Respondent denies that violations of an authorized state hazardous waste program are violations of Subtitle C of RCRA. Upon the grant of final authorization to a state, the requirements of state law apply in lieu of the requirements of federal law.</u></p> <p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange, in Respondent's Prehearing Exchange, and CX-21, to demonstrate that violations of California's federally authorized hazardous waste program constitute violations of RCRA and are subject to federal enforcement by EPA.</p>	<p>CX-21</p>
<p>¶ 17</p>	<p><i>Complainant alleges that Respondent failed to comply with the cited requirements of Title 22 of the California Code of Regulations and certain hazardous waste permit conditions set forth in the facility's 1996 Permit.</i></p> <p><u>Respondent denies it violated Condition II.R.1 or its Supplemental Landfill Operations Plan.</u></p>	

Paragraph from Answer	Brief Statement and/or Documents in Response to Documents Identified in Respondent’s Prehearing Exchange Identifying Documents in Support of its Denial of Allegations	Additional Documents in Support of Factual Allegations
	<p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange, and in Respondent’s Prehearing Exchange to demonstrate that Respondent violated conditions of its 1996 Permit and the federally authorized California hazardous waste management regulations.</p>	
¶ 24	<p><i>Complainant alleges that Respondent was engaged in the “disposal” of solid and hazardous waste as defined in California H&amp;SC Section 25113 and 22 CCR § 66260.10 at the time of the violations alleged in this Complaint.</i></p> <p><u>Respondent denies that the management of treated hazardous wastes in temporary staging piles, in accordance with Respondent’s permit, constitutes “disposal.”</u></p> <p>Complainant intends to rely on Respondent’s admission that it is engaged in the business of “disposal” of certain hazardous wastes at the Buttonwillow facility as defined under California and federal law.</p>	
¶ 25, 26, 40	<p><i>Complainant alleges that Respondent was engaged in the “land disposal” of hazardous waste as defined in 22 CCR § 66260.10 and that Respondent generated, stored, treated and/or disposed of “hazardous waste” as defined in California H&amp;SC Section 25117 and 22 CCR §§ 66260.10 and 66261.3 at the time of the violations alleged in this Complaint.</i></p> <p><i>Complainant further alleges that 22 CCR § 66268.40(a) requires that a prohibited waste, be land disposed only if it meets the requirements found in the table included in that regulation and that the term “land disposal” includes the placement of hazardous waste “in or on the land, except in a corrective action management unit, and includes, but is not limited to, placement in a landfill. . .”</i></p> <p><u>Respondent denies that the temporary staging of treated restricted hazardous wastes in staging piles, within the footprint of a landfill or elsewhere, pending receipt of</u></p>	

Paragraph from Answer	Brief Statement and/or Documents in Response to Documents Identified in Respondent's Prehearing Exchange Identifying Documents in Support of its Denial of Allegations	Additional Documents in Support of Factual Allegations
	<p><u>verification sample results, constitutes "land disposal" within the meaning of RCRA Section 3004(k).</u></p> <p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange, (see, e.g., documents identified with respect to ¶¶25 and 26), in Respondent's Prehearing Exchange and on Respondent's admissions to demonstrate that Respondent was engaged in the "land disposal" of hazardous waste, that Respondent generated, stored, treated and/or disposed of "hazardous waste," and that land disposal restricted hazardous waste must meet treatment standards prior to placement in a hazardous waste landfill. Whether or not the temporary staging of treated restricted hazardous wastes in piles<sup>2</sup> at the Buttonwillow facility above such standards constitutes "land disposal" is not relevant to the allegations contained in the Complaint, which focuses on illegal storage of restricted hazardous waste and Respondent's non-compliance with the conditions of its 1996 Permit.</p>	
¶ 29	<p><i>The purpose of EPA's October 2010 hazardous waste inspection at Respondent's Buttonwillow facility was to determine the facility's compliance with RCRA.</i></p> <p><u>Respondent denies that the purpose of EPA's October 2010 inspection at the Buttonwillow facility was "to determine compliance with RCRA."</u></p> <p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange, (see, e.g., documents identified with respect to ¶ 29), and in Respondent's Prehearing Exchange to demonstrate that the purpose of</p>	

<sup>2</sup> Complainant is using the terms "pile" or "piles" to refer to the treated waste staged on top of the landfill pending treatment verification at the Buttonwillow facility throughout this Rebuttal Prehearing Exchange. Other terms such as "staging pile" or "temporary staging pile" may have a particular regulatory meaning which is not applicable to this action.

