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MEMORANDUM

TO:	Board of Directors Upper Valley Waste Management Agency	FILE NO:	49088.0002
FROM:	Gary B. Bell, Esq.	DATE:	October 9, 2019
CC:	Steven Lederer, Director		
RE:	Recommendations Regarding Franchise Agreements		

INTRODUCTION

The Board of Directors of the Upper Valley Waste Management Agency (the "Agency") authorized Agency staff to retain outside counsel to review the Agency's two franchise agreements and develop recommendations regarding changes to those agreements. This report summarizes those recommendations.

SUMMARY OF RECOMMENDATIONS

We recommend the Agency:

1. Establish maximum rather than actual rates to better defend against any challenge under Propositions 218 or 26;

2. Consider increasing rates by the consumer price index alone, without resort to cost formulas, to reduce time and expense to the Agency (or, alternatively, require the contractor to hire an independent auditing firm to provide these calculations), make rate increases mandatory rather than discretionary, and prohibit charges to vacant properties;

3. Eliminate the distinction between major and minor breaches and instead provide for a list of "events of breach" to streamline and aid in enforcement, each of which could result in termination, liquidates damages, or other remedies such as injunctive or other equitable relief;

4. Reduce the cure and correct period for breaches from six months to ten days or two weeks and increase the liquidated damages amount significantly;

5. Increase reporting, auditing, and oversight of the contractor to ensure compliance with the Act and its obligations under the agreements (e.g., to ensure diversion requirements are met);

6. Consider a definitive term for the Upper Valley Franchise Agreement to ensure the Agency has an opportunity to renegotiate its terms and address operational or service issues when it does so;

7. Consider making solid waste collection mandatory throughout the service area with a self-haul exception and other provisions, either by working with the member agencies to do so or by amending the joint powers agreement to grant this power to the Agency, to increase the customer base and in turn offset any franchise fee;

8. Consider imposing a franchise fee on gross receipts under the Upper Valley Franchise Agreement to fund operations of the Agency or its member agencies;

9. Consider a single franchise agreement rather than two to better ensure the contractor's obligations under the agreements, and the Agency's obligations under the Act, are met; and

10. Consider increasing the rate of return to the contractor in conjunction with the imposition of a franchise fee and adoption of a revised rate formula.

We understand the contractor is interested in a single franchise agreement and possibly reconfiguring the rates and the rate methodology. If so, this is an opportunity to address these items, as well as the others, in a single, renegotiated agreement. At the Board's discretion, negotiations could begin to address all or some of these issues in a new agreement.

BACKGROUND

The Joint Powers Agreement. The Agency is a separate public entity organized and operating under a joint powers agreement between the County of Napa, the City of

Calistoga, the City of St. Helena, and the Town of Yountville.[1] The Agency's primary purposes include providing coordination of economical, regional waste management services, including, but not limited to, franchising of solid waste handling services; providing uniform rate review and rate setting for those services; and meeting the requirements of the California Integrated Waste Management Act of 1989 (the "Act").[2]

The Act authorizes each county, city, or other local governmental agency to determine the following: (a) "[a]spects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services,"[3] and (b) "[w]hether the services are to be provided by means of nonexclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding, or if, in the opinion of its governing body, the public health, safety, and well-being so require, by partially exclusive or wholly exclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding."[4] Further, "[t]he authority to provide solid waste handling services may be granted under terms and conditions prescribed by the governing body of the local governmental agency by resolution or ordinance."[5]

The Joint Exercise of Powers Act, under which the joint powers agreement between the member agencies was adopted, authorizes the member agencies to jointly exercise any power common to them regardless of whether the power could be exercised independently by each of them in the joint exercise area.[6] Because the member agencies each possess the powers discussed above, they may delegate these powers to be exercised by the Agency in the joint exercise area. Additionally, as authorized by the Act and stated in the joint powers agreement, the Agency is a "regional agency" to implement the Act on behalf of the member agencies.[7]

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[1] Joint Powers Agreement, § 2.1; Gov. Code, § 6500 et seq. [Joint Exercise of Powers Act].
[2] Joint Powers Agreement, § 3.1; Pub. Resources Code, § 40000 et seq. [California Integrated Waste Management Act of 1989].
[3] Pub. Resources Code, § 40059, subd. (a)(1).
[4] Pub. Resources Code, § 40059, subd. (a)(2).
[5] *Ibid.*
[6] Gov. Code, § 6502.
[7] Joint Powers Agreement, §§ 3.2, 6.1.c.; Pub. Resources Code, § 40970 et seq.

Accordingly, the Agency's relevant powers under the joint powers agreement include the following: (a) entering into franchises to provide solid waste handling services within the jurisdictions of the member agencies; (b) establishing rates, tolls, tipping fees, other fees, rentals and other charges in connection with franchise solid waste handling services, as well as any and all services provided by the Agency, and to include in such rates and charges amounts necessary to carry out those purposes described in the joint powers agreement; (c) providing for the implementation of the requirements of the Act for the members as a "regional agency" pursuant to the Act; (d) assisting with the development and implementation of the Countywide Integrated Waste Management Plan and other documents; and (e) coordinating efforts with local regional, and state waste management agencies.[8]

The Franchise Agreements. The Agency has two franchise agreements: (1) one with Clover Flat Landfill[9] for disposal of solid waste at the Clover Flat Sanitary Landfill (the "Clover Flat Franchise Agreement");[10] and (2) one with Upper Valley Disposal Service for collection of solid waste in the joint exercise area and disposal of that waste at the Clover Flat Sanitary Landfill (the "Upper Valley Franchise Agreement").[11] The Clover Flat Franchise Agreement expires July 1, 2047 subject to additional 10-year terms upon

[8] Joint Powers Agreement, § 6.1. Other powers include to sue and be sued; to employ agents, employees and to contract for professional services; to incur debts, liabilities, and obligations; to reimburse member agencies for the costs of special services provided to the Agency; to require member agencies to direct all solid waste generated by member agencies to franchise solid waste facilities; to make and enter into contracts and assume existing contracts made by member agencies; to apply for and accept grants, advances, and contributions; to make plans and conduct studies; to provide annual reporting to each member agency; to review and make recommendations on pending solid waste and household hazardous waste legislation; to represent the Agency on the Napa County and Cities Integrated Waste Management Local Task Force; to assist with the development of local markets for recycled products and provide resources for information concerning product availability; to conduct or contract for Household Hazardous Waste events and activities; and other responsibilities and duties as agreed to be the member agencies. Joint Powers Agreement, §§ 6.1, 6.3.

