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November 4, 2020

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Re: Multiple Requests for Hearing re SWIS No. 30-AB-0472
Petitioner: Rio Santiago, LLC and Milan REI X, LLC
Petitioner: Orange Park Association
LEA: Orange County Health Care Agency, Solid Waste Enforcement

Dear Counsel:

This letter presents the conclusions and findings of the Hearing Officer following two days of hearings on October 8 and 9, 2020 and review of the written materials and exhibits submitted, as well as the closing briefs filed by all parties on October 26, 2020. There were three separate Requests for Hearing filed with the Local Enforcement Agency ("LEA") for determination. Two were filed by Rio Santiago, LLC ("Rio Santiago") and Milan REI X, LLC ("Milan") [collectively "Petitioners" or "Rio Santiago"] and one

was filed by Orange Park Association ("OPA"). With the agreement of the parties to all the Requests for Hearing, the matters were consolidated into a single proceeding. The hearing was conducted pursuant to California Public Resources Code ("PRC") section 44310 and pursuant to the LEA's Administrative Hearing Rules.

The Notice of Intent To Revoke and the Pre-Hearing Stipulation and Ruling

On July 22, 2020, OPA submitted a Request for Hearing to the LEA generally contending that the LEA should revoke that certain Registration Permit identified as SWIS No. 30-AB-0472 (the "Permit") which was approved by the LEA on June 22, 2020 and which allowed Rio Santiago to operate an Inert Debris Type A Disposal Facility at 6145 East Santiago Canyon Road, Orange, California (the "Site" or the "Facility"). The principal contention of the OPA is that the LEA failed to act as required by law or regulation. PRC §44307. Although other grounds were advanced by OPA, for reasons discussed in more detail below, PRC section 44307 provided the only mechanism by which the OPA could seek to challenge issuance of the Permit.

On August 11, 2020, the LEA issued to the Petitioners a Notice of Intent to Revoke ("NIR") related to the Permit. The NIR was communicated in a letter addressed to both Rio Santiago and Milan. The letter indicated that the LEA found cause for revocation of the Permit pursuant to PRC section 44306(a). The NIR advised the Petitioners of their right to a hearing and that failure to request such a hearing pursuant to PRC section 44310 within 15 days would result in revocation of the Permit effective August 28, 2020. On August 25, 2020, Petitioners submitted a timely Request for Hearing challenging the NIR pursuant to PRC section 44306. Prior to issuing the NIR, on July 23, 2020, the LEA wrote to the Petitioners and offered Petitioners the opportunity to "voluntarily surrender the Registration Permit" in lieu of instituting a formal revocation process. The LEA's terms included the Petitioners ceasing all operations at the Site that were within the scope of the permit.

Early during the first day of the hearing, Petitioners' counsel advised that Rio Santiago had voluntarily returned the Permit and that a hearing on the merits of the NIR was therefore moot. The LEA disagreed, indicating that the voluntarily surrender of the Permit had no effect on the NIR and the hearing challenging it which was requested by the Petitioners. The LEA's position was that the correct process was for the Petitioners to concurrently withdraw their Request for Hearing as to the NIR since the NIR would be come effective either 15 days after its issuance, assuming no Request for Hearing was filed, or following a hearing held pursuant to PRC section 44306 which upheld the NIR. A discussion was held with all parties on the record and the Hearing Officer inquired of counsel for the Petitioners who reiterated his clients' position set forth in a letter dated September 15, 2020, that Rio Santiago were withdrawing their request for a hearing on the NIR.

Based on these statements, it is the Hearing Officer's determination that Rio Santiago has withdrawn its Request for Hearing and the Permit is revoked effective October 8, 2020.

Orange Park Association Request for Hearing

In its July 22, 2020 Request for Hearing, Orange Park Association ("OPA") sought to (1) challenge the terms and/or conditions of the issued Solid Waste Facility Permit ("SWFP) pursuant to Public Resources Code (PRC) section 44307; (2) appeal the completeness review of the registration pursuant to the California Code of Regulations (14 C.C.R. section 18104.4); (3) revoke the SWFP (PRC section 44306); and (4) challenge the alleged failure of the Enforcement Agency to act as required by law or regulation.

OPA's Request for Hearing contains only a single valid ground for doing so: challenging the alleged failure of the Enforcement Agency to act as required by law or regulation. PRC §44307. OPA may not assert does not have standing to assert other challenges. Thus, OPA may not demand a completeness appeal pursuant to C.C.R. section 18104.4 because it is not the applicant. California Code of Regulations 14 section 18104.4 authorizes only the applicant to appeal a determination that its application is incomplete. The regulation does not provide this ability to any other person or entity. Similarly, unlike PRC section 44307 which specifically provides that the enforcement agency shall hold a hearing if requested to do so by "any person requesting the enforcement agency to review an alleged failure of the agency to act as required" there is no similar provision in section 44306. While that section provides for a hearing and states that the enforcement agency may revoke a SWFP if any of the conditions under subsection (a), (b) or (c) are met, the statute appears to be directed to the facility or operator that is subject to the permit. Thus, this particular section does not apply to OPA's Request for Hearing.

