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Decision Re: Orange Citizens To Keep Orange Safe Request For Hearing And Appeal Of  
The June 16, 2022 Stipulated Notice And Order By And Between The Orange County  
Solid Waste Local Enforcement Agency And Milan REI X, LLC

Dear Counsel, Parties and Clerk of the Board:

On September 19, 20 and 21, 2022, I served as Hearing Officer in the matter of the Request for Hearing and Appeal filed July 17, 2022 by Orange Citizens to Keep Orange

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Safe RE: Stipulated Notice and Order dated June 16, 2022 (“SNO”) between Environmental Health, acting as the Solid Waste Local Enforcement Agency for County of Orange (“LEA”), and Milan REI X, LLC (“Milan”).

On July 17, 2022, Bonnie Robinson, Kim Plehn and Dru Whitefeather, on behalf of Orange Citizens to Keep Orange Safe (“Citizens”), submitted a *Request for Hearing with Associated Statement of Issues*, appealing the requirements of a Stipulated Notice and Order (“SNO”) issued June 16, 2022, made and entered into by and between Orange County Health Care Agency, Environmental Health, acting as the Solid Waste Local Enforcement Agency for County of Orange (“LEA”), and Milan REI X, LLC (“Milan”). concerning property located at 6145 E. Santiago Canyon Road in the City of Orange.

The essence of Citizens’ challenge is their assertion that LEA abdicated its enforcement responsibilities because the SNO does not adequately address the site’s past, present/continuing multiple violations and/or compliance concerns.

Prehearing Issues, Stipulations and Scheduling:

The parties held multiple prehearing conferences and agreed to reschedule the hearing to September 19-21, 2022 and to waive the time restrictions pursuant to *Government Code* 11445.10. (PRC Section 44310 (b).) in order to facilitate a live hearing and venue on those dates. The parties further agreed they would submit their final arguments in closing briefs via email on October 6, 2022 and to receive this Decision via e-mail on October 12, 2022. Statements of Issues, Summary of Evidence, Documents and Witness Lists were timely exchanged and after multiple briefing, the witness list was reduced and limited to LEA’s most knowledgeable employees<sup>1</sup>, subject to additional briefing or offer of proof<sup>2</sup>. Real Party in Interest and party to the SN&O, Milan participated in the hearing over the objection of Citizens.

PROCEDURAL, REGULATORY and HISTORICAL BACKGROUND:

According to Milan, in 2007, they purchased the subject property generally located at 6145 E. Santiago Canyon Road in the City of Orange, California (the “Property”), where sand and gravel mining operations had been performed dating back to the early 1900s. Milan acquired the Property with the intention of redeveloping the property into a place with productive uses, adding value to the surrounding community. From Milan’s perspective:

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<sup>1</sup> excluding LEA’s counsel, Mr. Shamel, from Citizens’ witness list. Witnesses from outside agencies were excluded as cumulative and unnecessary, most of whom ultimately advised the County of their unavailability or unwillingness to attend. After the written ruling, additional briefing or offers of proof were not proffered to support augmenting the witness list.

<sup>2</sup> Real Party in Interest, Milan listed employee witnesses, but they were not called.

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*“...Milan’s plans for the Property have been challenged by groups that stand in opposition to any development of the Property...”<sup>3</sup>*

According to Milan’s plans to put the Property back into productive use, pits from the prior sand and gravel operations need to be properly filled and compacted. In some locations, the pits contain silt from the past mining operations that need to be removed and in other locations undocumented fill may exist that will also need to be replaced with properly compacted fill.

In furtherance of potential development, the Property has been subjected to extensive environmental and geotechnical investigations. [See, e.g., Mar. 1996 Geotechnical Report, at CITIZEN00482—506; Aug. 2000 Phase I Environmental Site Assessment (“ESA”), at CITIZEN001680—1795; Aug. 2001 EIR Environmental Analysis Section, at CITIZEN001798—1825; Aug. 2009 Phase I ESA, at CITIZEN001561-1677; June and July 2010 TAIT Responses to City of Orange Environmental Comments, at CITIZEN-000725-973; Jan. 2011 Ginter Geologic/Geotechnical Engineering Plan, at MILAN-00511-564; and May 2011 Phase II Site Assessment, at LEA-RIO-1866-1892.]

