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BUTTONWILLOW, L.L.C.

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.,)	Respondent's Prehearing Exchange
)	
<u>Respondent.</u>)	

RESPONDENT, Clean Harbors Buttonwillow, L.L.C., 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 RESPONDENT'S PREHEARING EXCHANGE as follows:

I. Prehearing Exchange Directed to All Parties

A. Identification of Witnesses

1. Clean Harbors Employees

- a. Bill R. Ross, Vice President of Environment, Health and Safety, Safety-Kleen Systems, Inc., Fact Witness

Respondent may call Bill Ross as a potential fact witness. Mr. Ross is the author of the 1990 Supplemental Landfill Operations Plan which describes the manner in which treated hazardous waste will be temporarily staged within the footprint of the landfill, pending receipt of

sampling results that verify compliance with applicable Land Disposal Restrictions. Mr. Ross was employed by Laidlaw Environmental Services, Inc. (a predecessor to Clean Harbors) at the time the Operations Plan was written, and he is now employed by Safety-Kleen Systems, an affiliate of Clean Harbors. Mr. Ross will testify that the Operations Plan allows Clean Harbors to manage the treated waste in any manner that effectively contains the waste (prevents its dispersion into the environment), ensures its segregation from other batches of waste that have undergone treatment, and that allows for ready identification and retrieval of waste in the event a particular stockpile needs to be returned to the Stabilization Treatment Unit (STU) for further treatment. Mr. Ross will testify that the Operations Plan was not intended to require the facility to store waste in a traditional box or container, or in a “container” as defined in the hazardous waste regulations. See 22 CCR § 66260.10. He will also testify that the “box” or “container” (or “receptacle” or “Bin”) could be constructed of any material, including plastic of any suitable type, and could be configured in any manner that accomplishes the stated operational and environmental objectives. Mr. Ross will also testify that he and other personnel from Laidlaw Environmental Services had extensive discussions with staff from both the Department of Health Services (DHS), the predecessor to the Department of Toxic Substances Control (DTSC), and EPA Region 9 concerning the temporary staging of treated waste. He will testify that the operating practice in use today was approved by both DHS and EPA. Finally, Mr. Ross will testify that Condition II.R.1. of the facility’s Hazardous Waste Facility Permit uses terminology that was specifically intended to reflect the operational flexibility contemplated by the Supplemental Landfill Operations Plan, namely that treated waste be stored in “prefabricated or fabricated in place receptacles” (also referred to as “Bins” solely for purposes of this permit condition).

- b. Marianna Buoni, General Manager, Clean Harbors Buttonwillow, LLC, Fact Witness

Respondent may call Marianna Buoni as a potential fact witness. Ms. Buoni has been the General Manager of the Buttonwillow Facility since 1988 and has a detailed knowledge of the operating practice employed by the facility for temporary staging of treated waste. Ms. Buoni will testify that in early 1991, when the Supplemental Landfill Operations Plan was approved, the facility attempted to store treated waste in more traditional wooden containers, but found that this posed significant operational difficulties and lead to increased spillage and potential dispersal of waste. She will further testify that the facility worked closely with DHS permitting staff to refine the waste staging procedure so that it was both operationally practical and environmentally protective. Ms. Buoni will testify that the current practice that was worked out in early 1991 — placing treated waste in stockpiles that are placed on top of and thoroughly covered by plastic sheeting (Visqueen) and surrounded by plastic-lined wooden forms — was approved by DHS permitting staff and by EPA Region 9. She will testify that, with respect to treated wastes that are staged in WMU 35 (currently active), the wooden forms surrounding the staging piles are dismantled and moved on a regular basis to ensure separation of staged waste from the working area of the cell. With respect to wastes that are staged in WMU 34 (currently inactive), it is not necessary to periodically reposition the wooden forms as there is no other activity being conducted in the vicinity of the staging piles. Instead, the forms are installed at the periphery of the staging area. Ms. Buoni will also testify that the facility uses clean, native soil to secure the Visqueen around and on the piles. She will also testify that the facility's operating practice has not changed materially over the years, and remains in use today.

If the Chief Administrative Law Judge were ultimately to conclude that Respondent is in violation of its permit, Ms. Buoni will testify as to the nominal economic benefit (avoided costs) that inured to Clean Harbors as a result. Ms. Buoni will also testify that the verification sampling program conducted at the Buttonwillow Facility goes beyond what is required by applicable regulations and demonstrates with a high degree of confidence that all waste disposed of in the landfill meets applicable treatment standards. While Respondent disputes that any

penalty is warranted in this case, these sampling costs should be taken into consideration if a penalty is assessed.

- c. David B. Nielsen, P.E., Environmental Compliance Director, Clean Harbors Buttonwillow, LLC, Fact Witness

Respondent may call David Nielsen as a potential fact witness. Mr. Nielsen was hired by Laidlaw Environmental Services, Inc. in 1990 and was promoted to Environmental Compliance Director in 2002, which position he holds today. Mr. Nielsen has detailed knowledge of the permitting and regulatory requirements applicable to the facility and has participated in dozens of DTSC inspections of the facility during which waste staging operations were observed. He will testify that he worked closely with DTSC permitting staff to develop an acceptable methodology for staging treated waste in the landfill pending verification analysis. He will explain that, once the Stabilization Treatment Unit became operational, it was immediately evident that it was not feasible to load treated waste from the STU directly into individual bins or containers due to the weight of the treated waste and the force with which it drops out of the STU. He will testify that the waste staging practice in place today is the same practice that was approved by DTSC and EPA in the early 1990s, and that the Supplemental Landfill Operations Plan was intended to provide the facility with operational flexibility, while still being environmentally protective. He will testify that DTSC and EPA agreed that temporarily staging the waste in the landfill, which is underlain by a double liner and leachate collection and removal system, is the best location for wastes to be staged pending verification sampling. He will also testify that prior to this enforcement proceeding, the facility's treated waste staging practices have never been the subject of any enforcement action.

- d. Timmery Fitzpatrick, Senior Environmental Attorney, Clean Harbors Environmental Services, Inc., Fact Witness

Please see the attached Declaration of Timmery Fitzpatrick, Senior Environmental Attorney, Clean Harbors Environmental Services, Inc. Ms. Fitzpatrick conducted a file review of all Inspection Reports received by Clean Harbors or its predecessors relating to the

Buttonwillow facility from 1991 through 2015 and has summarized her conclusions in the attached declaration. Ms. Fitzpatrick's declaration is limited to factual matters of public record, and her submission of this Declaration should not be construed as a waiver of the attorney/client privilege. Ms. Fitzpatrick's Declaration states that, prior to EPA's inspection in 2010, over 90 inspections or compliance reviews were conducted at the Buttonwillow Facility by DHS/DTSC or EPA since 1991, with only five references to the facility's treated waste staging operations over that entire period, only one of which resulted in a finding of violation. As to that single instance, DTSC management ultimately agreed with facility personnel that Respondent's waste staging practices were in compliance with the facility's permit and no enforcement action was ever taken.

e. Phillip Retallick, Senior Vice President, Regulatory Affairs, Clean Harbors Environmental Services, Inc., Fact and Expert Witness

Respondent may call Phillip Retallick as a potential fact witness to testify regarding the treated waste staging practices employed by other hazardous waste landfills owned and operated by Clean Harbors in EPA Region 6 (the Lone Mountain Facility in Oklahoma) and Region 8 (the Grassy Mountain Facility in Utah). Mr. Retallick has in-depth knowledge of all operational practices at Clean Harbors' landfills and has overall responsibility for environmental compliance within the Clean Harbors organization. Mr. Retallick will testify that the RCRA Part B Permits for these other Clean Harbors facilities allow the use of temporary staging piles for management of treated restricted hazardous waste pending receipt of verification sampling results. He will also testify that the staging piles (stockpiles) at the Lone Mountain and Grassy Mountain facilities are located within the footprint of the landfills and are conducted in materially the same manner as the staging operations at Buttonwillow. Mr. Retallick will also testify, based on information and belief, that the hazardous waste landfills owned and operated by U.S. Ecology in Beatty, Nevada (EPA Region 9) and near Boise, Idaho (Region 10) also conduct temporary staging operations by stockpiling treated waste within "disposal trenches." He will further testify that each of these states (Utah, Oklahoma, Nevada and Idaho) has final authorization under

RCRA and fully endorses the use of temporary staging piles within the footprint of Minimum Technology landfills as the most operationally practical and environmentally protective means of managing treated hazardous waste prior to confirmation that applicable land disposal restrictions have been met.

