

BEFORE THE
DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY

In the Matter of:)
)
Appeal of Orange County Local enforcement)
Agency Hearing Officer Decision on Five Year)
Review of the Permit of Rainbow Disposal,)
Issued February 4, 2015.)

DECISION

) Public Resources Code Sections 44307,
) 45030 et seq.
)

1. This matter came before me based upon an appeal filed pursuant to Public Resources Code (PRC) section 45030. Petitioner, Orange County Health Care Agency (LEA), was represented by Nicole M. Walsh, attorney at law. Respondent, Ocean View School District (School District), was represented by Edmond M. Conner, attorney at law. Real Party in Interest, Rainbow Transfer/Recycling, Inc. (Rainbow), was represented by Thomas M. Bruen, attorney at law.
2. The LEA appealed a decision by Hearing Officer, Craig P. Alexander, attorney at law, that the LEA abused its discretion by not contacting the School District regarding issues the School District raised in its June 30, 2014, comment letter on the five year permit review for Rainbow and ordering the LEA to conduct an investigation into Rainbow's operations responsive to complaints raised by the School District. I determined that LEA's appeal raised one or more substantial issues and accepted the appeal. I also decided, pursuant to PRC section 45031(c), that I would review this matter based upon the record before the Hearing Officer and on written arguments submitted by the parties.

1 The written record and arguments were submitted by July 15, 2015. Rebuttal arguments
2 were submitted by August 14, 2015.

- 3 3. Having considered the arguments of legal counsel and the documents submitted by the
4 parties, and for good cause appearing, I have made the following determinations:
5

6 **Relevant Statutes**

- 7 4. PRC section 44307, under which this matter was filed provides, in part, that:

8 ...The enforcement agency shall also hold a hearing upon a petition to the
9 enforcement agency from any person requesting the enforcement agency
10 to review an alleged failure of the agency to act as required by this part,
11 Part 5 (commencing with Section 45000), or Part 6 (commencing with
12 Section 45030) or a regulation adopted by the department pursuant to this
13 part, Part 5 (commencing with Section 45000), or Part 6 (commencing
14 with Section 45030). A hearing shall be held in accordance with the
15 procedures specified in Section 44310.

- 16 5. PRC section 44310 provides, in part, that:

17 ... (a) (1) The hearing shall be initiated by the filing of a written request for
18 a hearing with a statement of the issues.

19 (A) If the hearing request is made by the person subject to the action, the
20 request shall be made within 15 days from the date that person is notified,
21 in writing, of the enforcement agency's intent to act in the manner
22 specified.

23 (B) If the hearing request is made by a person alleging that the
24 enforcement agency failed to act as required by law or regulation pursuant
25 to Section 44307, the person shall file a request for a hearing within 30
26 days from the date the person discovered or reasonably should have
27 discovered, the facts on which the allegation is based.

28 **Hearing Panel Decision**

- 29 6. The request for hearing was filed by the School District on November 19, 2014, alleging
30 that the LEA failed to act as required by law or regulation under PRC section 44307
31 when it issued its determination and Solid Waste Facilities Permit Review Report
32 regarding the five year permit review for Rainbow. Specifically, the School District
33 challenged the determination by the LEA that there were no operational changes at

1 Rainbow requiring a permit modification or revision. The School District also challenged
2 the findings that Rainbow was operating in compliance with state minimum standards
3 and that the existing solid waste facility permit adequately governs continued operations
4 at Rainbow. Finally, the School District requested that Rainbow's solid waste facility
5 permit be revised and that an environmental impact report under the California
6 Environmental Quality Act be prepared for that revision.
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8 7. The Hearing Officer heard this matter on January 12, 2015, and January 30, 2015. At the
9 hearing, the Hearing Officer heard testimony from the parties and received evidence
10 regarding the five year permit review for Rainbow. After ruling on various pre-hearing
11 motions related to the Brown Act, the continuance of the original hearing date, and
12 hearing officer bias, the Hearing Officer addressed the underlying allegations.
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14 8. The Hearing Officer found that a number of the School District's claims lay within the
15 jurisdiction of other government entities or were the subject of a pending lawsuit. As for
16 those claims within the jurisdiction of the LEA, the Hearing Officer concluded that the
17 LEA properly exercised its discretion in finding that the operational controls at Rainbow
18 are in place. The Hearing Officer also determined that the LEA was correct in its
19 interpretation of the scope of the LEA's role in a five year permit review and that the
20 LEA may exercise its discretion in determining whether Rainbow is operating in
21 accordance with state minimum standards and whether there are no operational
22 changes requiring permit revision or modification. None of these findings were appealed
23 by the School District.
24