In or about 2010, in order to fill and compact the Site, Milan first initiated an Inert Debris Engineered Fill Operation (“IDEFO”), which was operated by MTS on its behalf. In 2013, Milan “parted ways” with MTS, but continued the IDEFO initially with Don McCoy Grading and then Rio Santiago, LLC, an affiliate of Chandler’s Sand & Gravel. The status of the IDEFO led to the dispute between the LEA and Milan and ultimately, the SNO which is the subject of the instant appeal and hearing.

Essentially, Milan contends that the IDEFO never ceased and that its stockpiling of the inert debris has always been for the purpose of filling and compaction. On the other hand, the LEA contended that a new IDEFO notification was required, after it “archived” the MTS IDEFO and that the stockpiled materials therefore constituted disposed solid waste.

#### Site Operated as IDEFO 2011-2013

The LEA's regulatory history with the Site began in 2011 and lasted until 2013, when the Site was operated as an Inert Debris Engineered Fill Operation (“IDEFO”) from 2011 to 2013. In 2013, the Site notified the LEA that it was terminating its IDEFO operation as of February 2013. Accordingly, the LEA archived the IDEFO in 2013, effectively took the Site off its active solid waste facilities inventory and discontinued inspecting the Site.

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<sup>3</sup> “For instance, in 2019, the City of Orange approved plans for low density residential development with nearly three-quarters of the site to be dedicated perpetual open space development. This included the adoption of an Environmental Impact Report (“EIR”) and associated mitigation measures (the second EIR prepared for the site in the span of 5 years). However, in November 2020, a referendum on the project later overturned the City’s unanimous project approval.”

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Site Inactive From 2013 Until 2020 Illegal Dumping Complaint

The LEA became involved with the Site once again in January 2020, when the LEA received an illegal dumping complaint for the Site. In response, the LEA visited the Site, and observed the presence of many large stockpiles of inert debris Type A construction waste, i.e., asphalt, concrete, plaster, and shingles. The LEA did not observe any other activity such as grading or soil compacting during its visits. Based on its observations, the LEA determined that the Site must have a registration tier permit to store the inert debris Type A stockpiles.

Milan's 2020 (Defective) Application for Permit

In March 2020, the Site submitted a registration permit application to the LEA. The LEA rejected the application because, among other things, the application lacked confirmation that the Site was identified in either the countywide siting element ("CSE") or non-disposal facility element (NDFE) and did not include an approved closure/post closure plan. In May 2020, the Site submitted a revised application that included communication between City of Orange, Cal Recycle and Site related to efforts to identify the Site on the NDFE, as well as a copy of the closure plan/post closure maintenance plan for the Site. The LEA issued a Registration Permit for the Site on June 12, 2020. In July 2020, Cal Recycle advised that the Site needed to be identified in the CSE, as opposed to on the NDFE. Cal Recycle also informed that because the CSE did not identify the location of the Site, the County had to amend its CSE before a permit could be issued for the Site.

LEA Issues August 2020 Cease and Desist Order:

Accordingly, the LEA determined that the Registration Permit was invalid and demanded that the Site was to immediately stop accepting additional inert debris Type A waste until such time the Site's location was identified on the CSE. The Site, however, did not comply, and on August 3, 2020, the LEA issued a formal Cease and Desist Notice and Order ("C&DO") for the Site that ordered the Site to immediately stop receiving inert debris Type A waste and remove all the stockpiles present on the Site from the Site within one year. Among other things, the CDO mandated that the Site's operations immediately cease and desist until the Permit application could be perfected, stating that "the application for the Site remains incomplete," and that any Inert Debris Type A material would need to be removed if the Site was not added to the Countywide Siting Element. CDO, Recital ¶ 23, Order ¶ 4 at LEA-RIO-0169. On August 11, 2020, the LEA also issued a Notice of Intent to Revoke ("NIR") the Registration Permit. On August 11, 2020, the Site submitted a notice to the LEA, accompanied with an operation plan that was later revised, that the Site intended to commence a new IDEFO at the Site. The LEA rejected the original and revised operation plan due to certain defects therein and informed that the Site may not commence the IDEFO.