In its closing brief, OPA indicates that there are two issues remaining for the hearing officer to decide in connection with its Request for Hearing: (1) the LEA must revoke the Registration Permit as improperly issued; and (2) the LEA must issue a Cease and Desist Order to stop [Rio Santiago's] ongoing unpermitted, illegal disposal activity. (OPA Closing Brief, p. 2)

For reasons set forth in the first section of the Findings and Statement of Decision, the first remaining issue is moot. The Permit has been revoked effective October 8, 2020. As to the second issue, the matter also is moot as the LEA issued a Cease and Desist Order ("CDO") on August 3, 2020.

As to OPA's participation in this hearing and the Hearing Officer's decision to allow counsel for OPA to participate in the consolidated hearings and to ask questions and cross-examine the witnesses who appeared, the Hearing Officer is aware of the Petitioners' objections and noted them throughout the hearing. Specifically, the Petitioners observed that while the hearings were consolidated due to several common

issues of fact and to avoid the potential of differing results, the Requests for Hearing filed by the parties presented separate and distinct issues. On this basis, Petitioners objected to the Hearing Officer allowing OPA's counsel to cross-examine witnesses called as part of the Petitioners' case appealing an enforcement order, namely the August 3, 2020 CDO. The Hearing Officer again has considered the Petitioners' objections and overrules them. Given the informal nature of these proceedings and their public nature, the Hearing Officer allowed OPA's counsel to cross-examine witnesses. The Hearing Officer does not find that the Petitioners were disadvantaged by the allowed cross-examination or were otherwise prejudiced by it. Additionally, as the Hearing Officer stated during the live hearing, there was no jury or other fact finder to instruct and the Hearing Officer was confident in his ability to determine what weight, if any, to accord to testimony elicited by OPA's counsel's cross-examination.

Rio-Santiago's August 25, 2020 Request for Hearing

For the reasons previously set forth, Petitioners' Request for Hearing pursuant to PRC section 44306 regarding the Permit was withdrawn. The NIR was effective as of October 8, 2020.

Rio-Santiago's August 17 , 2020 Request for Hearing Challenging Cease & Desist Order

Rio Santiago challenges the validity of the CDO issued by th LEA on August 3, 2020. In its Request for Hearing and throughout these proceedings, Rio Santiago contends that the CDO was legally improper as a violation of the LEA's authority contending that in essence, ordering an immediate cessation of activity at Rio Santiago's facility violates the Petitioners' substantive due process rights. The Petitioners further contend that the CDO prejudices and causes them significant harm. Finally, the Petitioners contend that after issuance of the order the facility began to operate as an Inert Debris Engineered Fill Operation (IDEFO) which moots the CDO. Each of these arguments is addressed in turn.

The Issued CDO Was Not Invalid

Pursuant to Public Resources Code section 44002, "No person shall operate a solid waste facility without a solid waste facilities permit if that facility is required to have a permit pursuant to this division." PRC §44002(a)(1). If the local enforcement agency determines that a person is operating a solid waste facility in violation of this statute, the enforcement agency "shall immediately issue a cease and desist order pursuant to Section 45005" and order the facility to immediately cease all activities for which such a permit is required and those activities must cease until the person subject to the order has obtained other authorization pursuant to the regulations. PRC §44002(b) [emphasis added]. According to Public Resources Code section 45005, an enforcement agency may issue a cease and desist order to any "person who is operating, has operated, or proposes to operate a solid waste facility or operates a disposal site in an unauthorized

manner . . ." PRC §45005. Alternatively, the local enforcement agency may issue the same type of order to any person who disposes of solid waste (1) in violation of a solid waste facilities permit or in violation of this division or any regulation adopted pursuant to this division; (2) without a solid waste facilities permit; or (3) in a manner which causes or threatens to cause a condition of hazard, pollution or nuisance. PRC §45005(a)(1-3). Thus, two distinct grants of authority are given by section 45005. The first, which is broader, allows for the issuance of a cease and desist order as against anyone who the local agency suspects of operating a disposal site "in an unauthorized manner." The second, which is more circumscribed, requires certain conditions to exist. The broad grant of authority to the enforcement agency is confirmed by the first sentence of the statute: "An enforcement agency or the bard may issue a cease and desist order to any of the following . . ." Id. A Cease and Desist order is a proper order to be issued if the local enforcement agency suspects a violation. Id.; 14 C.C.R. §§18304.1(a)(2), 18304(a).