Respondent may also call Mr. Retallick as an expert witness to testify regarding the appropriateness of any monetary penalty sought by Complainant in this case. Mr. Retallick served as the Chief of the RCRA Enforcement Section, EPA Region 3, from 1983-1985. In 1985, he joined the State of Delaware Department of Natural Resources and Environmental Control (DNREC) where he served as Deputy Director, Division of Air and Waste Management, from 1985-1987 overseeing the Air Quality and Hazardous and Solid Waste Programs for the State of Delaware. During this period he also served as Chairperson for the Division's Enforcement Case Review Board. In 1987, Mr. Retallick was promoted to the position of Director, Division of Air and Waste Management, overseeing all Air Quality, Solid and Hazardous Programs and managing the Environmental Police Department within DNREC. He served in this position until 1992, when he became Vice President, Compliance and Regulatory Affairs for Rollins Environmental Services, Inc. in Wilmington, Delaware. Laidlaw acquired Rollins in 1997, and Mr. Retallick has been with Laidlaw or its successors since then. During his governmental service, he had occasion to participate in the calculation and review of proposed civil penalty calculations in numerous enforcement matters. As Senior Vice President for Regulatory Affairs for Clean Harbors Environmental Services, Mr. Retallick has extensive experience in evaluating the multiple factors specified in EPA's RCRA Civil Penalty Policy and in calculating potential penalty amounts.

Mr. Retallick will testify that the extent of deviation from regulatory requirements must take into consideration DTSC's and EPA's historical approval of the temporary staging practice in the manner described, and the fact that, with a single exception, Clean Harbors was never cited for staging treated waste in this manner prior to Complainant's issuance of a Notice of Violation on November 23, 2011. He will also testify that the sole citation that Clean Harbors

received in 2000 was never pursued by DTSC based on confirmation by DTSC permitting staff that the temporary staging of waste, as described, is in compliance with Clean Harbors' permit. Mr. Retallick will further testify that over 90 compliance inspections or reviews were conducted by DTSC or EPA at the Buttonwillow Facility since 1990.

- f. Geoff Jones, P.E., Vice President, Remediation and Discontinued Operations, Clean Harbors Environmental Services, Inc., Fact and Expert Witness

Respondent may call Geoff Jones as a potential fact and expert witness to testify regarding the appropriateness of any monetary penalty sought by Complainant in this case, particularly as it relates to the Potential for Harm component of the penalty calculation. Mr. Jones was hired by USPCI, a Union Pacific Company, in 1991 and was promoted to Vice-President, Remediation & Discontinued Operations in 2002, which position he holds today. Mr. Jones has extensive experience in the detailed evaluation of contaminant fate and transport processes, with specific experience in the application of such evaluations relative to the design and monitoring of Class I landfills that comply with RCRA Minimum Technology Requirements. Mr. Jones will testify that the temporary staging of treated waste piles at the Buttonwillow facility, on top of and completely encased by plastic sheeting and surrounded by plastic-lined wooden forms that prevent dispersal of waste outside the staging area, all performed entirely within the greater area of the landfill leachate liner and control system, has virtually no potential to cause harm to the environment, particularly given the hydrogeologic conditions and potential transport pathways present at the Buttonwillow site. Mr. Jones will testify that, even if Respondent is ultimately determined to have violated its permit by staging treated waste in this manner, the violation represented only a minor Potential for Harm under EPA's civil penalty matrix.

2. Clean Harbors' Consultant

- a. Shari B. Libicki, Ph.D., Ramboll Environ Corporation, Expert Witness

Respondent may call Shari Libicki, Ph.D., Ramboll Environ Corporation, to testify regarding the appropriateness of any monetary penalty sought by Complainant in this case, also as it relates to the Potential for Harm component of the penalty calculation. Ms. Libicki has over 25 years of chemical fate and transport experience, as applied to (among other things) estimating air emissions and dispersion from chemical processes and landfills. Ms. Libicki will testify that the temporary staging of treated waste piles at the Buttonwillow facility has virtually no potential to cause harm to human health or the environment via the air pathway. Ms. Libicki will testify that, even if Respondent is ultimately determined to have violated its permit by staging treated waste in this manner, the violation represented only a minor Potential for Harm under EPA's civil penalty matrix.

A copy of Ms. Libicki's CV is provided in Respondent's Exhibit RX-34.

b. Christopher Stubbs, Ph.D., P.E., Ramboll Environ Corporation, Expert Witness

Respondent may call Christopher Stubbs, Ph.D., P.E. Ramboll Environ Corporation, to testify regarding the appropriateness of any monetary penalty sought by Complainant in this case as it relates to the Potential for Harm and Extent of Deviation components of the penalty calculation. Mr. Stubbs is a professional civil engineer in California with over 18 years of experience in environmental science and engineering, with an emphasis on groundwater hydrology and chemical fate and transport in the environment. His specific areas of expertise include groundwater modeling, statistical analysis, risk-based site assessment and remediation, exposure analysis and human health risk assessment. Mr. Stubbs will testify that, from an engineering perspective, the encapsulation of treated waste within plastic sheeting that is in good condition and repair provides equivalent containment to more traditional types of containers. He will also testify that the temporary staging of treated waste piles at the Buttonwillow facility, on top of and completely encased by plastic sheeting, within the footprint of Minimum Technology landfills, has virtually no potential to cause harm to the environment via the groundwater pathway. He will testify that, even if Respondent is ultimately determined to have violated its

permit by staging treated waste in this manner, the violation represented only a minor Potential for Harm and Minor Extent of Deviation under EPA's civil penalty matrix.

A copy of Mr. Stubbs' CV is provided in Respondent's Exhibit RX-35.

3. Other Witnesses

- a. Charles Snyder, Waste Permitting Engineer, Department of Toxic Substances Control (retired), Fact Witness

Please see the attached Declaration of Charles Snyder, who served as the primary DHS/DTSC permit engineer for the facility during the time authorization was obtained from DTSC and EPA to construct and operate the STU. Mr. Snyder was directly and extensively involved in the review and approval of the temporary waste staging process utilized by Clean Harbors and will testify that the Supplemental Landfill Operations Plan was jointly approved by DHS and EPA Region 9.

- b. Other Potential Witnesses

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

B. Exhibits

An index is provided below that identifies the exhibits included with this Prehearing Exchange. Respondent is relying on each of these documents to support the denials and Affirmative Defenses set forth in its Answer. Please note that the assignment of specific exhibits to specific denials or affirmative defenses, as set forth in the tables in Sections II.A. and II.B. below is not intended to be exclusive. In many respects, all of Respondent's exhibits support in one way or another all of Respondent's denials and affirmative defenses.

1. Index to Respondent's Exhibits

<i>NUMBER</i>		<i>DESCRIPTION</i>
RX-1		Memorandum of Agreement between State of California Department of Toxic Substances Control and The United States Environmental Protection Agency, Region IX, dated July 6, 1992
RX-2		9441.1992(37) Letter from Sylvia K. Lowrance, Director, Office of Solid Waste, USEPA, to Richard S. Wasserstrom, dated October 29 (RO 11705)
RX-3		Letter from Elizabeth A. Cotsworth, Acting Director, Office of Solid Waste, USEPA, to William R. Weissman dated August 21, 1998 (Faxback 14283)
RX-4		Declaration of Timmery Fitzpatrick and exhibits thereto
	RX-4.1	DTSC Inspection Report for June 16, 1992 inspection
	RX-4.2	EPA Inspection Report for March 3, 1994 inspection ¹
	RX-4.3	DTSC Inspection Report for October 14-16, 1998 inspection, faxed to S. Armann, EPA, Region 9
	RX-4.4	DTSC Inspection Report for March 15-16, 2000 inspection
	RX-4.5	Letter from Safety-Kleen to Patricia Barni, Unit Chief, Statewide Compliance Division, DTSC, dated June 12, 2000
	RX-4.6	DTSC Inspection Report for February 7, 2001 inspection and May 10, 2001 transmittal letter from Astrid Johnson, Unit Chief, Statewide Compliance Division, DTSC, dated May 10, 2001
	RX-4.7	DTSC Inspection Report for March 27-28, 2012 inspection
	RX-4.8	DTSC Inspection Report for February 26-27, 2013 inspection
	RX-4.9	DTSC Inspection Report for May 14-15, 2013 inspection
RX-5		Department of Health Services/Department of Toxic Substances Control Inspection Reports from 1991 to present (listed by date of inspection)
	RX-5.1	Inspection dated 1/8-9/1991
	RX-5.2	Inspection dated 1/30-31/1991
	RX-5.3	Inspection dated 3/26-27/1991
	RX-5.4	Inspection dated 5/1-2/1991
	RX-5.5	Inspection dated 5/22-23/1991

¹ In the Index of Exhibits contained on the CD sent to the Chief Administrative Law Judge on February 18, 2016, the date of this inspection contains a typographical error. The correct date of the inspection is March 3, 1994.