C&DO Overturned by Cal Recycle in 2021:

As to the C&DO and NIR, the C&DO was initially upheld in October 2020, but Milan appealed pursuant to Public Resources Code ("PRC") section 45030 and the Order was

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overturned in February, 2021 by Cal Recycle on procedural grounds. (See Cal Recycle Hearing Officer Decision, at MILAN-00061) This effectively rendered the Site an Inert Fill Type A Disposal Facility. in violation of PCR §§ 44000.5 and 44002 in storing the stockpiled inert debris at the Site.

Inert Fill Type A Disposal Facility and SNO

Thereafter, LEA and MILAN engaged in dialogue and ultimately resolved and agreed that the site is not an IDEFO and should be treated as an unpermitted Inert Fill Type A Disposal Facility. (Stipulated Notice and Order June 16, 2022 page 1 C. E, page 2 G. H. page 3 Q) Ex. E. After over a year of meetings between the LEA and Milan, including arm's-length, sometimes contentious negotiations between the parties, the LEA and Milan reached an agreement as to the terms of the Stipulated N&O, effective June 16, 2022, which addresses the southern two-thirds of the Property (i.e., the Site) where Milan's operations involving the handling, storage and fill of inert debris have occurred. SN&O, Att. B and C at MILAN-00024-51.

Under the comprehensive Stipulated N&O ("SNO"), Milan may not conduct any operations (such as an IDEFO) at the Site until after it conducts multiple technical investigations and obtains the LEA's approval of the results. This includes sampling and testing of the soil and of the stockpiles. If test results indicate the presence of solid waste below grade, a remediation plan will be required to close the area. In the event that contaminants are detected in stockpiled materials, Milan would be required to remove those materials off the Site. Stipulated N&O, § 5.5.6 at MILAN-00012. Any future IDEFO at the Site will require compliance with applicable solid waste regulations (e.g., submission of an IDEFO Operation Plan).

On July 17, 2022, the three petitioners entitled "Orange Citizens to Keep Orange Safe"(CITIZENS), filed the subject Request For Hearing (the "Request") challenging the Stipulated N&O. PETITIONER/CITIZENS *Statement of Issues*, filed on July 17, 2022 ("SOI"), argues that the SNO is incomplete with respect to the following items:

- Site Description;
- Violation Description;
- Violation Of Statutes,
- Regulations Or Terms And Conditions;
- Schedule Of Compliance;
- Penalty;
- Notice Of Right To Appeal; And
- Declaration not attached

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Pursuant to PRC §44307, Petitioners claim that the LEA has failed to act as required by law and regulation, and request that an order amending the SNO to correct the deficiencies listed above or, if that is not possible, to revoke the SNO.

Standards of Review of Agency Actions:

Principles upon which judicial review is conducted over administrative agency actions are guided by the Federal Administrative Procedure Act. Courts reviewing an administrative agency action interpret constitutional and statutory provisions governing the agency action to decide the relevant questions of law.

Agency actions will be set aside or held unlawful if they are arbitrary, unreliable; an abuse of discretion, or contrary to law, constitutional rights, its power and privilege, or immunity. Specific standards are not prescribed for judicial review of administrative actions among state courts, however, they generally follow the Federal Administrative Act.

PRC § 44307 states, in more pertinent part, "[t]he enforcement agency shall also hold a hearing upon a petition to the enforcement agency from any person requesting the enforcement agency to review an alleged failure of the agency to act as required by [Part 4, Part 5 or Part 6 of Division 30 of PRC] or a regulation adopted by [Cal Recycle] pursuant to [Part 4, Part 5 or Part 6]."