Paragraph from Answer	Brief Statement and/or Documents in Response to Documents Identified in Respondent's Prehearing Exchange Identifying Documents in Support of its Denial of Allegations	Additional Documents in Support of Factual Allegations
	Complainant's October 2010 hazardous waste inspection was to determine the facility's compliance with RCRA.	
¶ 31, 37	<p><i>Complainant determined that Respondent violated provisions of the California hazardous waste program, and the facility's hazardous waste permit. 22 CCR § 66270.30(a) requires that the permittee comply with all conditions of the permit. Noncompliance with a permit is a violation and is grounds for enforcement.</i></p> <p><u>Respondent denies that it violated authorized state regulations or the provisions of its hazardous waste permit.</u></p> <p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange, (see, e.g., documents identified with respect to ¶ 31), and in Respondent's Prehearing Exchange to demonstrate that Respondent violated its permit and California hazardous waste management requirements and that such violations are grounds for enforcement.</p>	
¶¶ 41, 42, 43	<p><i>Complainant alleges that, pursuant to 22 CCR §§ 66268.50(a), (b) and (c), storage of hazardous waste that is restricted from land disposal is prohibited unless certain conditions are met.</i></p> <p><u>Respondent denies that § 66268.50(a), (b) or (c) apply to restricted waste that has already been treated and that management of such waste that has been treated but that requires further treatment to meet applicable LDRs is subject to the requirements set forth in Respondent's Waste Analysis Plan and Supplemental Landfill Operations Plan.</u></p> <p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange, and in Respondent's Prehearing Exchange to demonstrate that treated hazardous waste that fails to meet applicable land disposal restriction treatment</p>	



Paragraph from Answer	Brief Statement and/or Documents in Response to Documents Identified in Respondent's Prehearing Exchange Identifying Documents in Support of its Denial of Allegations	Additional Documents in Support of Factual Allegations
	standards is subject to the conditions for storage set forth at 22 CCR §§ 6268.50(a), (b) and (c).	
¶44	<p><i>Complainant alleges that Condition II.R.1 in the 1996 Permit establishes requirements relating to the management of treated hazardous waste at Respondent's Buttonwillow, CA facility pending disposal or retreatment of the waste.</i></p> <p><u>Respondent denies that EPA may interpret and enforce Permit Condition II.R.1. in a manner that is contrary to the manner in which it has been interpreted and enforced by DTSC for approximately 20 years.</u></p> <p>Complainant intends to rely upon Respondent's admission to demonstrate that that Permit Condition II.R.1. of the facility's 1996 permit establishes requirements relating to the management of treated hazardous waste pending disposal or retreatment of the waste.</p>	CX-22 CX-23
¶¶ 45, 46, and 49	<p><i>Complainant alleges that Condition II.R.1 in the 1996 Permit: (a) prohibits Respondent from mixing more than one stabilization batch in a waste curing area prior to post-treatment verification analysis that the wastes meet all applicable land disposal restriction requirements; and (b) imposes conditions on Respondent if more than one stabilization batch of waste is stored in a waste curing area prior to post-treatment verification analysis that the wastes meet all applicable land disposal restriction requirements. Complainant further alleges that at the time of the October 2010 EPA inspection, Respondent had placed and was storing more than one stabilization batch of treated hazardous waste in the waste curing area prior to post-treatment verification analysis that the wastes met all applicable land disposal restrictions.</i></p> <p><u>Respondent denies that it mixed waste from more than one stabilization batch in the waste curing area prior to post-treatment verification analysis.</u></p>	