[9] The business registration documents available from the Secretary of State show the business name as "Clover Flat Land Fill Inc." and the franchise agreement is with "Clover Flat Landfill". See searchable database at https://businesssearch.sos.ca.gov/.

[10] For purposes of this report, the "Clover Flat Franchise Agreement" refers to the Fourth Amendment to that franchise agreement dated December 19, 2016.

[11] For purposes of this report, the "Upper Valley Franchise Agreement" refers to the Ninth Amendment to that franchise agreement dated December 19, 2016.

notice from the Agency and the viability of the landfill.[12] The Upper Valley Franchise Agreement currently expires July 1, 2034 and automatically extends for an additional one-year period on July 1 of each year unless either party gives notice not to extend at least 90 days prior to the extension.[13] Thus, if the Agency gave notice today not to extend the Upper Valley Franchise Agreement for additional one-year terms, it would remain effective until July 1, 2034.

The franchise agreements must comply with relevant federal and state law including, but not limited to, the Act; the joint powers agreement and the powers delegated to the Agency in that agreement; and public agency contract law.

DISCUSSION

Typical franchise agreements include the following provisions: (1) recitals, (2) representations and warranties, (3) grant and acceptance of franchise, (4) term of agreement, (5) scope of collection services, (6) requirements for operations, equipment, and personnel, (7) billing and customer service, (8) record keeping and reporting, (9) franchise fees and other fees, (10) rate setting and contractor's compensation, (11) indemnification, insurance, and performance bond, (12) breach and remedies, (13) general provisions, and (14) definitions.[14] The franchise agreements include some, but not all, of these provisions. Additionally, existing provisions could be clearer or contain additional provisions to comply with the law and ensure performance by the contractor.

Recitals. Both the Clover Flat Franchise Agreement and the Upper Valley Franchise Agreement grant exclusive franchises. The Act states that the Agency may grant a partially exclusive or wholly exclusive franchise "if, in the opinion of tis governing body, the public health, safety, and well-being so require … ."[15] The two franchise agreements do not state the Agency's opinion or findings on this matter. Thus, unless the Agency has stated its opinion or findings justifying the exclusive franchises in some other

[12] Clover Flat Franchise Agreement, § 4.
[13] Upper Valley Franchise Agreement, § 4.
[14] Note: The revised and additional definitions are lengthy, so these are provided at the end of this report although typically included at the beginning of the agreements.
[15] Pub. Resources Code, § 40059, subd. (a)(2).

document adopted by the Board of Directors, we recommend this be added to the recitals or body of the two franchise agreements.

Other recommended recitals include: (1) a statement that the Agency intends to establish reasonable rates for collection, transportation, recycling, composting, and disposal of solid waste, (2) a statement that the contractor is qualified to perform the services in a good and workmanlike manner, (3) a statement that the contractor warrants and represents that it has the experience, responsibility, and training to perform the services, and (4) a statement that the Agency is a regional agency under the Act formed pursuant to a joint powers agreement and listing the specific powers of the Agency. This last suggested recital explains the authority to grant the exclusive franchises. Listing the specific powers justifies the specific requirements of the franchise agreements, as discussed in more detail below.

Representations and Warranties. The franchise agreements contain most of the recommended representations and warranties except for a litigation guarantee.[16] Thus, we recommend adding a representation and warranty that the contractor is not aware of any litigation that would: (a) affect its performance under the franchise agreements, (b) affect the validity or enforceability of the franchise agreements, or (c) affect the financial condition of the contractor, or any surety (i.e., bond) guaranteeing the contractor's performance under the franchise agreements. If litigation exists that may affect the contractor's performance, specific provision may be added including, for example, the litigation involving its facility on Whitehall Lane. These additional representations and warranties are necessary so the contractor discloses, or warrants the absence of, litigation that will prevent or serious impede its performance under the agreements.

Grant and Acceptance of Franchise. Both franchise agreements state "while the franchise granted herein … is exclusive."[17] The original franchise agreements executed in 1995 also grant "exclusive franchises." We recommend these provisions be expanded to make clear the Agency is not granting a franchise beyond its legal authority to do so, to specify limitations on the franchises imposed by law, and to impose general obligations on the parties relative to their performance under the franchise agreements including:

[16] Clover Flat Franchise Agreement, § 13; Upper Valley Franchise Agreement, § 12.
[17] Clover Flat Franchise Agreement, § 2.1; Upper Valley Franchise Agreement, § 2.1.

1. A provision that by signing the franchise agreements the Agency grants and the contractor accepts an exclusive franchise for solid waste handling services within the Service Area and Napa County Solid Waste Service Zone Three (3) subject to the terms of the franchise agreement and except where otherwise prohibited by federal, state, or local laws and regulations. By including a clause that the franchise is granted except where prohibited by federal, state, or local laws or regulations, the Agency will be better able to defend a challenge that it granted a franchise in violation of these laws (if, for example, the franchise agreements are ever challenged by a ratepayer or the contractor).

2. A provision that the franchise agreements do not preclude any person from delivering, collecting, or disposing of solid waste, subject to any authorization or permit required by any of the member agencies, including: (a) recyclable and organic materials, (b) self-hauled materials, (c) donated materials, (d) beverage containers, (e) materials removed by customer's contractor, (f) source-separated e-waste or universal waste, (g) animal, grease waste, and used cooking oil, (h) sewage treatment by-product, (i) excluded waste, (j) materials generated by state, county and federal facilities provided alternative arrangements have been made for collection and disposal, and/or (k) other recyclables. Also include a provision that the contractor agrees that the Agency or its member agencies may permit other persons to collect all materials excluded from the scope of the franchise by this section. These additional provisions clarify the existing provisions in both franchise agreements authorizing any person to sell divertible material to the contractor or any other person (as required by law)[18] and allowing persons to self-haul solid waste without using the services of the contractor.[19]

3. Provisions requiring the contractor to comply with Chapter 13.80 of the Yountville Municipal Code (Collection, Transportation, and Disposal of Solid Waste), Chapter 8.16 of the Calistoga Municipal Code (Garbage and Refuse), Chapter 8.04 of the St. Helena Municipal Code (Solid Waste Collection), and applicable provisions of the Napa County Municipal Code (Storage and Removal of Solid Wastes), as those municipal codes may change from time to

[18] *Waste Management of the Desert, Inc. v. Palm Springs Recycling Center, Inc.* (1994) 7 Cal.4th 478, 488-490.
[19] Clover Flat Franchise Agreement, § 2.1; Upper Valley Franchise Agreement, § 2.1.

time. If compliance with any of these municipal codes conflicts with any provisions of the franchise agreements, the parties agree to amend the relevant provisions of the franchise agreements within ninety (90) days to allow compliance or as soon as practical after the conflict is discovered.[20] By undertaking solid waste collection activities in these jurisdictions, the contractor is already subject to these provisions; however, specifically including these provisions in the franchise agreements makes violations subject to enforcement under the franchise agreements as well.