Petitioners have requested an administrative hearing pursuant to PRC §44307. In *Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v. County of Solana Department of Resource Management*, 167 Cal.App.4th 1350 (2008), the court interpreted the phrase in PRC § 44307, "failure to act as required by law or regulation," to mean that the agency has abused its discretion. (Id. at 1362.) "Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed ... A manifest abuse of discretion exists if the penalty was arbitrary, capricious, or patently abusive. If reasonable minds could differ over the appropriateness of a penalty imposed, there is no manifest abuse of discretion." (*Oduyale v. California State Bd. of Pharmacy*, 41 Cal.App.5th 101, 117-118 (2019)) Abuse of discretion is also established if the agency has not proceeded in the manner required by law. (*Sierra Club v. State Bd. of Forestry*, 7 Cal.4th 1215, 1236 (1994))

As discussed above, Petitioners' right to a hearing under PRC §44307 is narrowly defined: PRC § 44307 authorizes an applicant to challenge conditions imposed on a permit if the applicant deems them to be "inappropriate." It allows any other person to challenge only an agency's failure to "act as required by law or regulation." The right accorded to non-applicants is arguably narrower than an applicant's right to a hearing to challenge "inappropriate" conditions irrespective of whether they resulted from an agency's failure to act as legally required.

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Thus, Petitioners/Citizens may not agree with the particular terms or conditions contained in the SN&O, however, for purposes of this hearing, Petitioners have the burden of proving that the LEA failed to act as required by law or regulation. To wit: Petitioners must demonstrate that the LEA failed to act in a manner required by law or regulation when it entered into the Stipulated N&O or that, outside of the Stipulated N&O, the LEA was otherwise required by law or regulation to act but failed to do so. There is ample support for deference to LEA's discretion: "the application of the law to the facts is reversible only if arbitrary and capricious." *Haraguchi v. Superior Court*, 43 Cal.4th 706, 711-712 (2008). Petitioners have the burden of showing that the LEA acted in an arbitrary and capricious manner and did not issue the Stipulated Notice & Order in a manner required by law.

**FINDINGS:**

Based on the Administrative Record, written and oral statements and oral testimony at the hearing, it is clear that the LEA had the full statutory and legal authority and acted within its legal discretion to enter into the SN&O pursuant to PRC §§ 43200, 45011, and 14 C.C.R. § 18304. The LEA validly exercised its authority under PRC §§ 43200, 45011 and 14 C.C.R. § 18304. LEA did not abuse of its discretion. The resulting SNO is not legally deficient or invalid. The LEA's decision to agree to the SNO was not arbitrary, capricious, or patently abusive and the LEA proceeded in the manner required by law, as discussed below:

Solid waste disposal requires the appropriate permit or authorization from the LEA. The LEA is required, among other things, to enforce applicable provisions of Part 4 of Division 30 of PRC and regulations adopted thereunder. (PRC § 43209(a)) These provisions pertain to solid waste disposal and the requirements for obtaining the appropriate permit or authorization from the LEA to do so. Accordingly, under PRC § 44000.5, "a person shall not dispose of solid waste... or accept solid waste for disposal, except at a solid waste disposal facility for which a solid waste facilities permit has been issued pursuant to [Chapter 3 of Part 4 of Division 30 of PRC] or as otherwise authorized by [Division 30 of PRC] and the regulations adopted [by Cal Recycle] pursuant to [Division 30 of PRC]."

In accord with the Regulatory History And Background set forth above, LEA's involvement with the site commenced in 2011 when it correctly regulated the site as an IDEFO pursuant to 14 C.C.R. §§ 17388.3 and 18103.1.2 (LEA-RIO-0480.001- 0480.013) until it ceased operating as an IDEFO in 2013 (LEA-RIO-0480.014 - 0480.016) and the LEA ceased its regulation of the site, accordingly.

