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**BEFORE THE CALIFORNIA 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

OPENING BRIEF OF REAL PARTY
RAINBOW TRANSFER/RECYCLING INC.

Real Party in Interest, Rainbow Transfer/Recycling, Inc. (“Rainbow”), joins in the Opening Brief of Respondent Orange County Healthcare Agency, Local Enforcement Agency for Solid Waste Facility Permits (“LEA”).

Rainbow agrees the Hearing Officer exceeded his authority, which is limited to determining whether the LEA failed to act as required by the statutes and regulations **specifically set forth** in Public Resources Code section 44307, in connection with the LEA’s five year permit review for Rainbow’s Huntington Beach facility.

The Hearing Officer determined that under PRC 44307, the LEA Hearing Officer could determine whether the LEA had abused its discretion “in not conducting a complete investigation regarding Rainbow’s operations, specifically the complaints of OVSD’s witnesses of noise, vector and dust at the Oak View Elementary School site.” (Hearing Officer Decision, p. 29, lines 4-6.) More specifically, the LEA Hearing Officer was concerned about the response, or lack thereof, to a single letter written by the school district’s attorney to the LEA, dated June 30, 2014, at the very end of the permit review period. (Decision, p. 32, lines 12-16.) The LEA Hearing Officer concluded that because the LEA typically responds to citizen complaints, it was an “abuse of discretion” not to investigate the attorney’s letter—even though the LEA had no standard practice for responding to attorney’s letters and even though the letter did not provide any contact information for school district personnel or ask the LEA to contact any such persons or the attorney author of the letter.

1 The LEA’s Kathryn Cross testified that she had forwarded the attorney’s letter to her
2 management and she initially stated she believed her management had contacted counsel for the
3 school district (Decision, p. 33, lines 14-18) and later testified she did not know if they did. (Id., p.
4 35, lines 6 – 10.) Ms. Cross stated that while there was a standard practice in responding to
5 complaints from individual members of the public, there was no standard practice concerning
6 letters from attorneys, such as the one written by the school district’s attorney. (Id., p. 32, line 17 –
7 p. 35, line 15.) It was perfectly reasonable for the LEA, having received an eleventh hour legal
8 brief from an attorney, to have referred the matter to upper management and/or County Counsel.

9 Nevertheless, the Hearing Officer determined (without evidence that the LEA’s upper
10 management or counsel had not contacted the school district’s attorney), that this failure to
11 investigate the school district’s claims was an “abuse of discretion.”

12 The Hearing Officer exceeded his authority under PRC 44307. There is nothing in the
13 Public Resources Code sections listed in PRC 44307 or any of the regulations promulgated
14 thereunder that specifies how LEAs should respond to letters written to them by attorneys or
15 members of the public requesting changes in permit conditions. And, moreover, non-applicants do
16 not even have standing under PRC 44307 to challenge the appropriateness of conditions in solid
17 waste facilities permits issued by the LEA. The Court of Appeal in *Sustainability of Parks,*
18 *Recycling and Wildlife Legal Defense Fund (SPRAWLDEF) v. County of Solano* (2008) 167
19 Cal.App.4th 1350, was clear that non-applicants do not have standing under PRC 44307 to
20 challenge the appropriateness of permit conditions—which was the thrust of the school district’s
21 petition for hearing and the focus of its attorney’s letter to the LEA. As stated by the Court of
22 Appeal:

23 *But section 44307 does not, under any interpretation, afford a public right to request*
24 *an administrative hearing to review “every action” by the LEA. Rather, it authorizes*
25 *a member of the public to demand such a hearing only if he or she can allege that the*
26 *agency failed to act as required by law or regulation.*

27 (*SPRAWLDEF, supra*, at pp. 1362-3—emphasis added.)
28

1 *The right accorded to non-applicants is therefore narrower than an applicant's right to a*
2 *hearing to challenge "inappropriate" conditions irrespective of whether they resulted from*
3 *an agency's failure to act as legally required.*

4 (*SPRAWLDEF, supra*, at p. 1360.0)

5 The concept of "abuse of discretion" is defined under Code of Civil Procedure section
6 1094.5, which provides for judicial review of administrative agency actions, as:

7 Abuse of discretion is established if the respondent has not proceeded in the
8 manner required by law, the order or decision is not supported by the findings, or
9 the findings are not supported by the evidence. (Emphasis added.)

