Item 18
1/27/26 BOS Meeting

From: Tolentino, Monik R. <mtolentino@buchalter.com>
Sent: Friday, January 23, 2026 2:46 PM
To: Sloan, Doug; Clerk/BOS
Cc: Carr, Brandon M.; O'Hara, Gwenneth; Jennings, Colin
Subject: Correspondence re: 01/27/2026 Board Meeting
Attachments: Letter from B. Carr to County Counsel and Clerk of the Board dated 01.23.26.pdf

Mr. Sloan and Clerk of the Board of Supervisors:

Please see the attached letter concerning Agenda item 18 for the January 27, 2026 board meeting from attorney Brandon M. Carr. Thank you.

Best,
Monik Tolentino

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January 23, 2026

VIA FEDERAL EXPRESS AND EMAIL

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Board of Supervisors
2281 Tulare St., Room 301
Fresno, California 93721

Re: Agenda Item 18 [1/27/26 Board Meeting]: "Conference with Legal Counsel - Consider initiation of litigation against Toro Energy of California AA, LLC pursuant to Government Code, § 54956.9, subd. (d)(4) (1 case)"

Dear Mr. Sloan:

We are counsel for Toro Energy of California AA, LLC ("Toro"). We write to address the County's January 15, 2026 letter threatening termination of the *County of Fresno AADS Landfill Gas to Energy Project Revenue Agreement* ("Revenue Agreement") and Agenda Item no. 18 set for January 27, 2026 regarding potential litigation against Toro. In this letter we explain why the County has no basis to terminate the Revenue Agreement or initiate litigation.

It is clear the County stands to greatly benefit from honoring its obligations under the Revenue Agreement and working amicably with Toro toward project implementation—which is likely only 90-120 days away.

Toro has requested meetings to discuss the County's issues, however, each request has been rejected. Not only is a meeting required by the Revenue Agreement, but we believe it will help resolve the issues and allow project completion. Accordingly, we hereby request an in-person meeting within 10 calendar days of the date of this letter to attempt, in good faith, to move the project forward.

If the County declines that requested meeting, commences litigation, or terminates the contract, Toro will proceed aggressively to protect its rights without further notice. Toro will seek all damages available under the contract and California law, including the recovery of its attorneys' fees from the County under the prevailing party provision in the Revenue Agreement.

I. This Project Is an Extraordinary Financial and Operational Benefit to the County

The Revenue Agreement will provide millions of dollars to the County. Specifically, the Revenue Agreement provides a payment to the County of "50% of the Net Proceeds until the Project Finance Payments have been paid by the Developer. After Project Finance Payments have been paid by the Developer, Remittance of Net Proceeds will be 51% for the remaining Term of the Revenue Agreement." The percentage is significantly higher than the industry standard and similar revenue agreements.

In addition to revenue sharing, the project provides the County with substantial ancillary benefits, including: net wellfield maintenance charge payments, pipeline franchise payments, property tax revenues and electrical savings from reduced blower and flare operation.

Termination of the Revenue Agreement would also cause the County to forfeit the benefit of federal investment tax credits with an estimated value exceeding $20 million—credits that Toro has already lawfully safe-harbored and that will not be available to any replacement developer as the program expired at the end of 2024.

All of the fundamental long lead tasks are done. Toro has poured years of work and millions into this project, and with the County's partnership, implementation can start soon. In fact, the only key remaining items left required to implement the project are in the responsibilities of the County.

II. The Revenue Agreement Does Not Require Completion of the Conditions Precedent Within One Year of the Effective Date

The County's stated basis for termination is legally unsound, factually unsupported, and contradicted by the County's own conduct and the Terms and Conditions of the Agreements, and industry norms.

The County's entire termination theory rests on the assertion that Section 3.1.3 required Toro to *complete* all conditions precedent to execution of the Ground Lease within one year of May 19, 2022. That assertion is demonstrably incorrect.

Section 3.1.3 states, in pertinent part:

> Failure to *proceed with due diligence* to completion of the conditions precedent described in section 3.1 (inclusive of 3.1.1 and 3.1.2) above for either the Revenue Agreement or the Ground Lease within one (1) year after the Effective Date of the Revenue Agreement, unless extended in writing due to factually supported unforeseen circumstances by the parties, shall entitle the County to terminate the Revenue Agreement and the Ground Lease.