The LEA resumed regulation of the site in 2020, after receiving an illegal dumping complaint (LEARIO-0002), and after inspecting the Site in response to this complaint and conferring with other public agencies' records for the Site (See LEA-RIO-0004 to 0017), the LEA determined that the Site an inert debris Type A disposal facility (See LEA-RIO-

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0018). Therefore, in accordance with 14 C.C.R. § 17388.1, the LEA informed the Site owner/operator that the Site must have a Registration Permit to accept and store inert debris at the Site. (LEA-RIO-0018 to 0026) The Site consequently applied for, and received, a Registration Permit on June 22, 2022. (LEA-RIO-0155- 0158) After issuing the registration permit, LEA learned from Cal Recycle that the Site was not identified on the local planning document, namely the Countywide Siting Element (CSE) (LEA-RIO-0160 to 0163) LEA therefore issued two enforcement orders: (1) Cease and Desist Order ("CDO") pursuant to PRC § 45005; and (2) Notice of Intent to Revoke Registration Permit ("NIR") pursuant to § 44306. (LEA-RIO-0165 to 0186). Milan challenged the CDO and NIR and after multiple hearings, effective October 8, 2020, the Site was without an appropriate permit to continue operation as an inert debris Type A disposal facility, i.e., to accept additional inert debris to and store the stockpiled inert debris at the Site. (LEA-RIO-0957 to 0959) Milan subsequently appealed the Hearing Officer's decision to Cal Recycle pursuant to PRC § 45030, and on February 26, 2021, Cal Recycle overturned the Hearing Officer's decision. (LEA-RIO-00920 to 0928) With the Registration Permit revoked and the CDO overturned, the Site was once again in violation of PCR §§ 44000.5 and 44002 in storing the stockpiled inert debris at the Site.

In 2021, the LEA determined that to the extent Milan wanted to use the Site for recreational purposes and use the stockpiles at the Site to compact the Site's ground to be capable of sustaining improvements thereon, the Site had to implement a post closure maintenance plan and comply with regulatory provisions that pertain to use of the stockpiles for that purpose. In May 2021, Milan informed the LEA that it was planning to use the Site for park space. (See LEA-RIO-2330; 2332 to 2333) The LEA requested additional information from Milan accordingly. (LEA-RIO-1498 to 1501; 1505 to 1509) In August 2021, Milan provided detailed information about its plans for the Site, consisting of building homes, recreational uses, and open space. (See LEA-RIO-1493 to 1497) Milan also informed the LEA that it was planning to use the stored stockpiles in an IDEFO at the Site to compact the Site's soil to prepare it for supporting any planned improvements at the Site related to the newly planned uses. (LEA-RIO-1494t-1495) After reviewing the information, the LEA determined that Milan had to agree to a stipulated order that would require Milan to implement a post closure maintenance plan and conduct the IDEFO and related operations (such as processing the stockpile materials) in accordance with the applicable standards in the California Code of Regulations, Titles 14 and 27. (LEA-RIO-2331; 1503 to 1504; 1502; 1505 to 1509; 2121 to 2122; 2123 to 2125; 2127)

Sections 3 and 4 of the SN&O adequately require Milan to close the Site as an inert debris Type A disposal facility and implement the appropriate post closure maintenance plan in accordance with applicable standards in Title 27 of the California Code of Regulations. As for the first legal issue, the LEA determined that 27 C.C.R. 8321100(d) allows the LEA to close the Site as an inert debris Type A disposal facility such that the Site could then be used for recreational or other uses in accordance with the applicable



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local zoning codes and plans. (LEA-RIO-2333; 1502; 2121) Under 27 C.C.R. § 21100(d), "illegal or abandoned disposal sites which pose a threat to public health and safety or the environment shall implement the provisions of these regulations as required by the LEA. Given the Site's Registration Permit was revoked effective October 8, 2020, the Site is an "illegal" disposal site. Therefore, the LEA determined it had the authority to require Milan to implement the closure and post closure maintenance plans for the Site as part of closing the Site as a disposal site so that Milan could use the Site for other uses, e.g., recreational. (See LEA-RIO-2333; 1502; 2121)