25 9. The Hearing Officer did conclude, however, that the LEA abused its discretion by not
26 following its own procedures for addressing complaints from the public. Specifically, the
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1 Hearing Officer found that the LEA should have conducted “a complete investigation
2 regarding Rainbow’s operations, specifically regarding the complaints of the [School
3 District’s] witnesses of noise, vector and dust at the Oak View Elementary School site.”
4 (Record at 3189.) These complains were contained in the School District’s June 30, 2014
5 letter and its attachment.
6

- 7 10. The Hearing Officer ordered the LEA to re-open its five year permit review of Rainbow
8 for the limited purpose of investigating the allegations in the School District’s June 30,
9 2014 letter. The Hearing Officer further ordered the LEA to issue a final report based on
10 its investigation, due on or before June 2, 2015.

11 **LEA’s Argument**

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13 11. In its appeal, the LEA argues that the Hearing Officer exceeded the scope of review when
14 he ordered the LEA to re-open the five year permit review and issue a report to address
15 the allegations raised by the School District.
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17 12. The LEA claims that because the Hearing Officer based his determination of an alleged
18 violation by the LEA of its own internal operating procedure, the allegation is outside the
19 scope of a PRC section 44307 hearing because that internal operating procedure is not a
20 law or regulation reviewable under PRC section 44307.
21
22 13. The LEA also argues that it did properly address the School District’s June 30, 2014
23 letter by reviewing it prior to issuing its Solid Waste Facilities Permit Review Report.

24 **School District’s Argument**

- 25 14. The School District argues that the Hearing Officer’s determination and order was proper
26 because it is within the Hearing Officer’s purview to decide whether the LEA abused its
27 discretion in general. The School District argues that substantial evidence supports the

1 Hearing Officer's finding that the LEA failed to follow its own procedures for responding
2 to complaints.

3 15. The School District claims that the Hearing Officer's failure to cite which law or
4 regulation the LEA violated is immaterial because the Hearing Officer's decision should
5 be affirmed by CalRecycle if it is correct on any grounds regardless of whether those
6 grounds are stated in the decision. The School District offers several grounds for why the
7 decision was correct, including the *Accardi* doctrine¹ and Title 14 section 18302 of the
8 California Code of Regulations (CCR).

9
10 16. Finally, the School District argues that Hearing Officer properly excluded the LEA's
11 rebuttal witness and that the Hearing Officer's order for the LEA to prepare an additional
12 report after the ordered re-opening of the five year permit review was proper.
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14 **Real Party in Interest's Argument**

15 17. Real Party in Interest, Rainbow, joins in the arguments made by the LEA. Rainbow
16 argues that the Hearing Officer's scope of authority is limited to the statutes and
17 regulations specifically set forth in PRC section 44307 as they relate to the LEA's five
18 year permit review of Rainbow. Because an alleged standard operating procedure of the
19 LEA is not a law listed under PRC section 44307, Rainbow argues it is beyond the scope
20 of the Hearing Officer's purview.
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27 ¹ According to the School District, the *Accardi* doctrine "stems from the U.S. Supreme Court decision in *United States ex rel. Accardi v. Shaughnessy* (1954) 347 U.S. 260, and requires that agencies abide by their own internal policies and procedures when the rights of third parties are affected. (*See Alcaraz v. INS* (9th Cir. 2004) 384 F.3d 1150, 1162.)" (School District Rebuttal Brief at 5.)

1 to raise allegations that the LEA failed to act as required by a law or regulation that is
2 found or promulgated under the specific parts of the Public Resources Code listed in
3 section 44307, that is Part 4 (commencing with section 43000), Part 5 (commencing with
4 section 45000), and Part 6 (commencing with section 45030).