Section 3.1.3 requires the Developer to **"proceed" with due diligence** within 1 year of the Effective Date. It *does not* require completion of all conditions precedent within that 1 year period. To be clear, some conditions precedent, including, governmental approvals, are outside the Developer's control and completion within a year would be impossible. California law does not permit a public entity to rewrite an agreement after the fact to impose an impossible performance standard.

In interpreting section 3.1.3, "[t]he whole of [the Revenue Agreement] is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) This means that we "must interpret contractual language in a manner which gives force and effect to every provision" (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 473, italics omitted), and to avoid constructions which would render any of its provisions or words "surplusage." *McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110. Put simply, the terms of the Revenue Agreement "should not be construed to render some of its provisions meaningless or irrelevant." *Estate of Petersen* (1994) 28 Cal.App.4th 1742, 1754. We must also follow the rule that the language of the Revenue Agreements provisions should be construed in context, in view of the intended function of the provision and of the contract as a whole. *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265.

Further, where possible, we must "'avoid an interpretation which will make a contract extraordinary, harsh, unjust, or inequitable.'" *ASP Properties Group, L.P. v. Fard, Inc*. (2005) 133 Cal.App.4th 1257, 1269; *accord, Barroso v. Ocwen Loan Servicing, LLC* (2012) 208 Cal.App.4th 1001, 1013.)

Under the County's interpretation, Toro would have been required, within twelve months, to obtain final and non-appealable CEQA approvals, Planning Commission entitlements, Air District permits, a PG&E interconnection agreement, a County pipeline franchise, building and encroachment permits and exhaustion of all appeal periods for a complex, multi-agency industrial energy project. That interpretation is facially absurd, commercially unreasonable, and would not be enforced by any court.

Moreover, the conditions precedent are not unilateral obligations that Toro can complete by itself. Each condition precedent requires collaboration with, involvement by, or approval by the County, other government enforcement agencies and PG&E. It would be unfair and an unjust result to interpret section 3.1.3 as permitting the County to terminate the Revenue Agreement on the basis of Toro's failure to meet the conditions precedent, something it does not have control to do, and which the County has a role in completing.

For example, the Pipeline Franchise Agreement, took the *County*, not Toro two years to process and approve after Toro requested the Agreement within weeks of the effective date of the Revenue Agreement. The conditions precedent include the requirement for Toro to obtain all Governmental Approvals pursuant to the requirements of CEQA, which at a minimum includes Conditional Use Permits and Air Permits. The preparation for such permits, including detailed engineering documents, and approval thereof, could not be completed in a mere 12 months—making the County's offered interpretation an impossibility. Indeed, it took 7 months from the date Toro's filed its application for the Conditional Use Permit to be approved by the County and 14 months from the date Toro filed its application for the Air Permits.

The County itself did not interpret Section 3.1.3 this way for more than three years. No notice was issued at the one-year mark. No default was declared. No concern was raised until October 2025—approximately thirty-six months after the Effective Date—after Toro had already secured major approvals, with the County's knowledge and cooperation. Toro relied on the County's course of conduct (including, for example, allowing Toro to install a foundation at the proposed alternative lease premises to safe harbor the tax credits). In reliance on the County's conduct, Toro has spent millions towards the project.

III. The County Has Prevented Performance

Even if the County's interpretation were correct (it is not), the County would still be barred from terminating the Revenue Agreement because it has affirmatively prevented Toro from completing the very approvals it now claims are missing.

A CUP amendment is needed to advance the project. Planning staff accepted the application in May 2025, determined that the CUP amendment was minor in nature, exempt from further CEQA review, and ready for Planning Commission hearing as of November 2025. Nevertheless, the Department unilaterally suspended scheduling the hearing—not due to land-use concerns, but as leverage in a contractual dispute. Nothing in the Revenue Agreement authorizes the County to halt permitting to manufacture a default. Under Section 41.21 of the Revenue Agreement, the County is required to "perform all further acts that may be reasonably necessary to effectuate the provisions of the Revenue Agreement," and has not done so.

A party may not interfere with performance and then declare default based on the resulting delay. That principle is settled California law and would subject the County to significant damages.

IV. Unforeseen Circumstances

Section 3.1.3 also contemplates extensions for "unforeseen circumstances by the parties." There have been at least three significant, unforeseen circumstances that materially impacted the project: (1) grid power deficit; (2) project site relocation; and (3) increase in projected landfill gas production.