Accordingly, Sections 3 and 4 of the SNO require a comprehensive analytical and geotechnical investigation of the Site's soil below the current grade level. (See LEA-RIO-2341- 2345) Given that the LEA had been concerned about the adequacy of the existing records of the solid waste accepted at the Site, as well as lack of records regarding the Site's past operations and disposal activities (see LEA-RIO-0953 to 0955; 1506), the LEA determined that Milan must conduct thorough analytical and geotechnical investigation of the Site's soil below the grade level. (LEA-RIO-1506 to 1507; 2123) The LEA determined these investigations were necessary to determine the presence of certain contaminants and solid waste in the Site's soil to determine the scope and extent of the closure and post closure plans for the Site. (LEA-RIO-1506 t-1507; 2123) Sections 3 and 4, require Milan to conduct a thorough investigation of the Site's soil below the current grade level. It is critical to note that the SN&O does not waive the LEA's regulatory oversight regarding evaluating the adequacy of the analytical and geotechnical investigations' workplans and implementation thereof. (Sections 3.3 through 3.7, and 4.2 through 4.6 of the SNO; (LEA-RIO-2341-2345) In fact, the SNO reserves the right to the LEA to take any further appropriate enforcement actions to ensure Milan complies with the SNO. (Section 16 of the SNO; LEA-RIO-2352)

On pages 5 through 8 of their Statement of Issues, Petitioners question the adequacy of the analytical and geotechnical investigation of the Site under Section 3 and 4. Specifically, Petitioners reference the Site's disposal history. Contrary to Petitioners' claims, Section 3.2 adequately sets forth testing for the spectrum of the contaminants the LEA believes to be sufficient to the guide the LEA in determining the scope and extent of any remedial plans, including post closure maintenance plan, for the Site, especially given the lack of adequate records for the inert debris accepted at the Site and its past disposal history.

The testimony of Shyamala Rajagopal and Tamara Escobedo established that they reviewed the environmental reports that Petitioners had lodged into evidence and validated the sufficiency of Section 3.2 concerning the types of potential contaminants that could be present in the Site's soil as suggested by the environmental reports.

In addition, Section 3.9 of the SNO specifically holds Milan accountable in the event the analytical investigation of the Site shows the presence of concerning concentrations of the specified contaminants in Section 3.2, the presence of solid waste capable of producing methane gas upon decomposition, and presence of methane gas above regulatory levels. Milan must develop and implement a remediation plan, closure plan,

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and post closure maintenance plan in accordance with the applicable provisions of Title 27 of the California Code of Regulations. As supported by the testimony of Laurent Robinson and Tamara Escobedo, other public agencies would have jurisdiction with respect to their cleanup and the LEA would require Milan to coordinate with them, accordingly.

Section 5 of the SNO adequately requires Milan to use the stockpiled inert debris at the Site in accordance with applicable standards in Title 14 of the California Code of Regulations. There was an abundance of testimonial and documentary evidence explaining that, with Cal Recycle's guidance (LEA-RIO-1501;1503; 1507 to 1508), the LEA determined that use of the stored stockpiles at the Site would be appropriate for an IDEFO at the Site. Section 5.7 is consistent with Cal Recycle's guidance and 14 C.C.R. § 1 7388(1). That is, under § 17388(1), "[t]he operator shall also certify under penalty of perjury, at least annually, that only approved inert debris has been placed as engineered fill and specifying the amount of inert debris placed as fill." Therefore, the requirement under Section 5.7 of the SNO is consistent with the requirement stated in 14 C.C.R. § 17388(1) in that Section 5.7, too, requires written certification from a professional engineer or geologist as to the suitability of the stockpiles for use in an IDEFO at the Site.

Section 6 of the SNO requires Milan to conduct any IDEFO at the Site in accordance with an as authorized by the LEA pursuant to the applicable standards in Title 14 of the California Code of Regulations. LEA was concerned that any operation by Milan related to the stored stockpiles with respect to their use in an IDEFO, e.g., decreasing the size of stockpile materials and would come under the scope of definition of "processing" which must be conducted in accordance with the applicable provisions of 14 C.C.R. §§ 17380 through 17386. LEA thus inquired whether use of the stored Stockpiles at the Site would require any processing prior to use in fill. (See LEA-RIO-1503; 1501) Upon learning that Milan was planning to conduct operations with respect to the stored stockpiles that would fall under the scope of the definition in 14 C.C.R. § 17381(v) (see LEA-RIO-1495), the LEA notified Milan that any such operation must be conducted in accordance with 14 C.C.R. §§ 17386 and 17383.7(e) through (k), including requiring daily weight limit. (See LEA-RIO-1508)

