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7
8 **BEFORE THE CALIFORNIA DEPARTMENT**
9 **OF RESOURCES RECYCLING AND RECOVERY**
10

11 In the Matter of:

12 APPEAL OF ORANGE COUNTY LOCAL
13 ENFORCEMENT AGENCY OF HEARING
14 OFFICER DECISION ON FIVE YEAR
15 REVIEW OF THE PERMIT OF RAINBOW
16 DISPOSAL, ISSUED FEBRUARY 4, 2015
17

**OPENING BRIEF OF RESPONDENT
OCEAN VIEW SCHOOL DISTRICT IN
OPPOSITION TO ORANGE COUNTY
LOCAL ENFORCEMENT AGENCY'S
APPEAL TO SET ASIDE HEARING
OFFICER'S DECISION ON RAINBOW'S
FIVE YEAR PERMIT REVIEW**

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Table of Contents

I. INTRODUCTION.....	1
II. STATEMENT OF THE CASE.....	3
III. ARGUMENT.....	4
A. Review Of The Hearing Officer’s Decision Is Limited To Whether There Was An Abuse Of Discretion.....	4
B. Substantial Evidence Supports Hearing Officer’s Findings That the LEA Failed to Follow Its Own Procedures When It Did Not Contact Any Representatives of the School District or Its Counsel After Receiving The School District’s Complaint Letters And Also Failed to Properly Investigate the School District’s Complaints As Required by Law.	5
C. The Hearing Officer Correctly Determined That The LEA Abused Its Discretion By Failing to Proceed In The Manner Required By Law.	10
D. The Hearing Officer Did Not Exceed His Jurisdiction.	12
E. The Hearing Officer’s Decision Does Not Improperly Expand the Scope of the LEA’s Five Year Permit Review Report.....	13
F. The Hearing Officer Correctly Recognized That the Scope of Review of Third Party Petitions is Limited to Whether the LEA Failed to Act as Required by Law.	14
G. The Hearing Officer Did Not Abuse His Discretion In Excluding The Testimony of Mr. Sanchez.	15
IV. CONCLUSION.....	16

1 **I. INTRODUCTION**

2 A simple, good faith investigation. Nothing costly. Nothing difficult.

3 Just a simple investigation in which someone from the Orange County Health Care Agency (the
4 “LEA”) meets onsite with concerned teachers, staff, and school parents and actually talks to them about
5 their complaints regarding the horrendous odor, dust, noise, and seagull infestation problems being
6 created by the Rainbow Transfer Station and Public Dump (the “Rainbow Facility”).

7 That is all that Hearing Officer Craig Alexander (the “Hearing Officer”) ordered the LEA to do
8 in determining the validity (or invalidity) of the written complaints that were made to the LEA by
9 respondent Ocean View School District (the “School District”) regarding the sickening stench,
10 excessive dust, and mind-numbing noise being experienced at the Oak View Elementary School and
11 Preschool (the “Oak View Schools”) as a result of the solid waste, green waste, C&D, and recycling
12 operations being conducted immediately across the street at the Rainbow Facility.

13 Indeed, all that the Hearing Officer asked the LEA to do was to provide the School District with
14 the simple professional courtesy of verifying whether the Rainbow Facility is, or is not, causing the
15 disgusting and deplorable nuisance conditions that the School District’s six teachers and one
16 administrator described in graphic detail when they testified under oath during the two days of hearings
17 conducted by the Hearing Officer in January of this year.

18 In connection with the LEA’s decision as to whether it should “re-issue the permit, revise the
19 permit, etc., as required by law” (Decision at 37:4-11), the Hearing Officer determined that the School
20 District was and is entitled to have the LEA carefully investigate and consider the School District’s
21 compelling complaints about the intolerable and decidedly unhealthy conditions that the 1,000 students,
22 teachers, and staff at the Oak View Schools, and the nearly 10,000 residents of the Oak View
23 community, are being subjected to on a daily basis as a result of the unenclosed operations being
24 conducted at the Rainbow Facility.

25 Regrettably, however, the LEA apparently feels that the public will be better served if the LEA
26 spends taxpayer dollars in challenging, rather than complying with, the Hearing Officer’s simple
27 directive. Clearly, the LEA has no intention of investigating the School District’s complaints about the
28 Rainbow Facility and has now turned to CalRecycle in hopes that the Department will take the LEA’s

1 side in what has become a huge public controversy with extensive media coverage in several
2 newspapers, and on radio and TV.

3 Specifically, the LEA would like to draw CalRecycle into this controversy by having it take the
4 bold step of publicly reversing the Hearing Officer's decision and thereby condoning the LEA's
5 stubborn and inexplicable refusal to simply sit down with the teachers and administrators at the Oak
6 View Schools and listen in earnest to their complaints about how the Rainbow Facility is not being
7 operated in compliance with State Minimum Standards and is creating public nuisance conditions on
8 virtually a 24/7 basis.