Paragraph from Answer	Brief Statement and/or Documents in Response to Documents Identified in Respondent's Prehearing Exchange Identifying Documents in Support of its Denial of Allegations	Additional Documents in Support of Factual Allegations
	<p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange (see, e.g., documents identified with respect to ¶¶45, 46 and 49), in Respondent's Prehearing Exchange and on Respondent's admissions to prove the allegations set forth in ¶¶ 45, 46 and 49 of the Complaint.</p>	
<p>¶ 47</p>	<p><i>Complainant alleges that conditions imposed on Respondent under the 1996 Permit, Condition II.R.1., include provisions II.R.1.(a) through (e), relating to the waste curing bins required for storage of more than one stabilization batch of hazardous waste in the waste curing area.</i></p> <p><u>Respondent denies that it has violated any of the conditions set forth in Permit Condition II.R.1., as those conditions have been interpreted by DTSC for almost 20 years.</u></p> <p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange (see, e.g., documents identified with respect to ¶ 47), in Respondent's Prehearing Exchange and on Respondent's admissions to prove the allegations set forth in ¶ 47 of the Complaint.</p>	<p>CX-22 CX-23</p>
<p>¶¶ 48, 51</p>	<p><i>Complainant alleges that Condition II.R.1. of the 1996 Permit provides that the term "bin" for the purposes of this condition only includes prefabricated or fabricated in place receptacles, either disposable or reusable, as described in the Supplemental Landfill Operations Plan. Complainant further alleges that, at the time of EPA's October 2010 inspection, approximately 76 put piles of the Respondent's treated hazardous waste were wrapped in plastic and not placed in waste curing bins in the waste curing area atop the landfill known as WMU-34.</i></p> <p><u>Respondent denies that the term "Bin" as used in Condition II.R.1. is limited to its ordinary everyday meaning and, to the contrary, was intended to refer to any method of</u></p>	

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	<p><u>effective containment (receptacle) that might be employed by Respondent.</u></p> <p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange (see, e.g., documents identified with respect to ¶¶ 48 and 51), in Respondent's Prehearing Exchange and on Respondent's admissions to prove the allegations set forth in ¶¶48 and 51 of the Complaint.</p>	
¶ 50	<p><i>Complainant alleges that the Respondent's treated waste was placed on — and wrapped in -- plastic liners in piles atop the land-based landfill unit WMU 34 at the Facility.</i></p> <p><u>Respondent's waste curing area is located on the surface of, and within the footprint of WMU 34, as described in, and in accordance with, the Supplemental Landfill Operations Plan. The staging piles are placed on top of, and are completely covered by, heavy-duty plastic sheeting which serves to separate the waste from the ground surface and to fully contain the waste. The staging piles are positioned so that the discrete batches of stabilized waste are clearly separated from each other. The entire waste curing area is surrounded by rigid walls that are covered with heavy plastic sheeting and that serve to wall off the waste curing area from the remainder of the unit. Respondent denies that the management of treated waste as described constitutes a violation of the Permit or applicable laws or regulations.</u></p> <p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange, in Respondent's Prehearing Exchange and on Respondent's admissions to prove the allegations set forth in ¶ 50 of the Complaint.</p>	
¶¶ 52, 53, 54, and 68	<p><i>Complainant alleges that, at the time of the October 2010 inspection, nine hazardous waste piles had been placed atop WMU 34 and had remained there for longer than one year, that Respondent knew for over a year that each of the</i></p>	