10 But here, the scope of review for an LEA Hearing Officer hearing the petition of a non-
11 applicant is even narrower than the scope of review under CCP 1094.5. PRC 44307 reads in
12 relevant part:

13 The enforcement agency shall also hold a hearing upon a petition to the
14 enforcement agency from any person requesting the enforcement agency to
15 review an alleged failure of the agency to act as required by this part, Part 5
16 (commencing with Section 45000), or Part 6 (commencing with Section
17 45030) or a regulation adopted by the department pursuant to this part, Part
18 5 (commencing with Section 45000), or Part 6 (commencing with Section
19 45030). (Emphasis added.)

20 The Legislature could have, but did not, add language to PRC 44307 giving LEA
21 Hearing Officers broader power to determine whether in their judgment the LEA had
22 committed a general "abuse of discretion." And the Hearing Officer did not cite to any
23 statute or regulation enumerated in PRC 44307 that the LEA had failed to follow in
24 connection with the five year permit review for Rainbow. Indeed, in that regard, the
25 Hearing Officer found that the LEA correctly determined that the operational controls of
26 Rainbow were in place and the LEA had conducted its monthly inspections in a timely
27 manner. (Decision, p. 31, lines 18-24.) Nor did the Hearing Officer find that the LEA
28 had not properly reviewed the Rainbow permit for changes that might require a permit
 modification under 27 CCR 21640.

1 In reasoning that PRC 44307 gave the Hearing Officer the authority to determine
2 whether the LEA had acted “*within the law and its discretion in its investigation and*
3 *conclusions in the issuance of its report of October 20, 2014,*” the Hearing Officer
4 jettisoned the limitations on his jurisdiction expressly set forth in PRC 44307.

5 The LEA Hearing Officer did not find that the LEA had failed to follow any
6 statute or regulation indentified in PRC 44307, but instead found that the LEA had failed
7 to follow its own procedures which was “**a breach of the LEA’s own protocol for the**
8 **investigation of complaints.**” (Decision, p. 35, line 22 – p. 37, line 2.)

9 PRC 44307 does not place within the jurisdiction of the LEA Hearing Officer the
10 question of whether the LEA has acted consistent with the “standard operating practices”
11 or protocols (a vague term indeed) of a particular LEA. Granting LEA Hearing Officers
12 this broader authority to determine if LEA’s had violated their own standard operating
13 practices (even if they had acted in accordance with the statutes and regulations listed in
14 PRC 44307) would allow Hearing Officers to delve into the proprietary of specific permit
15 conditions, by allowing challengers to claim that the LEA had imposed or not imposed
16 permit conditions consistent with conditions imposed by the LEA in other situations—
17 and thus contrary’s to the LEA’s alleged “normal practices.” Or challengers could claim
18 inconsistencies in how the LEA dealt with information or complaints in one situation
19 versus another in connection with an enforcement action or the processing of a permit
20 application.

21 To put it differently, LEA “standard operating practices” and the “protocols” of
22 particular offices are not referenced in PRC 44307. It must be concluded then that the
23 Legislature never intended to place in the hands of an LEA Hearing Officer the ability to
24 order LEAs to take specific actions based on the alleged failure of one local LEA office
25 to consistently do something in a particular way in the exercise of its enforcement or
26 permitting activities—despite the LEA’s compliance with the express requirements of
27 those statutes and regulations listed in PRC 44307. To expand the Hearing Officer’s
28 authority in this manner without Legislative action would allow LEA Hearing Officers

1 who, with respect, are generally far less familiar with solid waste facilities and
2 operational practices, to trump the discretionary judgments of local LEAs.

3 Here, it is particularly sad that counsel for the school district repeatedly accused
4 the LEA Hearing Officer of misconduct and even of personal bias against the school
5 district's counsel. At one point, this challenge was based on a claim that a "look" on the
6 face of the Hearing Officer was evidence of animus towards the school district's counsel.
7 It is perhaps understandable that the Hearing Officer may have felt the need to bend over
8 backwards to grant the school district some relief just to clear himself of such completely
9 unfounded charges. But that does not provide a legal justification for the Hearing Officer
10 to order the LEA to conduct discretionary activities that are not mandated by statute or
11 regulation.

12 For these reasons, the LEA's appeal should be granted.

13
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15 Dated: July 17, 2015

Respectfully Submitted,

LAW OFFICES OF THOMAS M. BRUEN

16
17 By:  _____

Thomas M. Bruen

18 Attorneys for Real Party in Interest,
19 RAINBOW TRANSFER/RECYCLING, INC.
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