4. A provision that both parties will use reasonable commercial efforts to enforce the exclusiveness of the franchise by the contractor's identification and documentation of violations of the agreements.

5. A provision that both parties will provide timely notice to the other of a perceived failure by either party to perform as required under the franchise agreements.[21]

6. A provision that both parties will provide timely notice to the other of matters which may affect either party's ability to perform under the franchise agreements.

Term of Agreement. Both franchise agreements establish a defined term, subject to extensions discussed in more detail above.[22] The Agency may unilaterally extend these terms by providing written notice to the contractor.[23] Thus, the contractor is bound by the

[20] Note: Both franchise agreements require compliance with federal, state, and local laws regarding provision of solid waste handling services without specifying which laws. Clover Flat Franchise Agreement, § 5.7; Upper Valley Franchise Agreement, § 5.7. Specifying these municipal code provisions will provide clarity and aid in enforcement of the agreement. Further, the Agency may wish to amend the joint powers agreement, in accordance with its provisions, to provide procedures for how and under what circumstances the member agencies amend their respective municipal code regarding solid waste.
[21] Note: While both franchise agreements authorize the Agency to provide notice to the contractor of the contractor's breach, there is no comparable provision for the contractor to notify the Agency of the Agency's breach. Nor is there a provision allowing the contractor to terminate except in circumstances of insolvency or "significant changes in circumstances." Clover Flat Franchise Agreement, § 6; Upper Valley Franchise Agreement, § 6.
[22] Clover Flat Franchise Agreement, § 4.1; Upper Valley Franchise Agreement, § 4.
[23] *Ibid.*

existing terms of the franchise agreements for the extended term. Additionally, the franchise agreements only provide two limited circumstances for termination: (1) termination due to insolvency, and (2) termination due to "significant change in circumstances."[24]

For the Upper Valley Franchise Agreement, a "significant change in circumstance" includes a binding court decision declaring invalid Public Resources Code section 40059 — authorizing nonexclusive and exclusive franchises — or a court decision declaring the Agency should have complied with Public Resources Code section 49200 — requiring franchise agreements be granted by the County Board of Supervisors.[25] For the Clover Flat Franchise, a "significant change in circumstance" includes the same court decisions discussed above and also "undue hardship on rate payers as result of unexpected changes in laws, markets, or technologies." Because the Clover Flat Franchise Agreement does not define the phrase "unexpected change," there is risk in relying on this provision for terminating the agreement due to its ambiguity. The federal and state governments change laws and the public has notice of these changes typically one year and in some cases two years before they take effect. In that sense, all changes in law are expected. The Agency may also know in advance of changes to markets and technologies. For these reasons, we recommend revising this section to remove the word "unexpected" — if a change in law, markets, or technologies results in undue hardship on rate payers, that alone can be the basis to terminate the agreement without the need to litigate whether the change was unexpected.

We also recommend adding another basis for terminating the franchise agreements: breach. A typical provision would authorize the Agency to terminate the franchise agreements if the contractor breaches and does not cure the breach within the period to do so. Without this provision, the contractor could repeatedly breach provisions of the franchise agreements, fail to cure the breach within the period to do so, and be

[24] Clover Flat Franchise Agreement, § 6.11; Upper Valley Franchise Agreement, § 6.11.

[25] Clover Flat Franchise Agreement, § 6.11. Note: Public Resources Code section 49200 states every franchise shall be granted by the County Board of Supervisors "under the terms and conditions of this chapter." That chapter by its terms only applies to franchises granted by counties and not to franchises granted by cities or other local government agencies like the Agency, which are governed by a different chapter of the Act. Because the Act clearly authorizes cities to independently grant franchises, it is unlikely a court would find Public Resources Code section 49200 requires a county to approve these franchises.

subject only to liquated damages discussed in more detail below. Provided the contractor is still solvent and no change in circumstance exists, the Agency would not be authorized to terminate the franchise agreements and to seek another qualified contractor no matter how egregious the breaches may be.

Additionally, both franchise agreements authorize a "revocation" of the agreement if a "major breach" occurs and is not cured within the period to do so.[26] However, the franchise agreements do not define or explain the difference between revocation and termination. If the Agency's intention is to authorize a termination of the franchise agreements in the event of a major breach, we recommend revising that section to replace "revocation" with "termination." If the Agency intends a difference between "revocation" and "termination" in this context, we recommend these terms be defined to specify that intention.

The term of each franchise agreement is subject to negotiation between the parties. For the Upper Valley Franchise Agreement, the automatic one-year extensions mean the Agency will not have a guaranteed opportunity to revise the terms of the agreement, absent voluntary agreement between the parties, until the end of the term which, if it gives notice not to extend, is still many years in the future. While the terms of the franchise agreements are typically long enough to ensure a reasonable return on the contractor's investment, a definitive ten- or twenty-year term is much more common. This ensures the Agency will have the opportunity to revisit the terms of the franchise agreements and decide whether to seek proposals from other contractors. It also provides the Agency an opportunity to evaluate its operations holistically and make adjustments if needed. Under the current term, even if the Agency decided now that it wished to reevaluate the solid waste services currently provided, the relationship between the members agencies for these services, or some other aspect of operations, it may be difficult to do so given the limited bases for termination and breach provisions. A definitive term would provide a guaranteed opportunity to do so.

Scope of Collection Services. The Upper Valley Franchise Agreement requires the contractor to make "systematic collections" so that customers "can predict the day on which collection will be made."[27] Specifically, the contractor is required to collect "waste"

[26] Clover Flat Franchise Agreement, § 6.4; Upper Valley Franchise Agreement, § 6.4.
[27] Upper Valley Franchise Agreement, § 17.1.

and "divertible materials" at least weekly from all customers.[28] The clover Flat Franchise Agreement requires public access six (6) days per week, Tuesdays through Sunday with the exception of certain holidays.[29] However, these provisions do not distinguish between mandatory collection, as for the Town of Yountville, and voluntary collection, as for the remaining areas. We recommend adding a provision that the contractor shall collect waste and divertible materials from customers in the mandatory collection areas unless a particular customer has been exempted under that member agency's municipal code. This provision leaves open the possibility that other member agencies will require service in the future subject to a regulated self-haul exemption.