Paragraph from Answer	Brief Statement and/or Documents in Response to Documents Identified in Respondent's Prehearing Exchange Identifying Documents in Support of its Denial of Allegations	Additional Documents in Support of Factual Allegations
	<p><i>piles had failed the applicable land disposal restrictions treatment standards and that the purpose of such storage for over that time period was not for the sole purpose of accumulating sufficient quantities of such wastes to facilitate proper recovery, treatment or disposal of such waste, and that such activity constitutes a violation of the 1996 Permit, RCRA and the federally authorized California hazardous waste management regulations.</i></p> <p><u>Neither Respondent's Permit nor the regulations establish a specific period of time within which waste that failed to meet LDRs after initial treatment must be re-treated.</u></p> <p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange, in Respondent's Prehearing Exchange and on Respondent's admissions to prove the allegations set forth in ¶¶ 52, 53, 54 and 68 of the Complaint.</p>	
¶ 67	<p><i>Complainant alleges that, at the time of EPA's October 2010 inspection, approximately 21 hazardous waste put piles had been stored atop the landfill known as WMU-34 for over 45 days.</i></p> <p><u>See Paragraphs 41-43. Respondent denies that staging of treated waste for a period of 45 days violates the Permit or applicable regulations.</u></p> <p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange (see, e.g., documents identified with respect to ¶67), in Respondent's Prehearing Exchange and on Respondent's admissions to prove the allegations set forth in ¶ 67 of the Complaint.</p>	
¶ 70	<p><i>Complainant alleges that the violation at issue "presents a moderate potential for harm to the environment and the regulatory program, and is a moderate deviation from the</i></p>	CX-22 CX-23

Paragraph from Answer	Brief Statement and/or Documents in Response to Documents Identified in Respondent's Prehearing Exchange Identifying Documents in Support of its Denial of Allegations	Additional Documents in Support of Factual Allegations
	<p><i>regulatory requirement. A multi-day component of the penalty is appropriate for this violation for at least a five year period, based on the continuing nature of the violation of the 1996 Permit requirement to use a waste curing bin within which to stage treated waste pending sampling analysis confirmation that the treatment was successful. As of the filing of this Complaint, no evidence has been presented to the EPA which would demonstrate that the Respondent has ceased the land disposal or storage of treated waste on — and wrapped in — plastic sheeting rather than in a waste curing bin. Thus, the continuing nature of the violation warrants an assessment of a five-year (1825 days) multi-day component. Any penalty assessed for this violation should also include recoupment of any economic benefit that accrued to the Respondent as a result of the violation.”</i></p> <p><u>Respondent denies that it is [sic] violation of its permit; Complainant cannot prove the existence of any violation, let alone a violation that was continuous for a period of five years.</u></p> <p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange and in Respondent's Prehearing Exchange to demonstrate that that a civil penalty should be assessed against Respondent for its violations. Complainant intends to show that that Respondent's use of plastic instead of bins or containers for its treated waste piles is continuous and that the Permit violations observed during Complainant's investigation in October of 2010 were continuing when the Complaint was filed and that Respondent's prehearing exchange indicates that they are continuing today. In addition, in accordance with 40 CFR §22.19(a)(4), Complainant reserves the right and intends to file a document in this action specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any penalty criteria set forth in RCRA.</p>	

Paragraph from Answer	Brief Statement and/or Documents in Response to Documents Identified in Respondent's Prehearing Exchange Identifying Documents in Support of its Denial of Allegations	Additional Documents in Support of Factual Allegations
	Complainant intends to file such document by no later than Friday, March 4, 2016.	
¶ 71	<p><i>Complainant has issued a Compliance Order requiring Respondent, in part, to: Cease all hazardous waste management activities that fail to comply with the requirements of the Hazardous Waste Management Permit issued for the Facility by the California Department of Toxic Substances Control.</i></p> <p><u>Respondent denies that it can be ordered to cease its temporary waste staging operations, which operations are in compliance with the Supplemental Landfill Operations Plan as approved by DTSC and EPA in 1991 and as incorporated by reference, without revision, into the 1996 permit.</u></p> <p>In addition to legal arguments and witness testimony, Complainant intends to rely on the documents identified in its Prehearing Exchange, in Respondent's Prehearing Exchange and on Respondent's admissions to prove the Agency has the authority, through the processes set forth in the Consolidated Rules of Practice, at 40 CFR Part 22, to compel compliance with the facility's permit as set forth in the Compliance Order Section at ¶ 71 of the Complaint.</p>	CX-22 CX-23

Complainant respectfully reserves the right to supplement this list upon adequate notice to Respondent and the Chief Administrative Law Judge, if the need arises.