After discussing the limitations of the initial project site, the County proposed a larger, 1-acre site approximately 300 yards away from the initial location. The change would require County Board of Supervisor's approval for the requisite Ground Lease premises description. On June 29, 2023, Dan Amann of the Department of Public Works and Planning stated that he would need to take an item to the Board to modify the agreement with the revised Ground Lease exhibits—and that the revised exhibits would be shared once the survey team completed the legal description. This caused unexpected delay.

In October 2023, Toro submitted for Conditional Use and Air Permits which included the onsite power plant and the revised leased premises. The permit applications were accepted and processed, but they did not make it to the Planning Commission for vote until late-April 2024.

Then throughout 2024, following the County's completion of an excavation project and upgrade to the gas collection system, the landfill gas production potential increased sharply. This increase in gas production necessitated an amendment to the Conditional Use Permit and the Air Permit to increase the capacity of the project from 3,000 SCFM to 4,000 SCFM. This simple amendment was filed in May 2025. The amendment was to be voted on at the Planning Commission meeting on November 13, 2025. To date, the amended CUP has not been scheduled for the Planning Commission hearing and the Air District has communicated to Toro the revised air permits meet regulatory compliance and the District is "waiting" for the County's final determination on the CUP Amendment before it finalizes and issues the permits.

V. The County's Claim That The Dispute Resolution Process Does Not Apply Is Incorrect

Toro has tried to engage in alternative dispute resolution. The County asserts that termination under Section 3.1.3 is not subject to Article 36 dispute resolution and that Toro has "no recourse." That assertion is legally indefensible.

The Revenue Agreement defines the term "Dispute" to mean:

> Any dispute, disagreement, or controversy between the Parties under the Revenue Agreement, the Ground Lease, and/or any other agreement that may be entered into by and between the Parties with respect to the Revenue Agreement, or in connection with the transactions contemplated in the Revenue Agreement, the Ground Lease, and/or any such other agreement.

Whether the County is entitled to terminate under Section 3.1.3 is itself a dispute "arising out of or relating to" the Agreement. Especially, here, where the parties have differing interpretations of what is required under Section 3 of the Revenue Agreement.

If the County proceeds with termination while refusing to honor the required Article 36 ADR steps, it will compound its breach and expand its exposure to claims for wrongful termination, breach of the implied covenant of good faith and fair dealing, declaratory relief, and injunctive relief.

VI. The County's Threats of Litigation Based On Assignment Are Unfounded

The County's suggestion that Toro is a "shell" entity or has improperly assigned its obligations is inaccurate. Toro remains the Developer under the Agreement, and no assignment requiring County consent has occurred. Colony Energy Partners LLC is the managing member of the holding company for Toro. The County is fully aware of Colony's involvement in providing development services to Toro since before the effective date of the Revenue Agreement.

VII. Termination Would Expose the County to Litigation and Avoidable Risk

If the County proceeds with termination or litigation, Toro will seek all relief available, including monetary damages, attorneys' fees, and injunctive relief preventing the County from re-procuring or re-entitling the project while this dispute is pending. Any litigation will also substantially delay implementation of any alternative project, compounding lost revenues and public benefits. As Toro has made clear, litigation is not its preference—but it is fully prepared to pursue litigation and is confident in the outcome in light of the issues discussed above.

VIII. Toro's Preferred Path Forward

Toro's preferred path remains cooperation, not conflict. Toro requests that the County:

1. Table any recommendation to terminate the Revenue Agreement;
2. Add the CUP amendment to the Planning Commission calendar; and
3. Engage in good-faith discussions to resolve any outstanding issues under the existing Revenue Agreement.

Termination or litigation would set the County back years, reduce public benefits, and make it unlikely that the County could ever secure a more qualified, better capitalized, or more experienced developer than the one already committed to deliver this project. An alternative developer would have to begin its development efforts without the benefit of the valuable tax credits, and the long lead items Toro has already obtained. Finally, the projected date of commercial operation of Q4 2027 is commensurate, particularly in California, for the expected time required to design/permit/finance and construct a project of this nature.

Terminating the Revenue Agreement would also cause unnecessary litigation, loss of extraordinary public benefits, and long-term reputational damage to a project that remains viable, valuable, and ready to proceed.

All rights are hereby expressly reserved.

Respectfully submitted,

BUCHALTER LLP

Brandon M. Carr

[COMMUNICATION SUBJECT TO EVIDENCE CODE SECTIONS 1152 AND 1154].