9 In addition, the LEA would like CalRecycle to grant the LEA's appeal and thereby announce to
10 the citizens of Orange County and throughout California that:

- 11 (1) when a state agency, like the School District, makes a lengthy written submittal (including
12 photographs and petitions from hundreds of school parents and community members) in
13 connection with a five-year permit review process and asks that a particular Solid Waste
14 Facility Permit ("SWFP") be revised so as to mitigate or eliminate horrid conditions being
15 created by the Facility in question, the LEA is legally empowered to *ignore* the agency's
16 complaints and take no steps whatsoever to exercise due diligence and conduct a good faith
17 investigation of those complaints; and
- 18 (2) when a hearing officer, who is selected and paid by the LEA, listens to days of emotional
19 and heart-rending testimony from individuals directly impacted by the revolting conditions
20 being caused by the Facility and then orders the LEA to investigate those complaints further
21 before rubber-stamping a permit extension for that Facility, the LEA is entitled to seek a
22 ruling from CalRecycle that flatly rejects the hearing officer's decision and affirms the
23 LEA's practice of regularly ignoring the public's concerns.

24 The School District respectfully submits that, in this case, the Hearing Officer did not abuse his
25 discretion. Moreover, the minimal relief he granted in favor of the School District was certainly
26 supported by substantial—indeed overwhelming—evidence in the record. Notably, the Hearing Officer
27 did not order the LEA to revise, suspend, or revoke the SWFP for the Rainbow Facility. He merely
28 directed the LEA to provide the School District with a meaningful opportunity to have its complaints

1 evaluated by the LEA before it automatically renewed the SWFP and subjected the students, teachers,
2 and staff at the Oak View Schools to another five years of suffering.

3 For CalRecycle to reverse the Hearing Officer's decision would send a very bad message to the
4 public, for it would be a further denial of the minimum due process that the School District was entitled
5 to when it submitted its complaints to the LEA on June 30 and August 25 and 27, 2014, and then filed
6 its petition challenging the LEA's re-issuance of the SWFP for the Rainbow Facility.

7 In light of the reasons set forth above, and for the additional reasons discussed below, the
8 School District respectfully requests that the LEA's appeal be denied in its entirety.

9 **II. STATEMENT OF THE CASE**

10 On November 19, 2014, the School District petitioned the LEA for a hearing to review the
11 "LEA's failure to act as required by law," relating to the LEA's Five Year Permit Review Report for
12 the Rainbow Transfer Facility dated October 20, 2014 (the "Permit Review Report"). The Five Year
13 Permit Review Report determined that (1) there were "no operational changes that are within the
14 parameters of the facility's Solid Waste Facility Permit requiring the permit to be modified or revised"
15 and (2) Rainbow's facility was operating in compliance with state minimum standards. The LEA set
16 the hearing on the Petition for December 19, 2014, and it was then continued to January 12, 2015.

17 The hearing took place on January 12, and 30, 2015, before the Hearing Officer. Six Oak View
18 teachers and one administrator at the School District gave testimony detailing the negative impacts
19 Rainbow's open-air operations were having on the environmental health and safety of the School
20 District's students, staff and surrounding community. The School District also called as witnesses
21 (1) the LEA's head manager, Ms. Kathryn Cross, (2) the investigator for the LEA who was responsible
22 for drafting the Five Year Review Report for the Rainbow Facility, Mr. Dean Clarke, and (3) a second
23 LEA investigator who was involved with the monthly inspections at the Rainbow Facility. The hearing
24 concluded, and four days later the Hearing Officer issued his Decision on February 4, 2015 (the
25 "Decision"). In his Decision, the Hearing Officer ruled that the LEA (1) had failed to follow its own
26 standard operating procedures when receiving the School District's complaints, (2) had abused its
27 discretion relating to the investigation of those complaints, and (3) had failed to act as required by law
28 in issuing the Five Year Permit Review Report. The Decision ordered the LEA to "re-open its

1 review/investigation of the Five Year Permit Review for the limited purpose of investigating and
2 determining if the conditions described by the Oak View personnel” can be substantiated and “whether
3 such facts have any bearing on the LEA’s decision to re-issue the permit, revise the permit, etc. as
4 required by law.” (R. 3197:4-12¹, emphasis added.) The Decision further ordered the LEA to issue a
5 final report, on or before June 2, 2015, based on its findings from any investigations arising from the
6 School District’s complaints and inspection of the Oak View site. (R. 319: 9-19.)

7 The LEA delivered a Notice of Appeal by Orange County Local Enforcement Agency for Solid
8 Waste Facility Permits, dated February 13, 2015, to the Director of CalRecycle requesting that the
9 Hearing Officer’s Decision be set aside in its entirety. The parties executed a stipulation on March 4,
10 2015 (the “Stipulation”), which continued the time to file opening briefs to July 15, 2015 and rebuttal
11 briefs to August 14, 2015.