D. **Statement and/or Exhibits in Response to Respondent's Support for its Affirmative Defenses**

The following table includes a brief statement by Complainant regarding the evidence upon which it intends to rely in refuting and rebutting the evidence and arguments set forth in

Respondent's Prehearing Exchange regarding each of Respondent's specific affirmative defenses. These brief statements are not intended to provide a full legal analysis of the issues presented, but are merely for the purpose of putting the Chief Administrative Law Judge and Respondent on notice as to the general nature of the arguments that Complainant intends to raise with respect to each such affirmative defense.

<b>Affirmative Defense</b>	<b>Brief Statement and/or Documents in Response to Respondent's Affirmative Defenses, as set forth in this Rebuttal Prehearing Exchange, in Complainant's Prehearing Exchange</b>	<b>Additional Documents</b>
<i>1. Failure to state facts sufficient to state a cause of action.</i>	In addition to legal arguments, Complainant intends to rely on the witnesses and documents identified in this Rebuttal Prehearing Exchange, in Complainant's Prehearing Exchange, in Respondent's Prehearing Exchange, and on Respondent's own admissions, to demonstrate that it has pled facts sufficient to state a cause of action in this matter. Nothing in the federal authorization of California's hazardous waste management program or any Memorandum of Understanding entered into by EPA and the State or any provision of Federal or State law would dictate otherwise. Moreover, Complainant intends to show: that it may enforce the Federally authorized provisions of California's hazardous waste management program; that those requirements are at least as stringent as Federal law; that there is no basis to suggest that the State interprets the Federally authorized standards in a manner less stringent than Federal law; that the Federally authorized requirements of the State's land disposal restrictions are in fact interpreted by the State in a manner that is consistent with the Federal interpretation; that the question of whether or not the piles are in or on the landfill is not at issue in this matter; that this action turns on the Respondent's violation of the permit conditions in the facility's 1996 permit and on the prohibition against the storage of land disposal restricted waste except in certain circumstances; that Respondent has failed to meet its burden to show it was necessary to store the treated	CX-21

Affirmative Defense	Brief Statement and/or Documents in Response to Respondent's Affirmative Defenses, as set forth in this Rebuttal Prehearing Exchange, in Complainant's Prehearing Exchange	Additional Documents
	waste that had not met land disposal restrictions for as long as the piles were stored on the landfill; and that Complainant has met its burden to show that such storage was not necessary.	
<i>3. Expiration of Statute of Limitations</i>	In addition to legal arguments, Complainant intends to rely on the witnesses and documents identified in this Rebuttal Prehearing Exchange, in Complainant's Prehearing Exchange, in Respondent's Prehearing Exchange, and on Respondent's own admissions to demonstrate that the continuing nature of the storage of waste in piles on the landfill, coupled with the Tolling Agreement, as amended, entered into between the Parties, demonstrate that none of Complainant's action is barred by any statute of limitations. See, e.g., <u>In re: Elementis Chromium, Inc.</u> , (Docket No. TSCA-HQ-2010-5022) (TSCA Appeal No. 13-03), EAB Final Decision and Order, dated March 15, 2013.	
<i>4. Laches</i>	In addition to legal arguments, Complainant intends to rely on the witnesses and documents identified in this Rebuttal Prehearing Exchange, in Complainant's Prehearing Exchange, in Respondent's Prehearing Exchange, and on Respondent's own admissions to demonstrate that Complainant's action is not barred by laches. Complainant intends to demonstrate that, through this action, Complainant is acting in its sovereign capacity to protect the public interest. Complainant also intends to demonstrate that it has not delayed unduly in bringing this action nor has Respondent been unduly prejudiced by any purported delay.	
<i>5. Estoppel</i>	In addition to legal arguments, Complainant intends to rely on the witnesses and documents identified in this Rebuttal Prehearing Exchange, in Complainant's Prehearing Exchange, in Respondent's Prehearing Exchange, and on Respondent's own admissions to demonstrate that Complainant's action is not barred by estoppel. Estoppel applies against the government only if the government's actions amount to "affirmative misconduct" and if other requirements,	