	RX-5.6	Inspection dated 6/5/1991
	RX-5.7	Inspection dated 6/12/1991
	RX-5.8	Inspection dated 6/20/1991
	RX-5.9	Inspection dated 7/11/1991
	RX-5.10	Inspection dated 7/17/1991
	RX-5.11	Inspection dated 7/23/1991
	RX-5.12	Inspection dated 8/14/1991
	RX-5.13	Inspection dated 8/23/1991
	RX-5.14	Inspection dated 9/5/1991
	RX-5.15	Inspection dated 9/18/1991
	RX-5.16	Inspection dated 9/25/1991
	RX-5.17	Inspection dated 10/22-23/1991
	RX-5.18	Inspection dated 12/11/1991
	RX-5.19	Inspection dated 1/9/1992
	RX-5.20	Inspection dated 1/30/1992
	RX-5.21	Inspection dated 3/25-26/1992
	RX-5.22	Inspection dated 4/21/1992
	RX-5.23	Inspection dated 6/11/1992
	RX-5.24	Inspection dated 6/16/1992
	RX-5.25	Inspection dated 7/30/1992
	RX-5.26	Inspection dated 9/16-23/1992 (no report)
	RX-5.27	Inspection dated 2/10/1993
	RX-5.28	Inspection dated 5/19/1994
	RX-5.29	Inspection dated 11/1-2/1995
	RX-5.30	Inspection dated 4/11/1996
	RX-5.31	Inspection dated 7/29/1996
	RX-5.32	Inspection dated 8/8/1996
	RX-5.33	Inspection dated 9/19/1996
	RX-5.34	Inspection dated 10/24/1996
	RX-5.35	Inspection dated 11/20-21/1996
	RX-5.36	Inspection dated 12/10/1996
	RX-5.37	Inspection dated 1/14-15/1997
	RX-5.38	Inspection dated 2/5/1997
	RX-5.39	Inspection dated 3/6/1997
	RX-5.40	Inspection dated 4/16/1997
	RX-5.41	Inspection dated 5/21/1997
	RX-5.42	Inspection dated 6/16/1997
	RX-5.43	Inspection dated 7/21/1997
	RX-5.44	Inspection dated 8/20/1997
	RX-5.45	Inspection dated 9/25/1997
	RX-5.46	Inspection dated 10/16/1997
	RX-5.47	Inspection dated 11/19-20/1997
	RX-5.48	Inspection dated 11/20/1997
	RX-5.49	Inspection dated 12/17/1997
	RX-5.50	Inspection dated 4/28/1998

	RX-5.51	Inspection dated 5/8/1998
	RX-5.52	Inspection dated 6/29/1998
	RX-5.53	Inspection dated 7/30/1998
	RX-5.54	Inspection dated 8/27/1998
	RX-5.55	Inspection dated 9/17/1998
	RX-5.56	Inspection dated 10/14-16/1998
	RX-5.57	Inspection dated 11/18/1998
	RX-5.58	Inspection dated 12/16/1998
	RX-5.59	Inspection dated 1/12/1999
	RX-5.60	Inspection dated 2/2/1999
	RX-5.61	Inspection dated 4/6/1999
	RX-5.62	Inspection dated 5/5/1999
	RX-5.63	Inspection dated 6/1/1999
	RX-5.64	Inspection dated 9/30/1999
	RX-5.65	Inspection dated 3/15-16/2000
	RX-5.66	Inspection dated 2/7/2001
	RX-5.67	Inspection dated 11/20/2001
	RX-5.68	Inspection dated 2/4-6/2002
	RX-5.69	Inspection dated 5/6-7/2002
	RX-5.70	Inspection dated 3/10-12/2003
	RX-5.71	Inspection dated 5/6/2003 (letter only)
	RX-5.72	Inspection dated 2/17-18/2004
	RX-5.73	Inspection dated 5/5-6/2004
	RX-5.74	Inspection dated 2/7-8/2005
	RX-5.75	Inspection dated 3/22/2005
	RX-5.76	Inspection dated 4/27-28/2006
	RX-5.77	Inspection dated 5/2-3/2006
	RX-5.78	Inspection dated 12/12-13/2006
	RX-5.79	Inspection dated 1/9-10,16/2008
	RX-5.80	Inspection dated 1/6-7/2009
	RX-5.81	Inspection dated 12/8-9/2009
	RX-5.82	Inspection dated 2/23/2010
	RX-5.83	Inspection dated 3/27-28/2012
	RX-5.84	Inspection dated 2/26-27/2013
	RX-5.85	Inspection dated 5/14-15/2013
	RX-5.86	Inspection dated 10/8/2014
	RX-5.87	Inspection dated 11/5/2014
	RX-5.88	Inspection dated 11/16-18/2015
RX-6		EPA Inspection Reports from 1991 to present (listed by date of inspection)
	RX-6.1	Inspection dated 3/31/1993 (letter only)
	RX-6.2	Inspection dated 3/3/1994 (EPA letter notes date as 3/24/94)
	RX-6.3	Inspection dated 5/4-5/1995

RX-7		Table: Post-Treatment Verification Sampling Results for Temporary Staging Piles Stored Over One Year
RX-8		Letter dated January 6, 2011, with Attachment 1, from Marianna Buoni, General Manager, Clean Harbors Buttonwillow, to Kaoru Morimoto, EPA Region 9, responding to EPA Request for Information
RX-9		Letter dated February 28, 2012, with Attachments, from David B. Nielsen, Landfill Compliance Director, Clean Harbors Buttonwillow, to Kaoru Morimoto, EPA Region 9, in response to EPA November 23, 2011 Notice of Violation and Request for Information
RX-10		Treated Waste Verification and Disposal SOP, dated 1/4/11
RX-11		Condition II.R.1, Hazardous Waste Facility Permit (April 6, 1996)
RX-12		Supplemental Landfill Operations Plan dated September 20, 1990
RX-13		Waste Analysis Plan, Buttonwillow Facility
RX-14		Letter dated July 25, 1991 from James M. Pappas, Chief, Land Disposal Unit, Facility Permitting Branch, DTSC to Michael Feeley, US EPA, Region 9, transmitting staff memo regarding staging of waste from the Stabilization Treatment Unit at the Laidlaw Environmental Services (Lokern) Facility
RX-15		Memo dated July 22, 1991 prepared by Charles Snyder re Events Leading To Decision To Allow Staging Of Waste Generated From the Stabilization Treatment Unit, Keren County, EPA ID No. 980675276
RX-16		Declaration of Charles Snyder, DTSC Waste Permit Engineer (retired) and exhibits thereto
	RX-16A	Letter from William Ryan, Chief, Facility Permitting Branch, DHS to Tom Chambers, Laidlaw Environmental Services, dated September 11, 1990
	RX-16B	Supplemental Landfill Operations Plan dated September 20, 1990
	RX-16C	Memo dated July 22, 1991 prepared by Charles Snyder re Events Leading To Decision To Allow Staging Of Waste Generated From the Stabilization Treatment Unit, Keren County, EPA ID No. 980675276