Requirements for Operations, Equipment, and Personnel. The franchise agreements currently require the contractor to make collections, as described above, and provide all labor, equipment, and facilities necessary for performance.[30] We recommend adding provisions to specify:

1. Hours of collection for residential, commercial, and industrial customers including regular and holiday hours of collection (i.e., 6:00 a.m. to 6:00 p.m.);

2. Standards for collections such as pick up and replacement of containers, those applicable to multifamily or large containers, and procedures for reducing litter and spills;

3. Standards for vehicles including number, replacement, clean-air standards, signage, maintenance, noise levels, and reporting of these items to the Agency and its member agencies;

4. The number, types, sizes, appearance (i.e., logos and contact information), construction (i.e., watertight and types of materials) for all containers and bins; and

[28] Upper Valley Franchise Agreement, § 17.6
[29] Clover Flat Franchise Agreement, § 18.4.
[30] Clover Flat Franchise Agreement, § 2.1; Upper Valley Franchise Agreement, § 2.1.

5. The qualifications, standards, and training for drivers (i.e., class of license), mechanical, supervisory, customer service, and other personnel necessary as well as a contact person for each member agency and the Agency.

Billing and Customer Service. Both franchise agreements only require the contractor to conduct billing in a "uniform and regular manner."[31] We recommend adding provisions to specify:

1. The contractor only bill customers at the rates authorized by the agreements and resolutions of the Agency;

2. Intervals for billing (bi-monthly, monthly, or quarterly) and whether billing is in arrears or in advance;

3. That the Agency will pre-approve the format of the bill;

4. That the Agency and its member agencies may include informational pamphlets with the billing under prescribed circumstances sent to all customers or to customers within one or more of the jurisdictions of the member agencies;

5. How and under what circumstances customers may pay bills online;

6. That the contractor, and not the Agency, will be responsible for collection delinquent accounts consistent with applicable law (to further defend against a challenge under Propositions 218 or 26);

7. That the contractor will not disclose, other than to the Agency and its member agencies, information identifying individual customers, the composition or contents of the customer's solid waste, or other identifiable information of the customer except as required by law; and

8. Requirements regarding customer service, office location and hours, emergency contacts, and website requirements.

[31] Clover Flat Franchise Agreement, § 18.2; Upper Valley Franchise Agreement, § 17.9.

Record Keeping and Reporting. Both franchise agreements require "accurate records of all transactions" and monthly reports of this information to the Agency including information necessary to evaluate program effectiveness and comply with solid waste plans (e.g., the SRRE), laws, and regulations.[32] The franchise agreements also require the contractor to keep a log of complaints if "reasonably practical."[33] We recommend adding provisions:

1. Requiring the contractor to report to the Agency and its member agencies information on all customers receiving service including the address, name of account holder, and frequency of collection;[34]

2. Authorizing the Agency and/or the member agencies to conduct discretionary performance reviews of the contractor from time to time to examine all aspects of performance under the franchise agreements;

3. Authorizing the Agency to perform performance audits to determine whether the contractor is meeting its diversion goals and compliance with the SRRE and HHWE;[35]

4. Requiring the contractor to keep a log of complaints with the name and address of the complainant, the nature of the compliant, and the nature and date of resolution for a period of three years after the complaint is made and that the log be made available to the Agency upon request;

[32] Clover Flat Franchise Agreement, §§ 16.1, 16.2; Upper Valley Franchise Agreement, §§ 15.1, 15.3.
[33] Clover Flat Franchise Agreement, §§ 9.3; Upper Valley Franchise Agreement, § 9.3.
[34] Note: The lack of collection and disposal of solid waste presents health and safety concerns that may need to be addressed by the member agencies. This information is also relevant to the Agency's and member agencies' compliance under the Act to reduce landfill disposal by source reduction, recycling, and/or composting.
[35] Note: The Upper Valley Franchise Agreement requires the contractor to comply with its duties under the SRRE and "use its best efforts to meet or exceed the Act's requirements …"[35] to divert at least 50% of solid waste.

5. Requiring the contractor to keep a log of accidents, injuries, or damage caused during its performance under the franchise agreements; and

6. Requiring the contractor to report to the Agency any potential, alleged, or actual violation(s) of federal, state, or local laws or regulations within twenty-four hours of notice thereof from a federal, state, or local governmental agency.

Franchise Fees and Other Fees. As of May 2012, the Agency receives a surcharge placed on "tip fees" at the Clover Flat Landfill including $4.75 per ton for trucks and trailers (10 yards and over) and $1 per yard (loose refuse) for 3 cubic yards to 9.5 cubic yards. The joint powers agreement also authorizes each member agency to request in writing that the Agency collect a franchise fee from collections within the member agency's jurisdiction (as opposed to the service area as a whole).[36] The City of Calistoga has requested and receives a 6% franchise fee from gross receipts of collections in its jurisdiction However, the Agency does not impose a franchise fee and thus its operations are primarily funded through the surcharges on "tip fees" mentioned above.

Most franchise agreements impose a franchise fee on total gross receipts ranging from 5% to 20%. Some franchise agreements impose different fees on gross receipts from residential, commercial, or industrial collections and sometimes impose fees on some but not all of these collections. For individual cities and counties, franchise fees are typically placed in the general fund or a dedicated fund related to waste collection such as a landfill cleanup fund. As a joint powers agency, the Agency may have different needs for a franchise fee.

As mentioned above, each member agency may request a franchise fee for collections within its jurisdiction. This may be a reasonable compromise: those member agencies that wish for a franchise fee may impose it within their jurisdiction without affecting the rates in the other jurisdictions. And the Agency receives funding from tip fees unrelated to individual customers' service. Thus, the benefits to imposing a franchise fee under the Upper Valley Franchise Agreement are higher revenues to the Agency and its member agencies, which may be used for general fund purposes, other regulatory activities, or compliance with the Act. The Agency may also wish to increase the

[36] Joint Powers Agreement, § 6.5.

contractor's rate of return in conjunction with the imposition of a franchise fee through adoption of a revised rate formula.

Some franchise agreements also charge franchise fees to fund: (1) programs, pilot studies, education and outreach campaigns, reporting, compliance, and other activities required to comply with the Act, (2) litter abatement including street-sweeping and other activities to minimize litter, and (3) other activities of the regional agency or member agencies.