Petitioners argue that the scope of the hearing is whether the Cease and Desist Order was properly issued and whether the scope of that Order was proper. (Petitioners' Closing Brief, p. 2, l. 19-20). The Petitioners generally contend that it was improper for the LEA to issue a CDO which has the effect of stopping their operations without first proceeding by issuing a Notice of Intent to Revoke their permit. They have challenged the manner in which the LEA acted contending that the LEA does not have the legal authority to approve a valid permit, as it did on June 22, 2020 and then issue a subsequent CDO entirely prohibiting the activities of the facility because the LEA learned of information after the approval of the permit which might render the Site out of compliance with the relevant regulations. The Petitioners characterize this as an issue of due process and object to the CDO contending that pursuant to RPC section 45005(a)(1), they have not operated the Site "in violation of a solid waste facilities permit" and that they were never provided, prior to the issuance of the CDO, any evidence, such as a citation or violation notice, that they were operating the Site in violation of the validly issued permit. In response the LEA has argued that it discovered facts which rendered the previously issued permit invalid and that it was acting under the broad authority to issue the CDO as set forth in 45005(a). In response, the Petitioners reject the LEA's contention and point out that the CDO specifically cites PRC section 45005(a)(1) and that the characterization of the CDO as being based more generally on 45005 is a "Johnny come lately" theory that should be rejected because it was not the basis for issuance of the CDO when it was issued on August 3, 2020 and was first put forth in the LEA's response to the Petitioners' Request for Hearing.

An LEA which seeks to enforce rules and regulations pursuant to its grant of authority has multiple, separate and mutually exclusive remedies available to it to ensure compliance with the regulatory scheme applicable to disposal facilities. One option is to issue a Notice of Intent to Revoke in connection with a decision to remove a solid waste facility permit. PRC §44306. Another potential remedy is the use of a cease and desist order pursuant to PRC section 45005. (See, 14 C.C.R. §§18304, 18304.1(a)(2)).

While the Petitioners argue that the CDO in this case was improper because the effect of the CDO was to immediately halt their operations without first requiring the LEA to issue a NOI, they misapprehend the statutes and the regulatory scheme. No authority was provided to the Hearing Officer to indicate that a NOI must be delivered first to the operator of a disposal facility before a cease and desist order may issue. In fact, if an LEA could not issue a cease and desist order without first issuing a Notice of Intent to Revoke, it would render the statutes and regulations authorizing the use of cease and desist orders meaningless. The Notice of Intent to Revoke and a cease and desist order are separate tools provided to the LEA to ensure compliance with applicable regulations.

In this case, Rio Santiago argues that the NOI should have been issued first and that it is improper for a cease and desist order to apply to an operation that should be allowed to continue pursuant to a facially valid facility permit while an appeal is taken from a NOI. The Hearing Officer is unpersuaded by this contention. Rio Santiago had the same right to request a hearing on the CDO as it did with regard to the NOI, and did, in fact, exercise the right to demand hearings on both the CDO and the NOI.

The evidence in this matter is that the LEA issued to CDO after learning that the permit it had approved in June 2020 was actually incomplete because the Rio Santiago facility was not listed on the County Siting Element. As a result, the LEA determined that a material misrepresentation had been made in connection with Rio Santiago's permit application when Rio Santiago's representative checked the box on the permit application indicating that the facility was included in either the countywide siting element, the non-disposal facility element, or in the source reduction and recycling element for the jurisdiction in which it is located and then signed the application under penalty of perjury. The evidence is that the Petitioners and CalRecycle were working on this matter at or around the time the permit was approved. While the Petitioners might have obtained incorrect direction at times from CalRecycle, they could have and should have been prepared for this consequence. It was at least as much the Petitioners' responsibility to continue to shepherd their permit application to ensure it was entirely complete.

<u>The Petitioners' contend that the Site is an IDEFO and that the CDO is moot</u>

The Petitioners contend that the various meetings between themselves and the LEA in which there was an agreement reached that the Site would be classified as an Inert Debris Type A Disposal Site and that they would apply for and obtain the requisite permit, did not preclude the Petitioners from asserting, as they later did, that the facility had historically been an IDEFO and that it never lost that character. The contend that the site remained an IDEFO despite years in which no activity took place. The LEA contends that the Site, for various reasons is not an IDEFO and that in any case, while it was once an IDEFO, Kathryn Cross testified that it was shut down as such and that notification was provided to the Petitioners that the Site was "closed and archived" years earlier. The LEA's position is that notwithstanding the paperwork filed in August

2020 by the Petitioners to operate the Site as an IDEFO, Rio Santiago is not yet authorized or permitted to receive and dispose of any inert debris at the Site.