Affirmative Defense	Brief Statement and/or Documents in Response to Respondent's Affirmative Defenses, as set forth in this Rebuttal Prehearing Exchange, in Complainant's Prehearing Exchange	Additional Documents
	including reliance and substantial detriment, are satisfied. Complainant intends to demonstrate that these circumstances have not occurred.	
6. <i>Complainant's Actions are Arbitrary and Capricious</i>	In addition to legal arguments, Complainant intends to rely on the witnesses and documents identified in this Rebuttal Prehearing Exchange, in Complainant's Prehearing Exchange, in Respondent's Prehearing Exchange, and on Respondent's own admissions to demonstrate that the limited nature of Complainant's enforcement action against Respondent is neither arbitrary nor capricious. Indeed, Complainant intends to demonstrate that "selective enforcement" is not a basis upon which Respondent may deny the violations. Complainant also intends to show that the nature of this action, whereby Complainant seeks to enforce the explicit conditions of Respondent's permit is altogether reasonable. Complainant intends to show that Respondent's purported reliance on DTSC's purported "position" that its waste staging practices were in accordance with Respondent's actual practices was misplaced. Moreover, Complainant intends to demonstrate that there are no "new" rules that it seeks to enforce in this action and that the explicit concerns described in EPA's April 11, 2014 memorandum that specifically relate to piles being stored on top of land disposal units are not at issue here. Complainant intends to demonstrate that it has opted to address the issue of the language in Respondent's permit – that would allow treated hazardous waste to be stored on a landfill units pending verification that land disposal restrictions are met -- by working with the State with respect to the Agency's concerns. Complainant will also show that, by enforcing the provisions as set forth in the Complaint, it has <u>not</u> endorsed the storage of land disposal restricted hazardous waste on the footprint of the landfill at this facility prior to "final" disposition of the waste. In addition, Complainant intends to demonstrate that the timing of this	

<b>Affirmative Defense</b>	<b>Brief Statement and/or Documents in Response to Respondent's Affirmative Defenses, as set forth in this Rebuttal Prehearing Exchange, in Complainant's Prehearing Exchange</b>	<b>Additional Documents</b>
	enforcement action was altogether reasonable under the totality of circumstances.	
<i>7. Complainant is acting on the basis of informal guidance that violates the APA</i>	In addition to legal arguments, Complainant intends to rely on the witnesses and documents identified in this Rebuttal Prehearing Exchange, in Complainant's Prehearing Exchange, in Respondent's Prehearing Exchange, and on Respondent's own admissions to demonstrate that it is not relying on EPA's April 11, 2014 memorandum insofar as it specifically relates to piles being stored on top of land disposal units. Complainant intends to show that it is simply seeking to enforce the explicit provisions of Respondent's permit and that the issuance of the April 11, 2014 memorandum is not pertinent to the questions raised in this action regarding the location of Respondent's piles pending verification that they meet land disposal restrictions. Complainant intends to demonstrate that it has opted to address the issue of the language in Respondent's permit – that would allow treated hazardous waste to be stored on a landfill units pending verification that land disposal restrictions are met -- by working with the State with respect to the Agency's concerns. Complainant also intends to show that, even though it will not rely on the April 11, 2014 memorandum to show that the location of Respondent's piles is inconsistent with the land disposal restrictions – because that issue is not pertinent to this action -- the April 11, 2014 memorandum nonetheless provides a convenient summary of existing requirements relating to RCRA's land disposal restrictions. In addition, Complainant intends to demonstrate that nothing in the APA or any other federal rulemaking requirement would bar Complainant from pursuing enforcement of the conditions of Respondent's hazardous waste permit in this manner.	
<i>8. Respondent is being unfairly subject to</i>	In addition to legal arguments, Complainant intends to rely on the witnesses and documents identified in this Rebuttal Prehearing Exchange, in Complainant's	