Rate Setting and Contractor's Compensation. The Upper Valley Franchise Agreement calculates rates based on a review of the contractor's "major allowable expenses" and "major recoverable expenses" and adjusting all "other allowable non-fuel expenses" and "other recoverable expenses" by the adjusted consumer price index.[37] The Clover Flat Franchise Agreement calculates rates based on the consumer price index for adjustments to the "landfill tip fee" and "regulatory mandated expenses." By basing the rates in both franchise agreements on the change in the consumer price index, the rates are not discretionary which makes them more defensible under Propositions 218 and 26. Thus, to calculate the rate increases, significant time is spent by the Agency reviewing the contractor's books to determine allowable expenses and then calculating corresponding rate increases.[38]

Annual rate increases for 2018-2019 were just over 2%. To decrease time and cost, the Agency could provide for annual rate increases not to exceed the consumer price index and as approved by the Board of Directors. This avoids the need for the Agency to analyze annually the books of the contractor and provides the same or slightly higher rate increases as provided under the current formula. Alternatively, the Agency could require the contractor – rather than the Agency – to arrange for an independent audit of its books to calculate the rate increase based on the current formula. The formula for increasing rates is ultimately a decision for the Board based on negotiations with the contractor: some formulas are simple (consumer price index increase) and some are more complex. We also recommend the franchise agreements include provisions for

[37] Clover Flat Franchise Agreement, Exhibit B; Upper Valley Franchise Agreement, Exhibit B.
[38] Note: We understand from Agency staff that the cost to review the books and analyze the allowable expenses is between $10,000 and $15,000 annually.

extraordinary rate increases as well to account for changed circumstances or unexpected increases in operating expenses of the contractor.

Both franchise agreements currently allow the Agency to unilaterally amend the applicable rates at any time although this typically occurs once annually in June.[39] The Agency also sets the actual rates as opposed to maximum rates for a given service.[40] Because the member agencies have voluntary rather than mandatory solid waste collection, this approach is defensible under Propositions 218 and 26.[41] Customers are not required to pay for the service and therefore the fee is not "imposed" by the Agency.[42] Additionally, payments are collected by the contractor rather than the Agency. Nevertheless, the Agency will be better able to defend its rates if it sets maximum rates and allows the contractor to set the actual rate. Under this approach, the Agency is not "imposing" any rate but rather setting parameters within which the contractor may do so. As a practical matter, the contractor may set the rate at the maximum allowed by the Agency but, because the contractor is not required to do so, the actual rate is not imposed by the Agency. Thus, the Agency may wish to establish maximum rates the contractor may charge so the rates are more defensible.

Additionally, if the Agency chooses to require mandatory solid waste collection service, we recommend it do so under the following conditions to comply with Propositions 218 and 26:

1. The Agency sets maximum rather than actual rates for services;

2. Allow self-haul for those who wish under regulated but viable conditions;

3. Prohibit charges on vacant parcels;

4. Require the contractor to collect all charges without involvement of the Agency; and

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[39] Clover Flat Franchise Agreement, § 3; Upper Valley Franchise Agreement, § 3.
[40] Agency Resolution #18-03 adopted June 25, 2018 (Clover Flat Landfill Rates); Agency Resolution #18-02 adopted June 25, 2018.
[41] League of California Cities, Propositions 26 and 218 Implementation Guide (May 2019), pp. 58-77, <https://www.cacities.org/Prop218andProp26> [as of August 9, 2019].
[42] *Ibid.*; Cal. Const., art. XIII D, §§ 2, subd. (e), 6.

5. Provide for automatic annual increases in rates by the consumer price index.

Finally, we recommend adding a provision that the contractor's compensation for performance under the franchise agreements is gross receipts from the services provided.

Indemnification, Insurance, and Performance Bond. Both franchise agreements require indemnification by the contractor.[43] However, the indemnification is limited to liabilities resulting from or caused by the "acts" of the contractor.[44] We recommend revising this section to require the contractor to indemnify and defend the Agency for any and all claims, liability, loss, injuries, damage, expense, and cost (including, without limitation, costs and fees of litigation and attorney's fees and expert witness fees) of every kind and nature arising out of or in connection with the acts or omissions of the contractor in performing under the agreements or its failure to comply with its obligations under the agreements. In the absence of a broader indemnity provision, the contractor's indemnity obligations are arguably limited to its affirmative acts and do not include its failure to act.

Both franchise agreements require the contractor to maintain general liability insurance of at least $2,000,000 combined single limit per occurrence, comprehensive motor vehicle liability insurance of at least $2,000,000 combined single limit per occurrence, and workers' compensation insurance as required by law.[45] Given the scope and nature of the contractor's performance under the franchise agreements, we recommend the Agency consider:

1. Increasing the combined single limit amount for the general liability and motor vehicle liability insurance policies;

2. Requiring environmental liability/pollution insurance;

3. Requiring crime/employee dishonesty insurance;

[43] Clover Flat Franchise Agreement, § 5.10; Upper Valley Franchise Agreement, § 5.10.
[44] *Ibid.*
[45] Clover Flat Franchise Agreement, § 15; Upper Valley Franchise Agreement, § 14.

4. Requiring the Agency, the member agencies, and their officers, employees, agents, and volunteers be named as additional insured on all policies except for the workers' compensation policies (as limited by law);

5. Requiring the contractor's insurance be primary;

6. Requiring the contractor to waive rights of subrogation against the Agency, the member agencies, and their officers, employees, agents, and volunteers;

7. Requiring the same insurance requirements for all subcontractors of the contractor;

8. Requiring the contractor to deliver evidence of insurance coverage meeting these requirements including endorsements to the Agency on a specified date annually and upon request;

9. Requiring the policies include a provision that the Agency will be notified at least thirty days prior to cancellation of the policies; and

10. Requiring the contractor provide notice to the Agency if a claim is made against an insurance policy exceeding any deductibles or self-insured retention amounts.

Finally, both franchise agreements require a performance bond of $25,000 to the Agency to ensure full and faithful performance of the contractor's obligations under the agreements.[46] Given the nature of the services provided under the agreements, it is unlikely $25,000 would be sufficient for the Agency to do so. The $25,000 bond amount has also not been increased since the original franchises were granted in 1995. We recommend: (a) the bond amount be increased to an amount sufficient for the Agency or the member agencies to make alternative arrangements for the services to be performed, and (b) the Agency consider making the member agencies beneficiaries of the bond as well so they may independently make arrangements for performance of the services within their jurisdictions in the event the contractor cannot do so.