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6 21. Thus, while some testimony at the hearing revealed that the LEA has a standard operating
7 procedure of responding to complaints within 24 hours, that operating procedure of the
8 LEA is not a law listed under or a regulation promulgated pursuant to Part 4
9 (commencing with section 43000), Part 5 (commencing with section 45000), or Part 6
10 (commencing with section 45030) of the Public Resources Code. Therefore, an allegation
11 that the LEA failed to act according to its standard operating procedure is not reviewable
12 under PRC section 44307.

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14 22. Additionally, the *Accardi* Doctrine that the School District raises in its Rebuttal Brief is
15 also not a law listed under or a regulation promulgated pursuant to Part 4, Part 5, or Part 6
16 of the Public Resources Code. Therefore, an allegation that the LEA failed to according
17 to the *Accardi* Doctrine is not reviewable under PRC section 44307.

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19 23. Accordingly, the Hearing Officer erred when he found that the LEA had abused its
20 discretion by not responding to the School District's June 30, 2014 letter pursuant to a
21 standard operating procedure of the LEA.

22 **The LEA's Duty to Respond to the June 30, 2014 Letter**

23 24. According to the Hearing Officer, the LEA did not respond to the School District's June
24 30, 2014 letter. (See Record at 3192 and 3196.) However, after a review of applicable
25 law and the record, I conclude that the evidence does not support this conclusion.
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1 25. In a five year review of a solid waste facility permit, Title 27 of the CCR, section

2 21675(b) requires the LEA to prepare a solid waste facilities permit review report after
3 the LEA has reviewed all documents submitted by the facility operator and “any other
4 information in the record to identify any changes.”

5
6 26. In this case, the June 30, 2014 letter from the School District was properly included in the
7 record as a document the LEA reviewed before preparing its report. (Record at 0008.) In
8 addition, the record shows that there were at least five inspections of Rainbow after the
9 LEA received the June 30, 2014 letter, and none of those inspections revealed any
10 violations or areas of concern. (Record at 3087-3089.) In fact, a site visit on August 29,
11 2014, was specifically made in response to the concerns raised in the School District’s
12 June 30, 2014 letter. (Record at 3089.) That site visit did not reveal any of the violations
13 alleged by the School District. (*Id.*) Finally, to say that the LEA did not respond at all to
14 the letter or any of the petitions attached to the letter is not accurate.² The record reveals
15 that there was a meeting between the School District’s counsel and the LEA in response
16 to the June 30, 2014 letter. (*See* School District Opening Brief at 16 and LEA Rebuttal
17 Brief at 4. The substance and/or success of this meeting is unclear, but both parties agree
18 it occurred.) Further, at the hearing, the School District questioned three witnesses, Ms.
19 Cross, Mr. Clark, and Mr. Strozier, from the LEA who had not personally been involved
20 in any response to the June 30, 2014 letter. The School District has apparently concluded
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25 ² I think it is worth noting that the complaints of the school and its employees that the School District references in
26 its briefs (and which it accuses the LEA of not responding to) are not separate complaints potentially under 14 CCR
27 18302 (see next section) or comments on the five year permit review. These complaints are in the form of petitions
signed by school employees and parents that were attached to the June 30, 2014, letter. In fact, the entire attachment
to that letter, which contained the petitions, photos, and other evidence to support the letter’s allegations is a copy of
the exhibits that accompanied the School District’s complaint against Rainbow in a separate civil action for nuisance
that is currently pending in superior court.

1 that because these witnesses did not personally respond to the letter that no response was
2 made at all by the LEA. (*See, e.g.*, School District's Opening Brief at 9 and Rebuttal
3 Brief at 6.) This stretches the limits of logical reasoning too far. Just because Ms. Cross,
4 Mr. Clark, and Mr. Strozier did not personally contact the School District or its counsel,
5 does not mean that no one from the LEA did. For example, as Ms. Cross testified, while
6 she did not personally speak with the School District, her management did. (Record at
7 3878-3879.) And, at the hearing the LEA attempted to bring a rebuttal witness in the
8 LEA's management to respond to the questions about the LEA's response to the June 30,
9 2014 letter, but the Hearing Officer, after the School District objected, denied this
10 request. (*See* Record at 3976-3977 and 3647-3648.) While it is impossible to know what
11 this rebuttal witness would have said, the Record shows there was a meeting between the
12 LEA management and the School District's counsel and there was a site visit to Rainbow
13 in response to the June 30, 2014 letter.