12 III. ARGUMENT

13 A. **Review Of The Hearing Officer’s Decision Is Limited To Whether There Was An Abuse 14 Of Discretion.**

15 The scope of review of an administrative hearing officer’s decision is abuse of discretion, and
16 the reviewing body is limited to inquiring whether or not the findings and judgment of the hearing
17 officer are supported by substantial evidence in the record. (*Brown v. Valverde* (2010) 183 Cal.App.4th
18 1531, 1557; *Sustainability of Parks, Recycling and Wildlife Legal Defense Fund v. County of Solano*
19 *Dept. of Resource Management* (2008) 167 Cal.App.4th 1350, 1357; *Le Strange v. City of Berkeley*
20 (1962) 210 Cal.App.2d 313, 320.) The burden of proof falls upon the party attacking the decision to
21 demonstrate that the proceedings were unfair, or that there was a “prejudicial abuse of discretion,” or
22 that the hearing officer exceeded his or her jurisdiction. (*Anaheim Redevelopment Agency v. Dusek*
23 (1987) 193 Cal.App.3d 249.) In this case, therefore, the LEA has the burden of proving that the
24 Hearing Officer’s Decision is not supported by substantial evidence; or the Hearing Officer exceeded
25 his jurisdiction; or that the LEA was not given a reasonable opportunity to be heard. As discussed
26 below, the Hearing Officer correctly applied the law to the facts in this matter and determined that the
27 LEA had acted in an arbitrary and unlawful manner by not following proper protocol when the School

28 _____
¹ For ease of reference, references to the administrative record are marked “AR [Page #].”

1 District submitted its complaints, and he correctly ordered the LEA to “reopen” the Permit Review
2 process for the limited purpose of determining whether the Permit Review Report was prepared and
3 approved in accordance with the governing laws.

4 **B. Substantial Evidence Supports Hearing Officer’s Findings That the LEA Failed to Follow**
5 **Its Own Procedures When It Did Not Contact Any Representatives of the School District**
6 **or Its Counsel After Receiving The School District’s Complaint Letters And Also Failed to**
7 **Properly Investigate the School District’s Complaints As Required by Law.**

8 The LEA is charged with issuing permits to solid waste facilities to regulate their compliance
9 with State Minimum Standards, and to protect the health and safety of the public. When issuing a five-
10 year permit review report, the LEA is required under section 21675 of Title 27 of the California Code
11 of Regulations to “determine any actions required by the operator.” The solid waste facility’s permit
12 may contain conditions and regulations the LEA deems necessary and appropriate to protect public
13 health and safety. Indeed, according to section 44012(a) of the Public Resources Code, the LEA must
14 give “*primary consideration to protecting public health and safety and preventing environmental*
15 *damages, and that the long-term protection of the environment is the guiding criterion.*” [Emphasis
16 added.]

17 To achieve this goal, the LEA has the power to review and, if necessary, revise the solid waste
18 facility’s permit at least once every five years. (Pub. Res. Code, §44015.) Such revisions may include
19 “standards for the design, operation, maintenance, and the ultimate reuse of solid waste facilities.”
20 (Pub. Res. Code § 43021.)

21 Section 21675 of the California Code of Regulations regulates the five-year permit review
22 process: “the solid waste facilities permit review report shall include documentation that the following
23 have been reviewed: the operator’s application and ancillary documentation, the current solid waste
24 facilities permit and conditioning documents, all RFI amendments since the last solid waste facilities
25 permit review, the CEQA, *and any other information in the record to identify any changes.*” [Emphasis
26 added.] According to the testimony of LEA inspector, Dean Clarke (“Clarke”), he reviewed Rainbow’s
27 application, along with “all pertinent documents and everything in the file,” drafted the Five Year
28 Permit Review Report, and then submitted it to his boss, the head manager of LEA, Kathryn Cross, for
signature and submission to the CalRecycle. (AR 3310:20-25 and 3311:1-3.) Clarke determined that

1 Rainbow was in compliance with the State Minimum Standards and that the solid waste permit should
2 be reissued without modification or revision. However, Clarke’s determination was not made in
3 accordance with the laws and regulations governing the solid waste permit process (AR 3196:25).