[46] Clover Flat Franchise Agreement, § 6.1; Upper Valley Franchise Agreement, § 6.1.

Breach and Remedies. The franchise agreements specify that major breaches are those identified in the agreements.[47] The franchise agreements also specify minor breaches.[48] Thus, a breach of any provision not identified as a major breach under the provisions of the agreements is either a minor breach or not a breach. For example, while previous versions of the franchise agreements specified that violations of the assignments clause were minor breaches, the current versions of the agreements do not specify whether a breach of the assignments clause is a major breach, a minor breach, or even a breach. Because the franchise agreements specify that violations of certain provisions are major or minor breaches, a provision without this specification may not be subject to the breach provisions of the agreements at all and may only be enforceable through injunctive, equitable, or other relief in court as authorized by the agreements.

We recommend revising these provisions to eliminate the distinction between major and minor breaches and to address the issues raised by not specifying whether a violation of some provisions is a breach. To do so, we recommend defining an "event of breach" broadly to include:

1. Fraud or deceit;
2. Insolvency or bankruptcy;
3. Failure to maintain insurance coverage;
4. Violations of laws or regulations;
5. Failure to perform solid waste handling services for two or more days;
6. Failure to report required information (or pay a franchise fee if required);
7. Acts or omissions that violate the terms, conditions, or requirements of the agreements;
8. False, misleading, or inaccurate statements;

[47] Clover Flat Franchise Agreement, § 6.2; Upper Valley Franchise Agreement, § 6.2.
[48] *Ibid.*

9. Seizure or attachment of contractor assets;

10. Suspension or termination of service for two or more days;

11. Criminal activity;

12. Assignment without written consent; and

13. Failure to perform any obligation under the agreements.

This approach requires the contractor to perform all its obligations under the franchise agreements. For each breach, the Agency may include a cure and correct period, liquidated damages, provisions to suspend the contractor's operations, and termination. The following discussion illustrates how this approach will streamline and aid in enforcement.

Currently, major breaches include breaches of the following provisions: (i) law compliance (section 5.7). (ii) performance bond (section 6.1), (iii) facilities acquisition (section 10.1 of Upper Valley Franchise Agreement and section 11.1 of Clover Flat Franchise Agreement) (iv) facilities use (section 10.2 of Upper Valley Franchise Agreement and section 11.2 of Clover Flat Franchise Agreement), (v) responsibility (section 10.1 of Clover Flat Franchise Agreement only), (vi) closure and post-closure (section 10.2 of Clover Flat Franchise Agreement only), (vii) operating liability (section 10.3 of Clover Flat Franchise Agreement only), (viii) quality of performance (section 11), (ix) permits for whitehall lane (section 12(f) of Upper Valley Franchise Agreement only), (x) permits, licenses, etc. (section 13), (xi) accurate and accessible records (section 15.1), (xii) compliance (section 16.1).

However, the franchise agreements do not specify that minor breaches are those identified under the provisions of the agreements. Minor breaches are nevertheless specified in several sections including: (i) payment of subcontractors and agents (section 5.13), (ii) solid waste handline services (section 17 of the Upper Valley Franchise Agreement and section 18 of the Clover Flat Franchise Agreement), (iii) public awareness program (section 16.2 of the Upper Valley Franchise Agreement, (iv) monthly reports (section 15.3 of the Upper Valley Franchise Agreement and section 16.2 of the Clover Flat Franchise Agreement), (v) contractor representations and warranties (section 12 of the Upper Valley Franchise Agreement and section 13 of the Clover Flat Franchise

Agreement), (vi) quality of performance under certain circumstances (section 11 of the Upper Valley Franchise Agreement and section 12.1 of the Clover Flat Franchise Agreement), (vii) other complaints (section 9.3), (viii) legal action response (section 9.2), (ix) accident notification (section 9.1), (x) fair employment and housing act (section 5.16), (xi) non-discrimination (section 5.15), and (xii) taxes and fees (section 5.14.

A major breach is grounds for revocation while a minor breach is not.[49] Our recommendations regarding the distinction between revocation and termination are discussed above. Additionally, a minor breach is subject to liquidated damages of up to $100 per day and a major breach is subject to liquidated damages of up to $500 per day.[50] Given the relatively low dollar amount of liquidated damages, it may be unlikely these damages will ensure compliance and therefore the Agency may wish to increase them. Both major and minor breaches may be appealed to the Agency's Board of Directors and that decision may be contested through binding arbitration.[51]

Binding arbitration, subject to enforcement in court, is required for all claims arising out of or related to the agreements except claims for personal injury, property damage, or related to the hold harmless and indemnification provisions of the agreements.[52] Arbitration can be more cost effective and quicker than litigation but the parties waive protections afforded by formal rules of evidence, discovery, and a jury trial. Further, in binding arbitration, there is no right to appeal if the arbitrator's decision is legally or factually incorrect. Thus, both parties waive important rights. We generally recommend against binding arbitration for these reasons and because the parties may always agree to mediate or arbitrate a particular dispute.

The franchise agreements provide that the Agency may revoke the agreements upon a major breach if not cured within six months. Providing such a long cure period allows the contractor to continue the breach for potentially months without consequence. We recommend the franchise agreements be amended to provide a shorter cure period of ten days to two weeks to cure any "event of breach," with or without a hearing before the Agency's Board of Directors, before the Agency may terminate the agreements or seek

[49] Clover Flat Franchise Agreement, §§ 6.4, 6.5; Upper Valley Franchise Agreement, §§ 6.4, 6.5.
[50] Clover Flat Franchise Agreement, § 6.9; Upper Valley Franchise Agreement, § 6.9.
[51] Clover Flat Franchise Agreement, §§ 6.6, 6.7; Upper Valley Franchise Agreement, §§ 6.6, 6.7.
[52] Clover Flat Franchise Agreement, § 7; Upper Valley Franchise Agreement, § 7.

injunctive, equitable, or other appropriate relief. Binding or non-binding arbitration may also be part of this process if the Agency wishes but this is less common.

General Provisions. The franchise agreements contain standard provisions found in most contracts. We recommend revising or adding the following provisions:

1. **Independent contractor.** Both franchise agreement contain this provision.[53] We recommend revising it to specify that: (a) the contractor is not an officer of the Agency (in addition to not being an employee of the Agency), (b) the contractor is not an agent, partner, or joint venturer of the Agency, (c) the contractor is solely responsible for the acts and omissions of its officers, employees, subcontractors, and agents, and (d) the contractor and its officers, employees, subcontractors, and agents are not entitled to retirement benefits, workers' compensation benefits, or any other benefits which may accrue to employees of the Agency or its member agencies (in addition to just those benefits that accrue to employees of the Agency).