On page 11 of their SOI, the Petitioners question the validity of the SNO allowing Milan to "crush" the stored stockpiled material at the Site. Petitioners have failed to meet their burden with respect to this claim. As explained above, 14 C.C.R. § 17381(v) defines the term, "processing," as including "volume reduction." Milan had informed the LEA that "[l]arger pieces of inert debris (e.g., concrete) will need to be crushed to six-inches and below sized debris, which will further serve to allow for inspection and confirmation of the inert debris' suitability prior to fill operations." (See LEA-RIO-1495) The LEA determined this operation to fall under the scope of "processing," governed by 14 C.C.R. § 17387.3. Section 6 of the SNO requires Milan to process only those stored stockpiles at the Site that have been cleared in accordance with Section 5 as being contaminant free and suitable for use in an IDEFO in accordance with a workplan that meets the

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requirements of 14 C.C.R. §§ 17386 and 17383.7(e) through (k). (Section 6.4 of SNO; LEA-RIO-2349)

Sections 7 and 8 of the SNO require Milan to conduct any IDEFO at the Site in accordance with an authorization from the LEA in accordance with the applicable standards in Title 14 of the California Code of Regulations. LEA has not authorized Milan to conduct an IDEFO at the Site. (LEA-RIO-0972; 0965 to 0966) However, if Milan conducts any IDEFO at the Site, the LEA must authorize the IDEFO in accordance with 14 C.C.R. § 17388.3. (LEA-RIO-2349 to 2350). Furthermore, Pursuant to Title 27, subsections 21170(a)(1,2 and, if applicable, 3)." (14 C.C.R. F:317388.3(f)) 27 C.C.R. § 21170(a) ], Section 8 of the SNO requires Milan to file with the Orange County Clerk Recorder's Office the required descriptions under 27 C.C.R. §21170(a), and as required under 14 C.C.R. § 17388.3(f), for both the IDEFO that was terminated in 2013 and any future IDEFO at the Site upon its termination.

The SNO adequately describes the Site parcels subject to the SNO. At Page 4 of their SOI, Petitioners question the validity of the SNO with respect to excluding certain parts of the Site from being subject to the SNO. There was extensive testimony and documentary evidence concerning the "excluded areas" and the legal description/APN's included in the SNO (LEA-RIO-0881, 0915) "...the area was "native." (Jennifer Nguyen). Per the testimony of Shyamala Rajagopal and Jennifer Nguyen, who have been inspecting the Site since 2020, they have only observed solid waste disposal activity, i.e., inert debris stockpiling, in the areas that are subject to the SNO.

Moreover, Shyamala Rajagopal testified that closing the Site will not end the LEA's jurisdiction over the Site and the LEA would continue to inspect and regulate the Site for the duration of the time the post closure maintenance plan is in place, including enforcement actions occasioned by any discovery of buried solid waste capable of generating methane gas in the areas excluded from the SNO. The environmental reports on which the Petitioners heavily rely on, too, show that the Site's history of disposal, e.g., underground storage tank leakage, industrial uses, agricultural uses, etc., are all concentrated in the areas of the Site that are subject to the SNO. (LEA-RIO-1865)

The SNO includes a legal description of the areas that are subject to the SNO. (LEA-RIO-2364-2389) The SNO therefore clearly describes the areas that are subject to the SNO. The SNO also identifies by way of Assessor's Parcel Numbers ("APN") the total areas that comprise the Site, those APNs from the total collection that are excluded from being subject to the SNO in their entirety, and those APNs from the total collection that are partially excluded from being subject to the SNO. (Recital A of SNO; LEA-RIO-2337) The SNO clearly describes the areas of those of APNs that are partially subject to the SNO and the APNs that are completely excluded from the SNO.