	RX-16D	Letter dated July 25, 1991 from James M. Pappas, Chief, Land Disposal Unit, Facility Permitting Branch, DTSC to Michael Feeley, US EPA, Region 9, transmitting staff memo regarding staging of waste from the Stabilization Treatment Unit at the Laidlaw Environmental Services (Lokern) Facility
RX-17		Email from Charles Snyder (DTSC, retired) to Kandice Bellamy, EPA Region 9, dated July 11, 2013
RX-18		Memo from Robert L. Duprey, Director, Hazardous Waste Management Division, EPA Region 8, to Sylvia Lowrance, Director, Office of Solid Waste re Temporary Staging (or “Putting”) Procedures for Lan Ban Wastes, dated December 21, 1990
RX-19		Letter from Scott Nicholson, General Manager, Lone Mountain Facility to Allyn M. Davis, Director, Hazardous Waste Management Division, EPA Region 6, dated March 18, 1991, re clarification of land disposal restrictions under HSWA
RX-20		Memo from Barnes Johnson, Director, Office of Resource Conservation and Recovery, Office of Solid Waste and Emergency Response, US EPA, entitled Land Disposal Restriction (LDR) Requirements, dated April 11, 2014
RX-21		Letter from Kelly Dixon, Director, Land Protection Division, Oklahoma Department of Environmental Quality to Barnes Johnson Director, Office of Resource Conservation and Recovery, Office of Solid Waste and Emergency Response, US EPA, dated June 6, 2014
RX-22		Letter from Scott T. Anderson, Director, Division of Solid and Hazardous Waste, Utah Department of Environmental Quality, to Barnes Johnson Director, Office of Resource Conservation and Recovery, Office of Solid Waste and Emergency Response, US EPA, dated June 27, 2014
RX-23		Oklahoma Department of Environmental Quality, Position Paper entitled “Regulatory Status of Put-Piles at Hazardous Waste Treatment, Storage and Disposal Facilities,” dated February 6, 2015 (draft)
RX-24		Email from Mike Leigh, P.E., Supervisor, Permitting Branch, Bureau of Waste Management, Nevada Department of Environmental Protection, to D. Verbica, Utah DEQ and D. Hensch, OK DEQ, dated July 30, 2015

RX-25		Excerpt from April 1, 2011 RCRA Part B Permit for Respondent's Lone Mountain Facility (Oklahoma) relating to use of temporary staging piles (Condition 8.5)
RX-26		Excerpt from September 28, 2012 RCRA Part B Permit for Respondent's Grassy Mountain Facility (Utah) relating to use of temporary staging piles (Condition VI.D.8.)
RX-27		Excerpt from December 8, 2011 RCRA Part B Permit for U.S. Ecology's Facility in Beatty, Nevada, relating to use of temporary staging piles (Condition 7.11.1 and Permit Attachment 1C, Paragraph 2) (July 2015 Revision)
RX-28		Excerpt from November 12, 2004 RCRA Part B Permit for U.S. Ecology's Grand View Facility near Boise, Idaho, relating to use of temporary staging piles (Condition VI.A.2.g.; Attachment 19, Section D.11.) (modified May 22, 2012)
RX-29		Legal justification for temporary staging piles (prepared for Clean Harbors No Migration Petition)
RX-30		Schematic of landfill liners/leachate collection and recovery systems underlying Buttonwillow WMU 34 and 35
RX-31		Manufacturer specifications on Visqueen used in Staging Area
RX-32		Photographs of Waste Staging Area in WMU 34 (taken by Clean Harbors personnel)
RX-33		Excerpt from Clean Harbor's Application for Renewal of its RCRA Part B Permit, dated October 1, 2005 (Section 4.1.4.4, Staging of Treated Waste)
RX-34		Curriculum Vitae for Shari B. Libicki, Ph.D., Ramboll Environ Corporation
RX-35		Curriculum Vitae for Christopher Stubbs, Ph.D., P.E., Ramboll Environ Corporation

2. Other Exhibits

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

Respondent may request the Court to take official notice of appropriate matters in accordance with 40 CFR § 22.22(f).

C. Location of Hearing and Estimated Time for Respondent’s Case

Pursuant to 40 CFR §§ 22.19(d) and 22.21(d), Respondent requests that the hearing be held in San Francisco, California, either at Complainant’s office at 75 Hawthorne Street or at the offices of Pillsbury Winthrop Shaw Pittman LLP, counsel for Respondent, in Four Embarcadero Center. Respondent’s business is located in Buttonwillow, California, a small rural community located approximately 260 miles from San Francisco, with limited accommodations and other resources.

Respondent anticipates that its direct case will take approximately three (3) days and does not anticipate a need for any translation services.

II. Prehearing Exchange Directed to Respondent

A. Documents in Support of Denial of Factual Allegations Not Admitted

Documents in support of the denials contained in Respondent’s Answer are included as exhibits and are identified (by “RX” numbers) in the following table. A brief statement of the denial and basis therefore is also provided, where appropriate, with reference to the corresponding paragraph of the Answer.

Paragraph from Answer	Brief Restatement of Denial of Complainant’s Factual Allegations and Brief Explanation, if appropriate	Documents in Support of Denials
¶¶8, 30	Respondent denies that it violated Sections 3004 and 3005 of RCRA or the federally authorized California regulations adopted pursuant thereto.	RX-4, w/exhibits RX-5.1-5.88 RX-6, w/exhibits RX-12 RX-14-18 RX-21-29
¶¶9, 69	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	RX-4, w/exhibits RX-5.1-5.88 RX-6 w/exhibits

	the Complaint. Such operations were approved by DTSC and EPA prior to the grant of final authorization to the state and again by DTSC in 1996. DTSC has never taken any action against Respondent in connection with its temporary waste staging operations, and has determined during repeated inspections over a period of approximately 25 years that Respondent's operations are in compliance with its hazardous waste facility permit.	RX-12 RX-14-18 RX-21-29
¶¶16, 32	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.	RX-1 RX-2 RX-3
¶17	Respondent denies it violated Condition II.R.1 or its Supplemental Landfill Operations Plan.	RX-4, w/exhibits RX-5.1-5.88 RX-6, w/exhibits RX-12 RX-14-18 RX-21-29
¶24	Respondent denies that the management of treated hazardous wastes in temporary staging piles, in accordance with Respondent's permit, constitutes "disposal."	RX-13 RX-29
¶¶25, 26, 40	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 verification sample results, constitutes "land disposal" within the meaning of RCRA Section 3004(k).	RX-29
¶29	Given EPA's lengthy history of acceptance of the temporary waste staging operations conducted by Respondent, and the fact that other hazardous waste management facilities in Region 9 and other EPA regions utilize the same practice without any apparent objection by EPA, Respondent denies that the purpose of EPA's October 2010 inspection at the Buttonwillow facility was "to determine compliance with RCRA."	RX-6.1-6.3 RX-14-16 RX-19 RX-24-28
¶¶31, 37	Respondent denies that it violated authorized state regulations or the provisions of its hazardous waste permit.	RX-4, w/exhibits RX-5.1-5.88 RX-6, w/exhibits RX-12 RX-14-18

		RX-21-29
¶¶41-43	Respondent denies that § 66268.50(a), (b) or (c) apply to restricted waste that has already been treated. Management of 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.	RX-7
¶44	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.	RX-1 RX-2 RX-3
¶¶45, 46, 49	Respondent denies that it mixed waste from more than one stabilization batch in the waste curing area prior to post-treatment verification analysis.	RX-8 RX-9
¶47	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.	RX-4, w/exhibits RX-5.1-5.88
¶¶48, 51	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 effective containment (receptacle) that might be employed by Respondent.	RX-4.8 RX-11 RX-12
¶50	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.	RX-32

¶¶52-54, 68	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.	RX-10 RX-11 RX-12
¶67	See Paragraphs 41-43. Respondent denies that staging of treated waste for a period of 45 days violates the Permit or applicable regulations.	N/A
¶70	Respondent denies that it is 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.	RX-4, w/exhibits RX-5.1-5.88
¶71	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.	RX-4, w/exhibits RX-5.1-5.88 RX-6, w/exhibits RX-11 RX-12 RX-33

Respondent intends to file Freedom of Information Act and California Public Records Act requests with EPA and DTSC, respectively, and respectfully reserves the right to supplement this list upon adequate notice to Complainant and the Chief Administrative Law Judge to include documents provided in response to the requests or otherwise, if the need arises.