2. **Specific performance.** Both franchise agreements contain this provision and authorize injunctive and equitable relief without specify that these remedies include specific performance.[54] Because the term "specific performance" is only included in the heading and the terms of the agreements do not include the headings,[55] we recommend specifying in the text of this section that injunctive and equitable relief includes specific performance.

3. **Law compliance.** Both franchise agreements contain this provision.[56] We recommend revising it to include compliance: (a) with federal, state, and local regulations (in addition to laws), and (b) with the municipal codes of the member agencies (as discussed above).

4. **Jurisdiction and venue.** Neither franchise agreement contains this provision. In the absence of a provision specifying which court has jurisdiction and venue over a dispute, a lawsuit arising under or related to the franchise agreements

[53] Clover Flat Franchise Agreement, § 5.1.; Upper Valley franchise Agreement, § 5.1.
[54] Clover Flat Franchise Agreement, § 5.2; Upper Valley Franchise Agreement, § 5.2.
[55] Clover Flat Franchise Agreement, § 5.5; Upper Valley Franchise Agreement, § 5.5.
[56] Clover Flat Franchise Agreement, § 5.7; Upper Valley Franchise Agreement, § 5.7.

could be heard in federal court or in the superior court of another county. We recommend adding a provision that jurisdiction and venue for all disputes arising under or related to the franchise agreement and not subject to the mandatory arbitration provisions shall be in the Superior Court of California for the County of Napa.

5. **Assignment.** Both franchise agreements contain provisions requiring the Agency's consent to any assignment of the contractor's interests under the agreements without defining the term "assignment."[57] We recommend adding provisions to this section: (a) stating that an assignee shall be bound by all provisions in the agreements, and (b) defining "assignment" to include: (i) sale, exchange, or transfer of substantially all corporate assets to a third party, (ii) sale, exchange, or transfer of more than 10% or more of assets, ownership, or stock to any person (except to a revocable trust), (iii) any reorganization, consolidation, merger, recapitalization, stock issuance or re-issuance, voting trust, pooling agreement, escrow arrangement, liquidation or other transaction which results in change of ownership or control of 10% or more of the value or voting rights in stock of the contractor, (iv) divestiture of an affiliate used by the contractor to fulfill its obligations under the agreements, or (v) any combination of the foregoing.

6. **No third-party beneficiaries.** Neither franchise agreement contains this provision. We recommend adding a provision stating that there are no third-party beneficiaries under the agreements that, while not being parties to the agreements, may assert rights to enforce the agreement such as an affiliate, subcontractor, or independent contractor of the contractor.

7. **Entirety of agreement.** Both franchise agreements contain provisions stating that the agreements represent the entire agreements between the parties and superseded all other agreements, whether or oral or written, between the parties with respect to the subject matter of the agreements.[58] We recommend adding provisions to this section that: (a) both parties participated in the drafting of the agreements with the assistance of — or opportunity for

[57] Clover Flat Franchise Agreement, § 5.12; Upper Valley Franchise Agreement, § 5.12.
[58] Clover Flat Franchise Agreement, § 5.11; Upper Valley Franchise Agreement, § 5.11.

assistance from — counsel of their choosing, and (b) the agreement shall be construed fairly, according to its fair meaning, and not strictly for or against either party. In the absence of this provision, courts will interpret ambiguous or conflicting provisions against the drafter of the agreements and likely to the detriment of the Agency in this case.

8. **Reservation of Rights.** The franchise agreements reserve the right of the Agency to further regulate aspects of solid waste handling services in the future.[59] We recommend this section be revised to reserve the right of the member agencies to also further regulate aspects of solid waste handling services in the future.

9. **Closure and Post-Closure Funds (Clover Flat Franchise Agreement Only).** Because this section imposes duties on the contractor for thirty years after the landfill is closed and after the expiration or termination of the agreement, we recommend this section include a provision stating that it survives the expiration or termination of the agreement so it may be enforced after the parties' other contractual obligations have ceased.

10. **Inspection of Facilities.** We recommend revising this section to allow the Agency or its staff or agents to inspect the contractor's facilities, as defined, during normal business hours to ensure compliance with the contractor's obligations under the franchise agreements and law. The Agency is currently authorized to inspect the contractor's records but not its facilities.[60]

11. **Permits, Licenses, Etc.** We recommend revising this section to require the contractor to obtain business licenses from the member agencies as required by their respective municipal codes.

12. **Construction and Demolition Debris Program (Upper Valley Franchise Agreement Only).** The Upper Valley Franchise Agreement requires the contractor to operate a "construction and demolition debris program" at the Clover Flat Landfill in accordance with the parameters provided in the construction and demolition debris study approved by the Agency on

[59] Clover Flat Franchise Agreement, §§ 8.1; Upper Valley Franchise Agreement, § 8.2.
[60] Clover Flat Franchise Agreement, § 16.1; Upper Valley Franchise Agreement, § 15.1.

November 19, 2007. We recommend this study be incorporated by reference into the agreement, so its provisions become an enforceable part of the agreement.

Definitions. Because the franchise agreements are governed by contract law, a dispute over their interpretation or enforcement will turn on the meaning of the words used. Here, many words in the franchise agreements are undefined or inadequately defined which will lead to conflicting interpretations of the parties' obligations and difficulty with enforcement. To ensure the parties' obligations are clear, thus reducing the risk of a dispute and aiding in any enforcement action, we recommend revising or adding the following definitions:

1. "Affiliate" and "affiliated companies". Both franchise agreements refer to "affiliate companies" of the contractor and "affiliate of contractor or Agency" for the rate setting methodology and selection of an arbitration panel without defining these terms.[61] Typically, an affiliate or affiliated companies are those with an ownership interest in the contractor's business, those in which the contractor's business has an ownership interest, or those in which the same persons serve as officers or owners of the various companies.

2. "Collection", "collect", "collected". Both franchise agreements require or refer to collection of solid waste by the contractor without defining the term.[62] A definition could include taking physical possession of solid waste and removing solid waste from the premises, whether by manual, semi-automatic, or automated means, and transporting such pursuant to the franchise agreement.

3. "Construction and demolition debris". The Upper Valley Franchise Agreement requires the contractor to develop and implement a "construction demolition debris program" without defining the terms.[63] If this term is defined in the program document, that document should be fully incorporated by reference

[61] Clover Flat Franchise Agreement, § 7.2; Upper Valley franchise Agreement, §§ 7.2, Exhibit B.
[62] Clover Flat Franchise Agreement, § 1; Upper Valley Franchise Agreement, § 17.1.
[63] Upper Valley Franchise Agreement, § 18.

into the franchise agreement. Otherwise the term should be separately defined in the franchise agreement.