4 As Clarke testified, the LEA received the School District’s letter of comments relating to the
5 Five Year Permit Review for the Rainbow Facility, dated June 30, 2014 (the “Comment Letter”), citing
6 multiple health and environmental concerns arising from Rainbow’s operations at the Facility. (AR
7 3929:3-20) The Comment Letter included attachments, such as photographs evidencing dust clouds
8 migrating from the Facility, seagull infestations, and garbage deposited on the roof of the Oak View
9 Schools. Also enclosed was a Petition, signed by over 735 residents in the Oak View community,
10 addressing concerns relating to the “problems of odors, noise and seagull infestations caused Rainbow
11 Transfer Station” (AR 3162: 5-25). According to the CalRecycle website, Title 14, Division 7, Chapter
12 5 §18302(c) governs the LEA’s receipt of public complaints:

13 “Upon receipt of a complaint, the EA *shall within fifteen days examine the*
14 *complaint* and determine whether its allegations, if true, would constitute a
15 violation of a state minimum standard, permit term or condition or any
16 related state solid waste law or regulation. Should the EA determine that the
17 complaint fails to allege facts constituting a violation of a state minimum
18 standard, permit term or condition or related state solid waste law or
19 regulation, *it shall so advise the reporting party* in writing at the address
20 given in the complaint if an address is given and place a copy in its files.”
21 [Emphasis added.]

22 Upon receiving a complaint from the public, attorneys, or otherwise, the LEA has in place
23 standard operating procedures consistent with the above statute. According to the testimony of head of
24 the LEA, Kathryn Cross, those procedures would include the following:

25 HEARING OFFICER: What is the standard operating procedure of your office for
26 responding to [public] complaints?

27 THE WITNESS: We usually respond within 24 hours.

28 HEARING OFFICER: Any standard operating procedure regarding any verbal
response such as telephoning or investigating?

THE WITNESS: Yes. We have a SOP for that.

HEARING OFFICER: And what would that be?

THE WITNESS: Two I – I mentioned, respond back to the

1 public and *make sure to make contact with them* and tell
2 what came of the *investigation of the complaint*. [Emphasis
3 added.] (AR 3898: 4-25 & 3899: 1-25)

4 However, Ms. Cross goes on to testify that the LEA violated its own protocol and state regulations by
5 failing to communicate with the School District or the School District's counsel, Connor, Fletcher &
6 Hedenkamp, LLP.

7 MR. CONNOR: Okay. And with that foundation, ma'am, did you respond to my law firm
8 within 24 hours?

9 MS. CROSS: I did not. I referred your communication to my upper management.

10 MR. CONNOR: Do you know if they responded to my law firm?

11 MS. CROSS: I do not.

12 MR. CONNOR: You just used the term "SOP." Does that stand for
13 "standard operating procedure" like I asked before?

14 MS. CROSS: Yes.

15 MR. CONNOR: Yes. Now, is it standard operating procedure when you get a letter from a
16 law firm, like mine, representing a school district, to kick it upstairs to
17 upper management and not respond?

18 MS. CROSS: I don't believe that's in the SOP.

19 MR. CONNOR: No. But you did that, didn't you?

20 MS. CROSS: I did, yes.

21 MR. CONNOR: Do you know personally of any response in writing that was provided to
22 my firm or the School District in response to letters that we submitted?

23 MS. CROSS: No.

24 MR. CONNOR: Did you respond to any of the letters or concerns that we
25 raised?

26 MS. CROSS: The LEA, myself, no.

27 MR. CONNOR: Obviously, you, Kathryn Cross -- didn't you know anyone
28 else at the LEA who responded to any of the concerns that we raised?

MS. CROSS: I'm not aware of anyone else, if they did.

MR. CONNOR: And you told us as of June in 2014 that you had no obligation to respond;
right?

MS. CROSS: Yes. (AR 3896:19-25; 3897:1-3.)

1 The LEA further violated state regulations by failing to investigate the School District's
2 complaints within the prescribed 15-day period. (*Title 14 CCR Division 7, Chapter 5, Article 4*
3 *§18302(c)*).

4 MR. CONNOR: Well, you're aware, of course, that the letters that my law firm sent that --
5 that said -- that listed the number of complaints; right?

6 MS. CROSS: Yes.

7 MR. CONNOR: Did you instruct [LEA investigators] Mr. Clarke, Strozier, or Bright or
8 anyone else in your agency to conduct an independent third-party neutral
9 examination of those concerns raised in my letter by going out and
10 talking to members of the public?

11 MS. CROSS: No. (AR 3877: 10-19.)

12 Clarke testified that not only did the LEA fail to take the required action upon receipt of the
13 June 30 2014 letter, but management told him to breach protocol and to not contact the complainant,
14 the School District's counsel, which is a direct violation of the governing law.

15 MR. CONNOR: And you took no action to contact my law firm or anyone at the school
16 district to follow up on anything that was in the letter, did you?

17 MR. CLARKE: That's a management decision.

18 MR. CONNOR: Oh, who made that decision?

19 MR. CLARKE: Or probably the environmental health management.

20 MR. CONNOR: Who's that, sir? Is that somebody outside the LEA?

21 MR. CLARKE: It's -- was it -- probably Larry Honeybourn and Anthony
22 Martinez.

23 MR. CONNOR: What did these -- these gentlemen, Mr. Honeybourn and Mr. Martinez,
24 tell you to do or not do with respect to responding to my letter?