<b>Affirmative Defense</b>	<b>Brief Statement and/or Documents in Response to Respondent's Affirmative Defenses, as set forth in this Rebuttal Prehearing Exchange, in Complainant's Prehearing Exchange</b>	<b>Additional Documents</b>
<i>disparate treatment.</i>	<p>Prehearing Exchange, in Respondent's Prehearing Exchange, and on Respondent's own admissions to demonstrate that Complainant's has enforcement discretion to take action or not against those who violate RCRA, and federally authorized State requirements. Moreover, Complainant intends to demonstrate that this action does not single out Respondent for disparate treatment. Complainant intends to show that "selective enforcement" is not a valid basis upon which Respondent may deny the violations because Complainant did not "single out" Respondent among a group of similarly situated violators or otherwise invidiously discriminate against it. Rather, the Complainant intends to demonstrate that it has opted to address the issue of the language in Respondent's permit – that would allow treated hazardous waste to be stored on a landfill units pending verification that land disposal restrictions are met -- by working with the State with respect to the Agency's concerns. Furthermore, Complainant intends to demonstrate that it pursued enforcement action against Respondent because it determined that Respondent was in violation of and continues to violate explicit permit provisions relating to post-treatment waste management. Complainant's decision to narrow its enforcement action to the violations of the prohibition against storage of land disposal restricted waste and the Respondent's permit conditions was reasonable, rational and appropriate. Complainant also intends to show that, in light of the enforcement discretion that courts have traditionally accorded regulatory agencies because of constraints on their resources, Complainant acted reasonably by limiting its enforcement action as set forth in the Complaint.</p>	

E. **Response to Respondent's Prehearing Exchange with Respect to the Assessment of a Penalty**

As set forth above, in accordance with 40 CFR §22.19(a)(4), Complainant reserves the right and intends to file a document in this action specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any penalty criteria set forth in RCRA. Complainant intends to file such document by no later than Friday, March 4, 2016.

In the meantime, in addition to legal arguments, Complainant intends to rely on the witnesses and documents identified in this Rebuttal Prehearing Exchange, in Complainant's Prehearing Exchange, in Respondent's Prehearing Exchange, and on Respondent's own admissions to demonstrate that Complainant's recommended penalty in this action is appropriate in light of the statutory factors, Complainant's RCRA Penalty Policy and other relevant facts pertaining to this action.

Complainant respectfully reserves the right to supplement the foregoing information upon adequate notice to Respondent and the Chief Administrative Law Judge, if the need arises.

Respectfully submitted,

U.S. ENVIRONMENTAL PROTECTION AGENCY

BY: Mimi Newton 2/26/16

MIMI NEWTON, ESQ.

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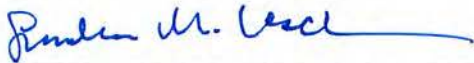
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ATTORNEY FOR COMPLAINANT

CERTIFICATE OF SERVICE

I hereby certify that the foregoing COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE dated February 26, 2016, and its attached COMPLAINANT'S EXHIBITS numbered CX 21 through CX23, were sent this day in the following manner to the addressees listed below:



2/26/2016

Sandra M. Lesch, Administrative Assistant  
U.S. EPA, Region 9  
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San Francisco, CA 94105  
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Date

One PDF Copy of Original Document and Separate (and in some cases multiple) PDF Copies of Each Exhibit Uploaded to OALJ E-Filing System for both:

Sybil Anderson  
Headquarters Hearing Clerk  
U.S. EPA  
Mail Code 1900R  
1200 Pennsylvania Ave., NW  
Washington, DC 20460-2001

And

Chief Administrative Law Judge Susan L. Biro  
Office of the Administrative Law Judges  
U.S. EPA  
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One PDF Copy of Original Document and Separate (and in some cases multiple) PDF Copies of Each Exhibit Transmitted By E-Mail To:

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