4. "Container". The Upper Valley Franchise Agreement requires the contractor to collect solid waste and provide customers at least one "recycling container" without specifying from where the solid waste is collected or what type of container meets the recycling container requirement.[64] The franchise agreement does require the contractor to provide "appropriately sized containers."[65] Defining these terms to specify the different sizes and designs of these items, whether the Agency will approve these items, and the containers from which solid waste will be collected, would provide clarity and aid in enforcement of the agreement.[66]

5. "Declared emergency". The Clover Flat Franchise Agreement authorizes the contractor to exceed the limit on receipt of solid waste from outside the jurisdiction during a "declared emergency" but does not define the term. This could be an emergency declared by the federal government, the state government, or by one or more of the member agencies. Defining the term to specify which agency or agencies must declare an emergency and under what authority an emergency may be declared (e.g., the California Emergency Services Act and/or a local ordinance) would add clarity to when the contractor may exceed its limit on out-of-jurisdiction solid waste and aid in enforcement of the agreement.

6. "Discarded materials". Both franchise agreements define "diversion" to include discarded materials without defining the term.[67] Generally, this includes any solid waste, recyclables, compost, or construction and demolition debris placed by a customer in a container, bin, or cart for the purpose of collection by the contractor.

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[64] Upper Valley Franchise Agreement, § 17.
[65] Upper Valley Franchise Agreement, § 17.4.
[66] Note: the rates for the Upper Valley franchise Agreement, adopted by separate resolution of the Agency, require certain size "carts" but enforcement of this requirement may be difficult without including it in the franchise agreement itself.
[67] Clover Flat Franchise Agreement, § 1; Upper Valley Franchise Agreement, § 1.

7. "Electronic waste" and "universal waste". Both franchise agreements exclude "hazardous wastes" from the definition of "solid waste" which may include some components of electronic waste (e-waste) or "universal waste" under California Code of Regulations, title 22, § 66273.1 et seq.[68] Adding a definition of electronic waste or universal waste, even to include these within the meaning of "hazardous wastes," would add clarity and aid in enforcement of the agreements.

8. "Environmental laws". The Clover Flat Franchise Agreement requires the contractor to indemnify the Agency for claims brought under "environmental laws" without defining the term.[69] Defining the term to include specific federal and state environmental laws would provide clarity and aid in enforcement of this provision.

9. "Gross receipts". Neither the franchise agreements nor the resolution adopting rates for the Upper Valley Franchise Agreement defines this term. If the Agency ultimately decides to impose a franchise fee on all the contractor's operations, or to clarify the current 6% franchise fee paid to the City of Calistoga, this term should be defined to explain the calculation of the fee based on a percentage of gross receipts.

10. "Hazardous waste", "hazardous substance", and "biomedical or medical waste". While both franchise agreements require the contractor "to carry out its responsibilities stated in the SRRE [Source Reduction and Recycling Element] and HHWE [Household Hazardous Waste Element],"[70] neither franchise agreement defines the terms "hazardous waste", "hazardous substance", or "biomedical or medical waste". The definition of "solid waste" in both franchise agreements excludes from its meaning "hazardous wastes" or "medical wastes" under federal or state law without further explanation. If these terms are defined in the SRRE and HHWE, these documents should be

[68] *Ibid.*

[69] Clover Flat Franchise Agreement, § 5.10.

[70] Clover Flat Franchise Agreement, § 17.1; Upper Valley Franchise Agreement, § 16.1.

fully incorporated by reference into the franchise agreements. Otherwise these terms should be separately defined in the franchise agreements.

11. "Mandatory collection area". Neither of the franchise agreements defines this term. The Town of Yountville has mandatory solid waste and recyclable services unless an exemption applies while the other jurisdictions are voluntary.[71] This term should be defined to clarify in which jurisdictions service is mandatory and in which jurisdictions service is voluntary.

12. "Non-collection notice". The Upper Valley Franchise Agreement does not currently have a procedure to notify customers of the reason for non-collection of solid waste in the event this occurs. A standard non-collection notice, and a requirement that the contractor provide the notice to customers upon non-collection, should be defined and required by the franchise agreement.

13. "Rate". Neither franchise agreement defines this term. A typical definition includes a statement that rates reflect the reasonable cost and the maximum amount charged by the contractor for the services provided.

14. "Recyclables" and "composting". Both franchise agreements require compliance with the SRRE (Source Reduction and Recycling Element), require compliance with the Act by "source reduction, recycling, and/or composting", and the Upper Valley Franchise Agreement requires recycling containers without defining the terms.[72] If these terms are defined in the SRRE, that document should be fully incorporated by reference into the franchise agreements. Otherwise these terms should be separately defined in the franchise agreements. "Compost" could include food waste or yard trimmings provided the materials meets the maximum acceptable metal concentration limits specified in California Code of Regulations, title 14, §§ 17868.2, 17868.3.

15. "Residential accounts", "commercial accounts" and "industrial accounts". Both franchise agreements define "customer" to include "residential,

[71] Yountville Mun. Code, § 13.80; Calistoga Mun. Code, § 8.16; St. Helena Mun. Code, § 8.04; Napa County Mun. Code, § 8.44.
[72] Clover Flat Franchise Agreement, § 17.1; Upper Valley Franchise Agreement, § 16.1.

commercial and industrial accounts" without defining these terms.[73] The Upper Valley Franchise Agreement further requires the contractor to provide appropriately sized recycling containers to "industrial/commercial" customers. The distinction between residential, commercial, and industrial accounts and customers could be based on the zoning designation for the property, the actual use of the property, or the customer's assertion of the zoning designation or the use of the property. Defining these terms will provide clarity and aid in enforcement of the franchise agreements.

16. "Subcontractor(s)". Both franchise agreements refer to the contractor's subcontractor(s) without defining the term.[74] Typically, the term is defined as any party who has entered into a contract, express or implied, with the contractor to perform any act or service required of the contractor under the agreement.

[73] Clover Flat Franchise Agreement, § 1; Upper Valley Franchise Agreement, § 1.
[74] Clover Flat Franchise Agreement, §§ 5.12, 5.13, 5.15, 12.1; Upper Valley Franchise Agreement, §§ 5.12, 5.13, 5.15, 10.1, 11.