25 MR. CLARKE: *Not to talk to attorneys.* [Emphasis added.] (AR 3969:14-23 & AR
26 3970: 20-24)

27 Finally, with respect to the Five Year Permit Review Report, the LEA arbitrarily ignored the
28 School District's complaints when reissuing the SWFP for the Rainbow Facility. According to Clarke,
the LEA considers "everything in the solid waste facilities file." However, the LEA arbitrarily
disregarded the School District's Comment Letter and the Petition signed by hundreds of Oak View
residents.

MR. CONNOR: Who was looking into it?

1 MS. CROSS: Public health officer looking into the complaints.
2 MR. CONNOR: And did he look into the complaints?
3 MS. CROSS: I don't know.
4 MR. CONNOR: Did you wait for him to look into the complaints before you issued your
5 report?
6 MS. CROSS: No.
7 MR. CONNOR: You knew he was doing that, and you went ahead and issued the report
8 before you found out his – his findings?
9 MS. CROSS: Yes.
10 MR. CONNOR: “Did anyone come to you and say, like, Mr. Clarke, Mr. Frasier, Mr.
11 Bright, ‘I have determined after investigating the School District’s
12 concerns that there are no conditions being caused by the transfer station
13 that are a threat to public health and safety or are causing a health hazard
14 or a public nuisance’? Did they say that to you?
15 MS. CROSS: No. (AR 3879:16-25; AR 3880: 1-15; AR 3884:5-14.)

16 As detailed in the Hearing Officer’s Decision, the LEA did not act in accordance with
17 applicable law or regulations: “All of the witnesses from Oak View Elementary testified that no one
18 from the LEA contacted them to discuss their concerns.” (AR 3196: 5-7) The LEA also failed to
19 contact the School District’s counsel to discuss the complaints detailed in their June 30, 2014 letter:
20 “Both of the LEA’s inspectors, Mr. Clarke and Mr. Strozier, testified that they never contacted anyone
21 at the School District or the Oak View Elementary School or the School District’s counsel at any time.
22 Neither of them sought access to the Oak View Elementary School site to inspect it at any time” (AR
23 3196:7-11).

24 The LEA may try to argue that its inspector, Clarke, investigated the School District’s
25 complaints on July 7, 2015, when he went to the Rainbow Facility for the required monthly inspection.
26 Clarke testified that he “rubbed his hand on the chain-linked fence” over by the Oak View Schools to
27 check for dust and “looked at palm trees.” (AR 3933:8-16.) His report notes that he “did not detect
28 any dust, birds, or odors migrating from Rainbow Transfer to Nichols Street.” (AR 3084.) However,
Clarke failed to verbally communicate with any teachers or staff persons at the Oak View Schools
regarding the conditions described in the Comment Letter. Clarke inspected the Rainbow Facility, per
usual, and the only deviation for his normal routine was to put his hand on the fence near Oak View

1 Schools to check for dust and to look at trees to see if there was observable dust. The Hearing Officer
2 held this was not an adequate “inspection” to properly investigate the School District’s complaints, as
3 required by law. (AR 3196: 12-21.)

4 To act in accordance with the law, upon receiving a complaint from the public, the LEA must
5 first investigate the complaint or determine that investigation is not necessary because of known facts
6 contrary to the complaint. The LEA must also make contact with the complainant, regardless of the
7 outcome of the investigation. (14 Cal. Code Regs. §18302(c).) However, this is not what happened
8 when the LEA received the Comment Letter. The LEA failed to adequately investigate the School
9 District’s complaints that were set forth in the Comment Letter. Furthermore, the LEA in excusably
10 chose not to contact the School District’s personnel or its counsel. As such, the LEA clearly failed to
11 proceed in the manner required by law and that is exactly what the Hearing Officer found.

12 **C. The Hearing Officer Correctly Determined That The LEA Abused Its Discretion By**
13 **Failing to Proceed In The Manner Required By Law.**

14 California courts have held that the failure of an agency to “proceed as required by law”
15 constitutes an abuse of discretion. (*Lincoln Place Tenants Assn v. City of Los Angeles* (2005) 130
16 Cal.App.4th 1491, 1503, 31 Cal.Rptr.3d 353; *Sustainability of Parks v. County of Solano* (167
17 Cal.App.4th 1362).) [Emphasis added.] (R-3188: 1-11.) An abuse of discretion may also be found when
18 the challenged action of the agency is arbitrary and capricious and is lacking in evidentiary support.
19 Here, the Hearing Officer found that the “LEA did not follow its own procedures for addressing
20 complaints from the public” and that the LEA abused its discretion by failing and refusing to conduct
21 an adequate investigation of Rainbow’s operations to determine whether the School District’s
22 complaints regarding odor, dust, noise, and vector problems could be substantiated. (AR 3188:20-25;
23 AR 3189:1-8.)