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16 27. Accordingly, the LEA acted properly in response to the School District's June 30, 2014
17 letter commenting on the five year permit review of Rainbow by considering the contents
18 of that letter before making its final report on the permit review.
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20 **School District's 14 CCR Section 18302(c) Claim**

21 28. In its opening and rebuttal briefs submitted to CalRecycle, the School District raises a
22 new argument that it did not posit in its underlying petition considered by the Hearing
23 Officer. This argument alleges that the June 30, 2014 letter was a complaint under Title
24 14 of the CCR section 18302 that the LEA was required to examine within 15 days of
25 receipt. (14 CCR § 18302(c).)

26 29. I want to be clear that new arguments not raised before the Hearing Officer cannot be
27 made now. Nevertheless, the School District seems to allege that 14 CCR section 18302
may have been the law the Hearing Officer could have found the LEA to have violated,

1 (see, e.g., School District Rebuttal Brief at 1 and 6-7); therefore, I will address this issue
2 here.

3 30. Section 18302(c) of Title 14 of the CCR requires an LEA, within 15 days of receipt of a
4 complaint alleging a facility is, among other things, in violation of state minimum
5 standards to “examine the report and determine whether its allegations, if true, would
6 constitute a violation....” If the LEA determines that the complaint does not allege facts
7 constituting a relevant violation, it must advise the complaining party of that
8 determination.

9 31. If the School District now wishes to allege that its June 30, 2014 letter was a complaint
10 under this section of the CCR and that the LEA failed to examine the complaint within
11 the required 15 days, then that allegation is separate and distinct from the School
12 District’s original allegations concerning the LEA’s approval of Rainbow’s five year
13 permit review. And, because such an allegation is separate from the five year permit
14 review, it is independently subject to the 30-day filing time period required by PRC
15 section 44310(a)(1)(B). That 30-day time period started from the date of the LEA’s
16 alleged failure to act as required by law. Here, the School District is saying that the LEA
17 failed to examine the facts contained in the June 30, 2014 letter within 15 days. Fifteen
18 days after June 30, 2014 was July 15, 2014, which made the 30-day filing deadline
19 August 15, 2014. The School District did not file its petition for hearing until November
20 19, 2014, well after the aforementioned August 15, 2014 deadline.

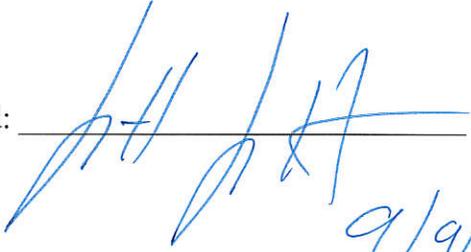
21 32. The June 30, 2014 letter was presented as a comment on the five year permit review for
22 Rainbow, (see Record at 2770. The letter was captioned as regarding “OVSD’s
23 Comments on Five Year Permit Review For The Rainbow Transfer/Recycling Facility
24 30-AB-0099” [sic]), and the LEA properly treated it as such. As detailed above, the LEA
25 was not under a specific obligation to personally respond to the School District’s
26 comment on the five year permit review. Rather, and as the LEA did, the LEA was
27 required to review the School District’s comments along with all of the other documents

1 submitted for the five year permit review before making its final report. If the School
2 District would now like its letter to be considered a 14 CCR section 18302 complaint,
3 then any allegation that the LEA failed to respond to that complaint as the regulations
4 require is time-barred by PRC section 44310(A)(1)(B)'s 30-day filing deadline.

5 **ORDER**

6 Based upon the foregoing, I hereby reverse the Hearing Officer's finding that the LEA abused its
7 discretion by allegedly not responding to the claims raised in the School District's June 30, 2014
8 letter. I order that the Hearing Officer's order for the LEA to re-open the five year permit review
9 of Rainbow, investigate the School District's claims, and issue a report based on its investigation
10 be vacated.
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13 This Decision shall be effective upon service.
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16 Dated:  _____
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19 Scott Smithline, Director
20 Department of Resources Recycling and Recovery (CalRecycle)
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