While the testimony of Kathryn Cross was persuasive in that the IDEFO operating at the Site was closed and archived, it is concerning that the historic use of the Site was not taken into account. The belated production of documents by the LEA further complicates the matter. It is curious why no attempt was made by the LEA to research the issue when the first complaints of a violation were reported to the LEA in early 2020, although that burden does not fall solely on the LEA. No evidence was presented as to why the Petitioners did not immediately contend that the facility was an IDEFO when the LEA proposed that it should be permitted as an Inert Debris Type A facility. Ultimately, the burden of proof in this hearing rests with the Petitioners. Despite multiple witnesses who testified about the duration and scope of the IDEFO, the Petitioners did not carry their burden. The testimony of Kathryn Cross was persuasive. That said, I am forced to return to the belated production of records from the LEA and the Petitioners' Motion to Compel which was initially denied without prejudice and which I later granted. If there had been no ongoing prior history of this site as an IDEFO the complete administrative record would have been the documentation which began with the complaint the LEA received in early 2020. However, there is a long history which cannot and should not be ignored. I believe that the belatedly produced documents were legitimately requested and are part of the administrative record. While the Petitioners addressed those documents in their closing brief and had time to review them, they were not available for the hearing and they could not be reviewed with witnesses and witnesses could not be cross-examined with them. Based on this I find that the failure to the LEA to produce these documents earlier potentially prejudiced the Petitioners in this proceeding and has compromised my ability to determine whether a valid IDEFO exists at the Site which may or may not be subject to the CDO.

That is not to say that the Petitioners are correct in asserting that they are operating an IDEFO. At best, the evidence presented was mixed and inconclusive. While it appears the Petitioners were contemplating re-establishing the facility as an IDEFO but hit the "pause" button in May of 2013 (LEA-RIO- 0480.046), nothing whatever prevented the Petitioners from revisiting the matter at any time from 2013 to 2020. That the Petitioners chose to do nothing for seven years is not the fault of the LEA. No evidence was presented at the hearing demonstrating that the LEA in any way deliberately misled the Petitioners about the status of the facility and no authority was presented by the Petitioners to support a position that it is the LEA's legal obligation to clear a path for the Petitioners so that they can operate as an IDEFO. No evidence was given that the LEA insisted upon a particular plan or otherwise was not open to any other use for the facility except as an Inert Type A Disposal Facility. As the Petitioners contend in their closing brief, if the LEA and the Petitioners kept talking past one another, that failure may be as much on the Petitioners as it is on the LEA and the Petitioners may or may not want to argue that they are entitled to a pass because they tried to cooperate with the LEA and that they were mis-served to their detriment.

Hearing Officer's Determinations

1. Permit SWIS No. 30-AB-0472 is revoked effective October 8, 2020.
2. The CDO was validly issued and properly was asserted as against the Petitioners' operations as an Inert Debris Type A Facility only, i.e., the CDO is limited to its express terms (see below).

LEA's Request for the Hearing Officer to Modify the CDO is denied

In its closing brief, the LEA requests that the Hearing Officer agree to modify the CDO, specifically paragraphs 1 and 4 (while asserting that paragraphs 2 and 3 no longer apply). This the Hearing Officer will not do. In Footnote 8, the LEA points out that if the Hearing Officer will not issue a modified order as requested (LEA Closing Brief, pp. 4-9), the LEA will be compelled to issue another enforcement order to seek removal of the current stockpiles at the Facility and go through another hearing." While that may be true and inconvenient, no authority has been provided to the Hearing Officer demonstrating that he has the authority to modify the CDO issued by the LEA. In fact, in the absence of an express grant of authority, the Hearing Officer doubts he has any such authority as he does not act for or on behalf of the LEA and his job only is to determine whether the CDO was a proper and enforceable order when it was issued and whether and the extent to which it still remains such. Enforcement of the order is the province of the LEA and if the LEA has determined that it needs to issue a new or modified order, it certainly has the authority to do so. In fact, the Hearing Officer observes that the LEA potentially could have issued a CDO at any time after the Petitioners submitted their material in support of their alleged IDEFO operation, assuming the LEA could find a legal basis for doing so. That the LEA chose not to is the LEA's business, just as is enforcement of its order. If the LEA believes portions of its CDO are no longer applicable, it is not required to enforce them. As the Petitioners have pointed out throughout these proceedings, changing the playing field would deprive them of due process. The Hearing Officer will not do that.

Respectfully Submitted,

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SOD and findings of fact.wpd