24 As discussed above, 14 Cal. Code Regs. § 18302(c) provides that the LEA has the discretion to
25 forego investigating a complaint if facts are known that are contrary to the complaint. However, that
26 decision must be communicated to the complainant. The LEA did not present any persuasive evidence
27 that an investigation was not required in this matter. Instead, the LEA admitted that it had never
28 inspected the campus of the Oak View Schools and had ever spoken to any nurses, teachers, or staff

1 persons at the Oak View Schools to inquire if there were any problems stemming from Rainbow's
2 operations. (AR 3920:1-8.) As the Hearing Officer stated in his Decision, the School District's
3 Comment Letter gave rise to a duty to investigate the complaints set forth therein, in accordance with
4 the LEA's standard operating procedure, to determine if these complaints could be substantiated. (AR
5 3196:18-23.)

6 In its Notice of Appeal, the LEA contends that the Comment Letter was "intended to contain
7 persuasive legal argument, not to request an investigation." (AR 3106.) This statement is not accurate
8 because the Comment Letter specifies "odor, dust, noise, seagull infestation . ." as environmental
9 health issues caused by Rainbow's operations. (AR 2774.) Similarly, the Comment Letter notes that
10 "hazardous substances have been allowed to blow unimpeded toward the Oak View Schools, where
11 they have been inhaled by preschool and elementary school aged children along with teachers, staff,
12 parents, and the residents in the nearby Oak View community . . ." (AR 2774.) The Comment Letter
13 also detailed "complaints to the school nurse relating to allergies, asthma, colds, sore throats, coughs,
14 headaches, nausea, and stomachaches have seen a dramatic increase since Rainbow began intensifying
15 its concrete crusting operations in or about 2009." (AR 2779.) The LEA's claim that a complaint letter
16 from the public must "request an investigation" has no basis in law, fact, or common sense. The LEA's
17 claim that the Comment Letter was merely "persuasive" argumentation and, therefore, should be excluded
18 from being classified as a complaint is unconvincing, and the Hearing Officer correctly ruled as much
19 in his Decision.

20 The LEA further claims that the Comment Letter did not warrant an investigation because it did
21 not include "specific dates" or names of complainant witnesses. (AR 3107.) However, the Comment
22 Letter clearly stated specific causes of concern (odor, dust, noise, seagull infestation, etc.) and
23 described how these conditions were affecting the daily lives of over 1,000 students, teachers, and staff
24 at the Oak View Schools. Besides, photographs enclosed with the Comment Letter depicted conditions
25 that existed as of the dates of the photos. In any event, the applicable statutory requirements do not
26 require specific dates to be supplied as a condition precedent to trigger the LEA's duty to investigate
27 complaints. The LEA's claim that a complaint must specify dates of occurrence in order for the LEA to
28

1 conduct an investigation is patently unreasonable because it places unfair burdens upon the
2 complainant, and is calculated to frustrate public participation and input in the regulatory process.

3 Furthermore, the LEA states, “In fact, the LEA cannot now substantiate specific past
4 occurrences at the Oak View School since those events have passed.” (AR 3107.) Apparently, the
5 LEA is now contending that past events cannot be substantiated by investigation, even with specific
6 dates, because those dates have passed. The School District submitted the Comment Letter on June 30,
7 2014, which was within the statutory five-year review period. If the LEA had bothered to investigate
8 the School District’s complaints, it would have determined the complaints related to past as well as
9 ongoing problems being caused by the Rainbow Facility on a daily basis. These complaints could—
10 and still can—be easily substantiated by interviewing School District personnel—which is exactly what
11 the Hearing Office found.

12 The LEA’s behavior in response to the Comment Letter was arbitrary and capricious. As
13 detailed above, the standard operating procedure dictates that the LEA *must* communicate its findings
14 to the complainant. That protocol was completely disregarded. Indeed, from the very outset the LEA
15 was uncooperative in its first set of communications with the School District’s counsel:

16 MR. CONNOR: You -- you responded to Mr. Hedenkamp, and you indicated in the last
17 sentence of the first paragraph, *you said, your firm can submit written*
18 *comments* to us regarding the five-year review. *However, we are under*
no obligation to respond, period, close quote. You wrote that right?
[Emphasis added.]

19 MS. CROSS: Yes. (AR 3895: 9-25.)
20 Contrary to the LEA head manager’s actions, according to the State regulations, response to public
21 complaint is due within 15 days. (14 Cal. Code Regs. § 18302(c)). According to the testimony of Ms.
22 Cross, the LEA responds typically within 24 hours. (AR 3897:24.) The LEA has not provided *any*
23 evidence supporting its contention that the LEA has the discretion to choose whether or not to respond
24 to a complainant.