B. Documents and arguments in Support of Affirmative Defenses

Each of Respondent's Affirmative Defenses is discussed below, including a brief explanation of the arguments in support of each such defense and supporting documents, where appropriate.

1. Failure to state facts sufficient to state a cause of action

Documents in support of Respondent's First Affirmative Defense are specified in the table below.

<i>Supporting Exhibit</i>	<i>Description</i>
RX-1	Memorandum of Agreement between State of California Department of Toxic Substances Control and The United States Environmental

	Protection Agency, Region IX, dated July 6, 1992
RX-2	9441.1992(37) Letter from Sylvia K. Lowrance, Director, Office of Solid Waste, USEPA, to Richard S. Wasserstrom, dated October 29 (RO 11705)
RX-3	Letter from Elizabeth A. Cotsworth, Acting Director, Office of Solid Waste, USEPA, to William R. Weissman dated August 21, 1998 (Faxback 14283)
RX-12	Supplemental Landfill Operations Plan, dated September 20, 1990
RX-13	Waste Analysis Plan, Buttonwillow Facility
RX-29	Legal justification for temporary staging piles (prepared for Clean Harbors No Migration Petition)

The State of California received final authorization under RCRA on August 1, 1992. Pursuant to the Memorandum of Agreement between State of California Department of Toxic Substances Control and The United States Environmental Protection Agency, Region IX, dated July 6, 1992 (MOA), the State assumed primary responsibility for implementing the RCRA hazardous waste program within its boundaries. Following authorization, Region 9 assumed an “advisory, contributory, and oversight role for the authorized program.” The Region also committed “to promote national consistency in implementation of the RCRA hazardous waste program.” Complainant’s actions in this case are not consistent with this obligation, as it seeks to prohibit reasonable, operationally practical and environmentally protective waste staging operations that are currently ongoing — without enforcement — at numerous other RCRA hazardous waste landfills in other authorized states including Oklahoma (Region 6), Utah (Region 8), Nevada (Region 9) and Idaho (Region 10). EPA guidance relating to the respective roles of authorized states and the federal government make it clear that decisions relating to the adequacy of waste containment features are properly left to authorized state agencies. The State of California is aware of Respondent’s waste staging operations, having approved these very practices over 25 years ago. The State has taken no enforcement action against Respondent relating to the facts alleged in the Complaint.

RCRA Section 3004(k) (42 U.S.C. § 6924(k)) prohibits the “land disposal” of restricted hazardous waste that has not been treated to meet applicable LDRs. Under RCRA section 3004(k), “land disposal” is defined as “any placement of hazardous waste into a landfill, surface impoundment, waste pile, injection well, land treatment facilities, salt dome formation, salt bed formation, or underground mine or cave.” 42 U.S.C. § 6924(k) (emphasis added). The statute does not use the phrase “on a landfill.” The term “placement” is not defined in the statute, but was intended by Congress to contemplate permanent disposition of waste in one of the enumerated units where, over time, hazardous constituents could leach into the environment if the wastes were not treated.

The temporary staging piles at the Buttonwillow Facility are located on the surface of (not in) the landfill, within the area protected by the Facility’s double liner/leachate control system and groundwater monitoring program. A further description of the waste curing area where the temporary staging piles are located is provided in Respondent’s response to Paragraph 50 of the Complaint, incorporated herein by reference. Upon confirmation that applicable treatment standards have been achieved, the waste is moved from the staging area to the landfill for disposal. Respondent conducts extensive verification sampling of treated waste that greatly exceeds the amount of sampling conducted by similarly situated facilities.

Section 3.2.3.1 of the Facility’s Waste Analysis Plan states that “[t]reated waste undergoing final placement in a landfill will . . . not be restricted from land disposal . . .” (emphasis added). Management of treated wastes in temporary staging piles is not “final placement in a landfill.”

In the limited circumstances where it is determined that applicable treatment standards were not achieved (e.g., due to unusual characteristics or heterogeneity of the waste), the waste is retrieved and returned to the STU for further treatment. Neither applicable state regulations, analogous federal regulations, the 1996 Permit, the Supplemental Landfill Operations Plan, nor the Facility’s Waste Analysis Plan specify a time limit within which waste must be retreated.

2. Failure to provide adequate notice to the State of California

Complainant's Prehearing Exchange includes a copy of the written notice dated October 29, 2014, provided to the State of California in accordance with RCRA Section 3008(a)(2). Accordingly, Respondent withdraws its Second Affirmative Defense.

3. Expiration of statute of limitations

Documents in support of Respondent's Third Affirmative Defense are specified in the table below.

<i>Supporting Exhibit</i>	<i>Description</i>
RX-4	Declaration of Timmery Fitzpatrick and all exhibits thereto
RX-14	Letter dated July 25, 1991 from James M. Pappas, Chief, Land Disposal Unit, Facility Permitting Branch, DTSC to Michael Feeley, US EPA, Region 9, transmitting staff memo regarding staging of waste from the Stabilization Treatment Unit at the Laidlaw Environmental Services (Lokern) Facility
RX-15	Memo dated July 22, 1991 prepared by Charles Snyder re Events Leading To Decision To Allow Staging Of Waste Generated From the Stabilization Treatment Unit, Keren County, EPA ID No. 980675276

There is a five-year statute of limitations under RCRA. All allegations relating to the use of temporary staging piles within the footprint of the landfill, which have been ongoing, without material change, on a continuous basis since 1991, are barred by the statute of limitations. All such claims were time barred prior to Respondent's entry into a Tolling Agreement with Complainant on December 23, 2013, and a First Amendment thereto on February 11, 2015.

4. Laches

Documents in support of Respondent's Fourth Affirmative Defense are specified in the table below.

<i>Supporting Exhibit</i>	<i>Description</i>
RX-4	Declaration of Timmery Fitzpatrick and all exhibits thereto

RX-14	Letter dated July 25, 1991 from James M. Pappas, Chief, Land Disposal Unit, Facility Permitting Branch, DTSC to Michael Feeley, US EPA, Region 9, transmitting staff memo regarding staging of waste from the Stabilization Treatment Unit at the Laidlaw Environmental Services (Lokern) Facility
RX-15	Memo dated July 22, 1991 prepared by Charles Snyder re Events Leading To Decision To Allow Staging Of Waste Generated From the Stabilization Treatment Unit, Keren County, EPA ID No. 980675276
RX-18	Memo from Robert L. Duprey, Director, Hazardous Waste Management Division, EPA Region 8, to Sylvia Lowrance, Director, Office of Solid Waste re Temporary Staging (or “Putting”) Procedures for Lan Ban Wastes, dated December 21, 1990
RX-19	Letter from Scott Nicholson, General Manager, Lone Mountain Facility to Allyn M. Davis, Director, Hazardous Waste Management Division, EPA Region 6, dated March 18, 1991, re clarification of land disposal restrictions under HSWA

EPA’s claims relating to the use of temporary staging piles are barred by laches. EPA was directly involved in the development of this practice in 1990/1991 and has been aware (or should have been aware) that the practice has been ongoing since that time. EPA took no action to object to the use of temporary staging piles until November 23, 2011.

5. Estoppel

Documents in support of Respondent’s Fifth Affirmative Defense are specified in the table below.

<i>Supporting Exhibit</i>	<i>Description</i>
RX-4	Declaration of Timmery Fitzpatrick and all exhibits thereto
RX-14	Letter dated July 25, 1991 from James M. Pappas, Chief, Land Disposal Unit, Facility Permitting Branch, DTSC to Michael Feeley, US EPA, Region 9, transmitting staff memo regarding staging of waste from the Stabilization Treatment Unit at the Laidlaw Environmental Services (Lokern) Facility
RX-15	Memo dated July 22, 1991 prepared by Charles Snyder re Events Leading To Decision To Allow Staging Of Waste Generated From the Stabilization Treatment Unit, Keren County, EPA ID No. 980675276

RX-5.63	DTSC Inspection Report dated December 18, 1998, relating to October 14-16, 1998 inspection, faxed to Steve Armann, EPA Region 9, March 19, 1999
RX-6.2	U.S. EPA Inspection Report dated May 16, 1994 (for inspection conducted on March 3, 1994)
RX-21	Declaration of Charles Snyder, DTSC Waste Permit Engineer (retired)

EPA Region 9 was directly involved in late 1990/early 1991 in the development of the waste staging plan for hazardous wastes that were treated in the Stabilization Treatment Unit. EPA conducted an unannounced Compliance Evaluation Inspection at the Laidlaw Facility on March 3, 1994² and did not identify any violations relating to temporary waste staging. While EPA could have inspected the Buttonwillow facility on a periodic basis under its oversight jurisdiction, EPA allowed 16 years to pass before it performed another inspection, which occurred in October 2010. Complainant did not even identify the use of staging piles as a violation at the time of the inspection or in its June 2, 2011 Inspection Report (EPA raised objection only to the length of time certain staging piles were allowed to remain on top of WMU 34). EPA did not identify the use of temporary staging piles within the footprint of the landfill as a violation until it issued the Notice of Violation to Respondent on November 23, 2011.