25 **D. The Hearing Officer Did Not Exceed His Jurisdiction.**

26 The LEA incorrectly argues that the orders set forth in the Decision exceeded the scope of the
27 Hearing Officer’s jurisdiction. (AR 3107-3108.) The Decision ordered the LEA to comply with the law
28 by “re-open[ing] its review and investigation of the Five Year Permit Review of the operation of the

1 Rainbow site by for the limited purpose of investigating and determining if the conditions described by
2 the Oak View Elementary personnel who testified at the Hearing on this matter can be substantiated or
3 not, and if substantiated, and whether such facts have any bearing on the LEA’s decision to re-issue the
4 permit, revise the permit, as required by law.” (AR 3197: 4-10.)

5 Public Resources Code § 44307 would be meaningless if a Hearing Officer, upon finding that
6 the agency abused its discretion by failing to conduct a five-year permit review in the manner required
7 by law, could not order the agency to correct its error and comply with applicable laws and regulations.

8 **E. The Hearing Officer’s Decision Does Not Improperly Expand the Scope of the LEA’s Five
9 Year Permit Review Report.**

10 The LEA also argues that it has no legal requirement to investigate claims raised during the
11 January 2015 hearing for the Permit Review period covering June 2009 to June 2014, and that, to order
12 it to do so, would be to improperly expand the scope of the permit review process. (AR 3107-3108.)

13 This argument lacks merit. First, the Comment Letter was delivered to the LEA on June 30, 2014, well
14 within the five-year review period. Secondly, testimony of the Oak View teachers was offered as
15 evidence to substantiate the School District’s earlier complaints to the LEA, proving there was a *duty*
16 for the LEA to investigate. The testimony given at the January 2015 hearing did not include “new
17 claims,” but merely supported the School District’s prior complaints in the Comment Letter. As the
18 administrative record demonstrates, the teachers who testified at the hearing answered the same
19 questions the LEA could have asked if a proper investigation had taken place relating to the School
20 District’s claims:

21 PRINCIPAL DALE-PASH:

22 MR. CONNOR: Have you ever smelled any green waste smells
23 over at the school?

24 MS. DALE-PASH: Yes.

25 MR. CONNOR: Could you characterize them?

26 MS. DALE-PASH: On a daily basis we smell trash. It’s-- it’s like your trash
27 can if you are smelling inside your trash can. Probably on a good day
28 times 20. That odor fluctuates depending upon the weather and, I assume,
other conditions, and that can intensify. It’s a putrid smell. It’s rotten.
Imagine, like, rotten -- rotten food, and that’s what we smell on a daily
basis. (AR 3698: 8-17.)

1 APRIL HENDERSON (PE Teacher):

2 MR. CONNOR: Have you ever noticed any odor problems while you were conducting
3 your PE classes?

4 MS. HENDERSON: Yes. As soon as I get out of my car, I can tell how the odor is going that
5 day or how the wind is going. And we've had times where we couldn't
6 even be outside. We had to go inside the classroom because students were
7 covering their mouths and gagging. Students throwing up. (AR 3750:20-
8 25.)

9 MR. CONNOR: What causes the birds to fly overhead?

10 MS. HENDERSON: Well, they -- where we're at, you can see them go right from the rooftops
11 of Rainbow right to our rooftops and back and forth. And as they're
12 traveling back and forth between Rainbow and our school site, they're
13 dropping trash on our playground. (AR 3753: 17-23)

14 CYNTHIA REICHENTHALER (Teacher):

15 MR. CONNOR: Do you know -- have you made any type of assessment as to whether any
16 of the impacts caused by the transfer station have any -- had any affects
17 on the health of you, your fellow teachers, or your students?

18 MS. REICHENTHALER: Well, I can speak for myself. The second year I was
19 teaching at Oak, I was diagnosed with adult onset asthma. (AR 3761: 17-
20 23.)

21 These are public health and safety conditions that the LEA is charged with regulating pursuant
22 to the solid waste facility permit process. The Hearing Officer found that: “the testimony *gives rise to a*
23 *duty to investigate* to determine if these conditions do exist at the school and if it is caused by the
24 operation of the adjoining waste transfer station, and if caused by the transfer station, whether the
25 LEA’s decision to re-issue Rainbow’s permit would have been impacted.” (AR 3196:16-23.) [Emphasis
26 added.] While the Hearing Officer acknowledged that the LEA has discretion over the manner and
27 method of investigations, the evidence shows that the LEA had a duty to investigate and failed to
28 follow its own protocol in that regard.