EPA Region 9 was provided with an opportunity to review and comment on the draft Hazardous Waste Facility Permit at the time it was proposed to be issued in early 1996. EPA did not raise any objection at that time to the staging of waste on the surface of the landfill or at any other time over the ensuing 15 years, up until issuance of the Notice of Violation in 2011 inspection.

6. Complainant's actions are arbitrary and capricious

Documents in support of Respondent's Sixth Affirmative Defense are specified in the table below.

² EPA's transmittal letter states that the inspection was conducted on March 24, 1994, but the attached Inspection Reports states that the inspection occurred on March 3, 1994.

<i>Supporting Exhibit</i>	<i>Description</i>
RX-14	Letter dated July 25, 1991 from James M. Pappas, Chief, Land Disposal Unit, Facility Permitting Branch, DTSC to Michael Feeley, US EPA, Region 9, transmitting staff memo regarding staging of waste from the Stabilization Treatment Unit at the Laidlaw Environmental Services (Lokern) Facility
RX-15	Memo dated July 22, 1991 prepared by Charles Snyder re Events Leading To Decision To Allow Staging Of Waste Generated From the Stabilization Treatment Unit, Keren County, EPA ID No. 980675276
RX-16	Declaration of Charles Snyder, DTSC Waste Permit Engineer (retired)
RX-18	Memo from Robert L. Duprey, Director, Hazardous Waste Management Division, EPA Region 8, to Sylvia Lowrance, Director, Office of Solid Waste re Temporary Staging (or “Putting”) Procedures for Lan Ban Wastes, dated December 21, 1990
RX-20	Memo from Barnes Johnson, Director, Office of Resource Conservation and Recovery, Office of Solid Waste and Emergency Response, US EPA, entitled Land Disposal Restriction (LDR) Requirements
RX-21	Letter from Kelly Dixon, Director, Land Protection Division, Oklahoma Department of Environmental Quality to Barnes Johnson Director, Office of Resource Conservation and Recovery, Office of Solid Waste and Emergency Response, US EPA, dated June 6, 2014
RX-22	Letter from Scott T. Anderson, Director, Division of Solid and Hazardous Waste, Utah Department of Environmental Quality, to Barnes Johnson Director, Office of Resource Conservation and Recovery, Office of Solid Waste and Emergency Response, US EPA, dated June 27, 2014
RX-23	Oklahoma Department of Environmental Quality, Position Paper entitled “Regulatory Status of Put-Piles at Hazardous Waste Treatment, Storage and Disposal Facilities,” dated February 6, 2015 (draft)
RX-24	Email from Mike Leigh, P.E., Supervisor, Permitting Branch, Bureau of Waste Management, Nevada Department of Environmental Protection, to D. Verbica, Utah DEQ, and D. Hensch, OK DEQ, dated July 30, 2015

When Complainant initiated this action through the issuance of its November 15, 2012 Notice of Intent to File an Administrative Penalty Complaint, it alleged that Respondent’s management of treated restricted hazardous waste within the footprint of the Buttonwillow

landfill constituted unlawful “land disposal” of restricted hazardous waste. EPA alleged that it was unlawful to stage treated waste within the footprint of the landfill regardless of the manner in which the staging was conducted and even if the treated waste was stored in “containers” as that term is defined in the RCRA regulations. This assertion was made despite the fact that the Buttonwillow landfill had utilized temporary waste staging piles (sometimes called “put piles”) for decades, with the concurrence of DTSC and EPA Region 9 itself. Moreover, Complainant’s position was at odds with the position of a number of other fully authorized RCRA states (Nevada, Utah, Idaho and Oklahoma) where Respondent and other commercial operators utilized temporary staging piles, located within the footprint of the landfill, as a means of managing treated restricted hazardous waste pending receipt of verification sampling results demonstrating compliance with applicable land disposal restrictions.

It is also noteworthy that, in December 1990, the use of “put piles” for post-treatment staging of wastes was brought to the attention of Sylvia Lowrance, then Director of EPA’s Office of Solid Waste, by Robert Duprey, then Director of EPA’s Hazardous Waste Management Division, Region 8. At the time, U.S. Pollution Control, Inc. (USPCI) owned and operated the Grassy Mountain hazardous waste management facility in Utah. Mr. Duprey’s memo requested specific guidance from the Office of Solid Waste as to the whether the use of “put piles” constituted “placement” and would violate the land ban insofar as some percentage of the waste might be shown not to meet the treatment standards after initial treatment. In March 1991, the General Manager of USPCI’s Lone Mountain Facility in Oklahoma requested the same guidance from EPA Region 6. Safety-Kleen acquired both of these facilities in 2002, and they are now owned and operated by Clean Harbors.

As far as Respondent is aware, neither the Office of Solid Waste, nor either of the EPA regional offices, issued any guidance forbidding the use of put piles, and this operating practice has been safely used at these facilities since at least 1990. It is also evident from Mr. Duprey’s letter that Region 6 generally supported the temporary staging or “putting procedure” utilized by USPCI from a technical and operational perspective. The timing of these communications

coincides with DTSC's and EPA's original approval of Clean Harbors' temporary waste staging practice at the Buttonwillow Facility. Thereafter, EPA did not issue any guidance or directive concerning the use of "put piles" until April 2014, as discussed below.

After filing Notice of Intent to File an Administrative Complaint in this matter, but lacking any legal authority for its position that temporary staging piles within the footprint of a landfill constitute unlawful "land disposal" under RCRA, Complainant sought issuance of a memorandum in support of its position from the Director of the Office of Resource Conservation and Recovery at EPA Headquarters. On April 11, 2014, Mr. Barnes Johnson issued a memo which states that restricted hazardous waste that does not meet applicable treatment standards may not be "placed" in or on a landfill, regardless of the manner of placement, unless the owner or operator has obtained a No Migration Variance from EPA. As asserted in Respondent's Seventh Affirmative Defense, this informal memorandum constitutes a new rule of national application and significance which should have been subject to formal notice and comment rulemaking, and other appropriate analysis, as required by the Administrative Procedure Act (APA) and other requirements relating to the adoption of federal rules.

Notwithstanding the April 2014 memorandum from Barnes Johnson (and indeed contrary to that memo), Complainant has now abandoned its position in this case that treated wastes may not be staged within the footprint of the landfill. Complainant's reversal of position on this issue is based on the provisions of the Buttonwillow permit (namely, the Supplemental Landfill Operations Plan) that expressly allow staging of waste within the footprint of the landfill. Complainant now admits that Respondent is authorized to stage treated waste in a waste curing area on top of the landfill, claiming instead that the waste must be stored in individual "study boxes or containers." Respondent disputes this interpretation of the permit.

The RCRA Part B Permit for the Buttonwillow Facility has historically been interpreted by the Department of Toxic Substances Control to allow the use of temporary staging piles as described herein. As a fully authorized RCRA agency, DTSC's interpretation of its own permit

is controlling. EPA’s Complaint ignores essential facts regarding the Buttonwillow Facility, namely that the temporary staging piles (which are themselves staged on and completely covered by plastic) are further contained within a fabricated, plastic-draped, rigid structure that holds and isolates the waste. DTSC considers this structure, which encloses the fully encased stockpiles, to constitute an appropriate receptacle that meets the requirements of the 1996 Permit. This interpretation of the permit was confirmed in a July 11, 2013 email from Charles Snyder, the now-retired DTSC permit engineer for the Buttonwillow Facility, to Kandice Bellamy, Environmental Specialist, USEPA, Region 9 (identified as a Fact Witness by Complainant). Complainant’s Prehearing Exchange does not contain any evidence that Ms. Bellamy or anyone else at EPA Region 9 communicated with DTSC in mid-2013 regarding the information contained in Mr. Snyder’s email. Indeed, the only direct written communication between EPA Region 9 and DTSC contained in Complainant’s Prehearing Exchange is the October 29, 2014 notice letter required by RCRA Section 3008(a)(2).

Respondent’s witnesses will testify that the Department of Toxic Substances Control has never taken enforcement action against Respondent in connection with its use of temporary staging piles or communicated any “official position” to Respondent relating to this matter. Complainant’s brief description of Mr. Nieto’s forthcoming testimony, as set forth in Complainant’s Prehearing Exchange, is the first and only suggestion that DTSC may “officially” have changed its interpretation of Condition II.R.1. Respondent submits that this change in interpretation, if true, may only be accomplished by modification of the permit.

7. Complainant is acting on the basis of informal guidance that violates the APA

Documents in support of Respondent’s Seventh Affirmative Defense are specified in the table below.

<i>Supporting Exhibit</i>	<i>Description</i>
RX-20	Memo from Barnes Johnson, Director, Office of Resource Conservation and Recovery, Office of Solid Waste and Emergency Response, US

	EPA, entitled Land Disposal Restriction (LDR) Requirements
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The April 2014 memorandum from Barnes Johnson constitutes a *de facto* rule which was adopted in violation of the rulemaking requirements of the Administrative Procedures Act and other federal rulemaking requirements. The memo purports to establish a federal rule that applies on a nationwide basis to management of all restricted hazardous waste, including such wastes that are managed in states with final authorization under RCRA. No justification is provided for the rule, which has major operational and economic implications for all RCRA Part B hazardous waste landfills around the country. Written objections to the memorandum were submitted to EPA by the Utah Department of Environmental Quality and the Oklahoma Department of Environmental Quality, both of which specifically endorse the use of temporary staging piles and have permitted this practice at hazardous waste landfills operated in those authorized states. EPA’s failure to comply with the APA renders the April 11, 2014 rule null and void.

8. Respondent is being unfairly subject to disparate treatment

Documents in support of Respondent’s Eighth Affirmative Defense are specified in the table below.

<i>Supporting Exhibit</i>	<i>Description</i>
RX-21	Letter from Kelly Dixon, Director, Land Protection Division, Oklahoma Department of Environmental Quality to Barnes Johnson Director, Office of Resource Conservation and Recovery, Office of Solid Waste and Emergency Response, US EPA, dated June 6, 2014
RX-22	Letter from Scott T. Anderson, Director, Division of Solid and Hazardous Waste, Utah Department of Environmental Quality, to Barnes Johnson Director, Office of Resource Conservation and Recovery, Office of Solid Waste and Emergency Response, US EPA, dated June 27, 2014
RX-23	Email from Mike Leigh, P.E., Supervisor, Permitting Branch, Bureau of Waste Management, Nevada Department of Environmental Protection, to D. Verbica, Utah DEQ, and D. Hensch, OK DEQ, dated July 30, 2015

RX-25	Excerpt from April 1, 2011 RCRA Part B Permit for Respondent's Lone Mountain Facility relating to use of temporary staging piles (Condition 8.5)
RX-26	Excerpt from September 28, 2012 RCRA Part B Permit for Respondent's Grassy Mountain Facility relating to use of temporary staging piles (Condition VI.D.8.)
RX-27	Excerpt from December 8, 2011 RCRA Part B Permit for U.S. Ecology's Facility in Beatty, Nevada, relating to use of temporary staging piles (Condition 7.11.1 and Permit Attachment 1C, Paragraph 2) (July 2015 Revision)
RX-28	Excerpt from November 12, 2004 RCRA Part B Permit for U.S. Ecology's Grand View Facility near Boise, Idaho, relating to use of temporary staging piles (Condition VI.A.2.g.; Attachment 19, Section D.11.) (modified May 22, 2012)

To the best of Respondent's knowledge, neither EPA nor any state agency has initiated enforcement action against any other hazardous waste disposal facility in the United States that utilizes temporary waste staging piles for management of treated hazardous wastes pending verification of LDR compliance. No action has been initiated by EPA Region 6 or by the Oklahoma Department of Environmental Quality against Clean Harbors' Lone Mountain Facility in Oklahoma; by EPA Region 8 or the Utah Department of Environmental Quality against Clean Harbors' Grassy Mountain Facility in Utah; by EPA Region 9 or the Nevada Department of Environmental Protection against U.S. Ecology's Facility in Beatty, Nevada; or by EPA Region 10 or the Idaho Department of Environmental Quality against U.S. Ecology's Grand View Facility near Boise, Idaho. Respondent believes that EPA Region 9's action against the Buttonwillow facility is the only enforcement action that has been taken anywhere in the county concerning the use of temporary staging piles.

C. Information and Documentation Pertaining to the Assessment of a Penalty

Respondent stipulates that the land disposal restrictions program is a central tenet of the RCRA regulatory framework. Mr. Retallick will testify that Clean Harbors spends millions of dollars every year complying with LDR requirements at Buttonwillow and its other RCRA Part

B landfills. Mr. Retallick will testify that the LDR compliance program utilized at Buttonwillow is far more robust than the program employed by its primary competitor in California. Unlike its competitor's program, Clean Harbors' program involves verification sampling of each and every truckload of treated waste exiting the STU, corresponding to each and every staging pile. This approach provides near certainty that every load of waste that is moved into the landfill for disposal meets applicable treatment standards prior to disposal. Mr. Retallick will further testify that the nine staging piles that form the basis for this enforcement action represent a miniscule percentage of the restricted hazardous waste that is successfully treated and disposed of every year at the Buttonwillow facility in a safe and timely manner.

Documents that support Respondent's position regarding any penalty assessment are specified in the table below. These documents are in addition to the RCRA Civil Penalty Policy and other penalty guidance referenced in Complainant's Prehearing Exchange.

<i>Supporting Exhibit</i>	<i>Description</i>
RX-7	Table: Post-Treatment Verification Sampling Results for Temporary Staging Piles Stored Over One Year (from EPA Inspection Report, CX-3A, annotated to include Universal Treatment Standards)
RX-8	Letter dated January 6, 2011, with Attachment 1, from Marianna Buoni, General Manager, Clean Harbors Buttonwillow, to Kaoru Morimoto, EPA Region 9, responding to EPA Request for Information
RX-9	Letter dated February 28, 2012, with Attachments, from David B. Nielsen, Landfill Compliance Director, Clean Harbors Buttonwillow, to Kaoru Morimoto, EPA Region 9, in response to EPA November 23, 2011 Notice of Violation and Request for Information
RX-10	Treated Waste Verification and Disposal SOP, dated 1/4/11
RX-31	Manufacturer specifications on Visqueen used in Staging Area
RX-32	Photographs of Waste Staging Area in WMU 34
RX-33	Excerpt from Clean Harbor's Application for Renewal of its RCRA Part B Permit dated October 1, 2005 (Section 4.1.4.4, Staging of Treated Waste)

The Complaint alleges two categories of violation: (1) a general failure by Respondent to comply with Permit Condition II.R.1, which EPA interprets to prohibit the use of temporary staging piles; and (2) failure to timely dispose of treated waste (and to retreat the waste if necessary to meet treatment standards), thus violating applicable regulations and Permit Condition II.R.1.

With respect to the first category of violation, Respondent maintains that its use of temporary staging piles in the manner described is in compliance with the permit and that no penalty may be assessed for all of the reasons set forth in Sections II.A. and II.B of Respondent's Prehearing Exchange. At the opposite end of the spectrum, Complainant will presumably seek to demonstrate that Respondent failed to make any effort to come into compliance with the permit and has unlawfully continued to use temporary staging piles since receipt of the November 2011 Notice of Violation, and that Respondent's failure to store individual loads of treated waste in individual "study boxes or containers" in the staging area represents a significant deviation from regulatory requirements which poses a significant risk of harm to the environment and to the RCRA regulatory program.