29 **F. The Hearing Officer Correctly Recognized That the Scope of Review of Third Party
30 Petitions is Limited to Whether the LEA Failed to Act as Required by Law.**

31 The LEA claims that the Hearing Officer’s “Decision is fundamentally flawed because it does
32 not reference laws or regulations that LEA failed to proceed in accordance with in issuing the Five Year
33 Permit Review Report. The omission is fatal to the February 4, 2015 Decision because the scope of the
34 review when a third party, not an operator, petitions for the review is limited to whether the LEA failed
35 to act as required by law.” (AR 3184: 1-10.) (Pub. Res. Code § 44307.). The Hearing Officer cited the

1 case of *Sustainability of Parks, Recycling and Wildlife Legal Defense Fund v. County of Solano* (2008)
2 167 Cal. App. 4th 1350, 1360 for the proposition that, under Pub. Res. Code § 44307, the proper scope
3 of review when a third party challenges the agency’s action is whether the agency failed to act as
4 required by law or regulation. As noted above, the failure of an agency to “proceed as required by law”
5 means that the agency has abused its discretion. (*Lincoln Place Tenants Assn. v. City of Los Angeles*
6 (2005) 130 Cal.App.4th 1491, 1503;” *Sustainability, supra* at page 1362.) [Emphasis added.] (AR 3188:
7 6-12.) The LEA is way off base here because the Decision cites case law and statutes providing that
8 the scope of review is limited to “failure to act as required by law.” (AR 3184: 2-10.)

9 **G. The Hearing Officer Did Not Abuse His Discretion In Excluding The Testimony of Mr.
10 Sanchez.**

11 At the conclusion of the January 12, 2015 hearing, counsel for the LEA attempted to present a
12 rebuttal witness, Richard Sanchez, Assistant Director of the LEA, to rebut the School District’s
13 contention that the LEA had failed to conduct a proper investigation. However, neither the School
14 District, nor the LEA, had listed Mr. Sanchez as a witness on their respective Statements of Issues,
15 dated December 4, 2014. (AR 3976:1-23; 3977:24-25.)

16 The Hearing Officer took the LEA’s request under submission, and then issued a written
17 decision excluding the LEA’s rebuttal witness. Simply put, the LEA failed to disclose Mr. Sanchez as
18 a witness as required by Administrative Hearing Rules 6 and 11. (AR 3608.) The statutes and rules
19 governing informal hearings do not provide for rebuttal witnesses. (*See* Cal. Gov. Code §§ 11445.10-
20 11445.60.) Furthermore, the Decision stated: “while the Hearing Officer may have authority to grant
21 such a motion, I did not find sufficient reason to do so” (AR 3608). Thus, the Hearing Officer did not
22 find good cause to allow Mr. Sanchez to testify and he properly excluded Sanchez as a rebuttal witness
23 in accordance with the governing statutes.

24 The LEA now belatedly attempts to state what “Sanchez would have said” in its Notice of
25 Appeal (AR 3106). The LEA asserts that Sanchez would have testified that he and “others” met with
26 the Superintendent of the School District and other officials following the receipt of the June 30, 2014
27 letter. This assertion is outside the record that was before the Hearing Officer and is an improper
28 attempt to augment the record. In addition, Mr. Sanchez’s hypothetical testimony would have been

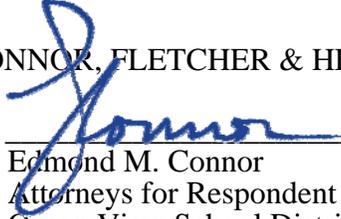
1 misleading and irrelevant to the issues raised by this appeal. The true facts are that the LEA did not
2 initiate any meeting with the School District. Instead, counsel for the School District, Edmond Connor,
3 initiated a meeting between the LEA (Mr. Sanchez), County Counsel (Mr. James Harmon), and the
4 Superintendent of the County Board of Education and his counsel, to try to convince the LEA to
5 conduct a good faith investigation of the School District's complaints and to take action to eliminate the
6 problems being caused by the Rainbow Facility. To say that the meeting was unsuccessful would be an
7 understatement. What is particularly relevant to the LEA's appeal, however, is that at no point during
8 the meeting did the LEA offer to or agree to visit the Oak View Schools or to interview any of the
9 teachers, students, or staff members.

10 **IV. CONCLUSION**

11 In light of the foregoing, the School District respectfully requests that the LEA's appeal be
12 denied in its entirety.

13
14 DATED: July 15, 2015

CONNOR, FLETCHER & HEDENKAMP LLP

15 By  _____
16 Edmond M. Connor
17 Attorneys for Respondent
18 Ocean View School District
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PROOF OF SERVICE BY ELECTRONIC DELIVERY

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed with Connor, Fletcher & Hedenkamp LLP, whose address is 2211 Michelson Drive, Suite 1100, Irvine, California 92612; my electronic service address is ccason@businesslit.com; I am not a party to the cause; and I am over the age of eighteen years.

I caused the foregoing document to be served electronically by electronically mailing a true and correct copy through Connor, Fletcher & Hedenkamp LLP's electronic mail system to the e-mail address(es), as set forth below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

OPENING BRIEF OF RESPONDENT OCEAN VIEW SCHOOL DISTRICT IN OPPOSITION TO ORANGE COUNTY LOCAL ENFORCEMENT AGENCY'S APPEAL TO SET ASIDE HEARING OFFICER'S DECISION ON RAINBOW'S FIVE YEAR PERMIT REVIEW

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 15, 2015, at Irvine, California



Connie Cason