Respondent's witnesses will offer testimony to rebut each of these assertions. Their testimony will demonstrate that even if the Chief Administrative Law Judge were to determine the use of plastic-wrapped temporary staging piles is not in compliance with the Permit, no penalty should be assessed based on Respondent's good faith understanding that the Department of Toxic Substances Control has historically interpreted the permit to allow use of temporary staging piles in the manner described, as evidenced by repeated inspections and no enforcement over a period of 25 years. Mr. Retallick will also testify that despite Mr. Nieto's testimony regarding "DTSC's current official position" (which according to Complainant's Prehearing Exchange, is "consistent with" its own), DTSC — to this day — has never communicated its "official position" to Clean Harbors.

To the contrary Complainant's Exhibit CX-2, DTSC's EnviroStor page for the Buttonwillow Facility dated January 28, 2016 (one week prior to submittal of Complainant's Prehearing Exchange), indicates that no decision has yet been made regarding the compliance status of the Facility's waste staging practices: "The permit application associated with the proposed permit renewal does not include new changes to the Facility's hazardous waste management units, waste types or capacity. As of March 2015, completion of the permit renewal activity requires evaluation for compliance with the California Environmental Quality Act, determination of compliance pertaining to temporary placement of treated wastes awaiting confirmation sampling, and preparation of public outreach documents. After completion of these activities, DTSC will public notice a draft permit decision." (Emphasis added.) Given the number of years that Respondent has utilized temporary staging piles, with the full knowledge and concurrence of DTSC senior permitting and enforcement staff, basic due process demands that Respondent's current practices are entitled to a presumption of compliance. Mr. Retallick will testify that neither Mr. Nieto nor anyone else at DTSC has advised Clean Harbors that it is operating in violation of its permit.

Moreover, Mr. Retallick will testify that Clean Harbors personnel have recently been informed by the facility's current permit writers that they believe the use of temporary staging is allowed by the permit, that it is fully protective of the environment and practical from an operational perspective, and that they do not intend to prohibit the use of staging piles in the renewed permit unless they are required to do so by senior management. Clean Harbors' permit renewal application describes the staging of treated waste as follows:

"The waste will be transported from the Stabilization Treatment Unit (STU) to the landfill in off-road dump trucks or similar type trucks. The waste will be off-loaded onto plastic sheets (e.g., Visquen [sic] or similar materials). At the end of the operating day, the piles of treated waste will be covered with plastic sheets until laboratory analysis indicates the waste meets the appropriate treatment standard. After it has been

determined that the waste met the treatment standards, the waste piles will be buried in place or moved to the operational area of the landfill for final burial. If the treated waste piles do not pass the treatment standards, the earthmoving equipment will be used to retrieve the pile(s) and return them to the STU for further treatment. Records will be kept indicating the location of the pile(s) and the waste being treated.” RX-33.

This description describes the staging practice that has been used for the past 25 years, the only change being that Respondent is proposing to eliminate the requirement to construct wooden forms (the Box) around the staging area. As is evident from the photographs submitted as RX-32, the wooden forms are being used today, as required by the permit. Mr. Retallick will testify that, under these and other relevant circumstances, there is no justification under the RCRA Civil Penalty Policy for assessment of any civil penalty, let alone the maximum civil penalty for each day of violation, as asserted in Complainant’s Prehearing Exchange (see proposed testimony of Richard Francis, Section II.C, at page 20).

With respect to the second category of violation, both the Complaint and Complainant’s Prehearing Exchange are vague as to the precise number and extent of alleged violations.

Respondent understands that Complainant seeks civil penalties for the nine staging piles that were stored for more than a year. However, the Complaint also refers to 21 staging piles that were stored for more than 45 days, without reference to any requirement that has allegedly been violated. Respondent is unaware of any legal guidance or precedent that establishes 45 days as the maximum period of time that treated wastes may be staged prior to retreatment and/or final disposal. Regardless, no penalty may be assessed in respect of any staging pile that meets applicable treatment standards, irrespective of the number of days it may have remained on top of WMU 34.

As Ms. Buoni or Mr. Retallick will testify, the pozzolanic chemical reactions used to stabilize metals in hazardous waste continue to occur over an extended period of time. The longer such waste is allowed to cure, the more effective the stabilization treatment becomes. Of

the nine staging piles referenced in Paragraph 52 that are alleged to have been on top of WMU 34 for longer than one year, two of these piles (No. 090520-003, 14-21 and No. 090606-003, 1-7) were sampled by Respondent on October 18, 2010 in order to determine their current status prior to returning them to the STU for further treatment. Laboratory analysis confirmed that these two piles met applicable treatment standards.³ These two piles were originally tested after treatment on June 1 and June 12, 2009, respectively, and failed the treatment standard for lead (in the case of Pile No. 090520-003, 14-21) and for lead and cadmium (in the case of Pile No. 090606-003, 1-7). However, because the curing process is continuous, it is impossible to state on what day the piles achieved the treatment standards. Because EPA lacks any means of proving how many days these two piles remained on top of WMU 34 while exceeding applicable treatment standards, daily penalties may not be assessed for either of these piles. Given that the remaining seven piles were treated using the same pozzolonic stabilization process, it is more probable than not that had piles been sampled prior to retreatment in the same manner as No. 090520-003, 14-21 and No. 090606-003, 1-7, they too would have met applicable treatment standards.

Respondent asserts that the timeframes specified in 22 CCR § 66268.50(a), (b) and (c) are not intended to and do not apply to restricted hazardous waste after it has been treated to meet land disposal restrictions, even where it is shown that the initial treatment was not fully effective in meeting the standards. Further, there is nothing in the Permit or the Supplemental Landfill Operations Plan or Respondent's Waste Analysis Plan that specifies a specific number of days within waste must undergo final disposal. However, to minimize the length of time that wastes may remain in the staging area, and as evidence of its good faith effort to address EPA's concern about inadequate tracking of staging piles, Clean Harbors has implemented an internal

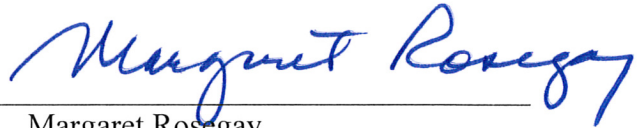
³ A duplicate sample from Pile No. 090606-003, 1-7 that was analyzed by EPA indicated that the treatment standards for lead and cadmium were still exceeded. However, applicable regulations and Respondent's Waste Analysis Plan (WAP) allow post-treatment verification sampling to be conducted on the basis of a single grab sample. Complainant identified Respondent's post-treatment verification analysis procedures as an "area of concern" in the Inspection Report, but the Complaint does not allege any violation of the WAP.

policy that no waste pile shall be staged on the landfill for more than 120 days. A new Standard Operating Procedure was put into place on January 4, 2011, and multiple training sessions have been conducted with facility personnel to ensure timely management of the piles is maintained. Clean Harbors has also improved the maps that it uses for tracking the length of time that wastes are staged in the landfill awaiting treatment verification analysis.

* * * * *

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

Respectfully submitted,



Dated: February 18, 2016.

Margaret Rosegay
Pillsbury Winthrop Shaw Pittman LLP

Attorneys for Respondent
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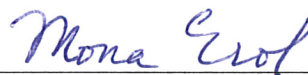
PROOF OF SERVICE BY ELECTRONIC TRANSMISSION

I, Mona Erol, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Winthrop Shaw Pittman LLP in the County of San Francisco, State of California.
2. My email and business addresses are mona.erol@pillsburylaw.com; Four Embarcadero Center, 22nd Floor, San Francisco, CA 94111-5998.
3. My mailing address is P.O. Box 2824, San Francisco, CA 94126-2824.
4. On February 18, 2016, at Four Embarcadero Center, 22nd Floor, San Francisco, CA 94111-5998, I served a true copy of the attached document titled exactly RESPONDENT'S PREHEARING EXCHANGE by sending a PDF copy of the Original Document via electronic transmission through the OALJ E-Filing System to the following persons:

[See Attached Service List]

I declare under penalty of perjury that the foregoing is true and correct. Executed this 18th day of February, 2016, at San Francisco, California.



Mona Erol

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