On page 9 of their SOI, Petitioners challenge the validity of the SNO as lacking sufficient

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specification of Milan's violations of solid waste laws and how steps outlined in the SNO would bring Milan into compliance. Recitals on pages A through D, and U specifically state the Site's violations of solid waste laws. Recital V states the new uses that Milan, as the landowner, intend for the property. Recital W expressly states:

"[t]he LEA alleges that Milan is required to comply with solid waste laws and Title 27 regulations pertaining to closure, post-closure maintenance and land use restrictions, as applicable, to use and/or develop the Site to that effect stated in Recital V. The LEA alleges that use of the stockpiles of inert debris solid waste, as referenced in Recital C, above, for an IDEFO at the Site, is in violation of Title 14 regulations. The LEA alleges processing the stockpiles of inert debris solid waste, as referenced in Recital C above, at the Site is in violation of Title 14 regulations."

Additionally, Sections 3 through 8 of the SNO set forth the corresponding regulatory requirements for the specific activities identified in Recital V. The SNO thus meets the requirements of PRC § 45011 and 14 C.C.R. § 1 8304.1(a)(3).

In their closing brief, Citizens express their concerns with the site owner's "...intent to develop the site for residential and recreational use and leave some parts of the Site as open space." (Citizens001962) They allege that: "To protect the residents currently living adjacent to the site, it is critical that the entire site be tested. . . . There are no indications of an actual project approved or slated for other parts of the site, just a few ideas. Ms. Lane testified at the hearing that on her visit to the site on May 27, 2021 with Christopher Nicholson, President of Milan Capital Management, Incorporated, that she was not shown a plan that delineates the different areas of the site and proposed future use, whether they are being considered for recreation or open space." The testimony and documentary evidence presented at the hearing abundantly demonstrated that the SNO sufficiently addresses Citizens' elaborated concerns and refutes these claims.

In August 2021, Milan provided detailed information about its plans for the Site, consisting of building homes, recreational uses and open space. (See LEA-RIO-1493 to 1497) Milan also informed the LEA that it was planning to use the stored stockpiles in an IDEFO at the Site to compact the Site's soil to prepare it for supporting any planned improvements at the Site related to the newly planned uses. (LEA-RIO-1494 to 1495) After carefully reviewing the information, the LEA determined that Milan had to agree to a stipulated order that would require Milan to implement a post closure maintenance plan and conduct the IDEFO and related operations (such as processing the stockpile materials) in accordance with the applicable standards in the California Code of Regulations, Titles 14 and 27. (See LEA-RIO-2331; 1503 to 1504; 1502; 1505 to 1509; 2121 to 2122; 2123 to 2125; 2127)

Contrary to Petitioners' suggestion of LEA and Milan "collusion", Cal Recycle has long employed the use of stipulated notice and orders as a means of securing compliance and specifically advises LEAs of the option to use such orders. As set forth in the

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Government Code, “[a]n agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding . . . employed the use of stipulated notice and orders as a means of securing compliance and specifically advises LEAs of the option to use such orders. . . . “[a]n agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding . . . the settlement may be on any terms the parties determine are appropriate.” Gov. Code § 11415.60(a).

LEA alleges that the Site is unpermitted and that Milan is required to comply with solid waste laws and regulations pertaining to closure, as applicable, regarding the continued storage of the stockpiles onsite. Stipulated N&O, Q, U and W (MILAN-00003). The LEA asserts that given the return of the Permit, it had authority to require Milan as the owner and operator of the Site to institute a plan needed for closure pursuant to 27 CCR section 21100 (a) and (d). Id. at § 3.9. (MILAN-00007) Importantly, when acting in accordance with 27 CCR section 21100, the LEA “shall apply these regulations to non-MSWLF units, except for disposal sites that have received household or commercial wastes, only as necessary to protect public health and safety, until such time as those non-MSWLF units or disposal sites have been placed into the regulatory tier structure set forth in Subchapter 2 of Chapter 4 (§21460 et seq.)” 27 CCR §21100(f). This is the exact purpose of the Stipulated N&O. Depending upon the results of the investigations and testing, the appropriate tier will be determined for the Site, including potentially an IDEFO. (Cal Recycle Regulatory Permit Tiers: <https://calrecycle.ca.gov/swfacilities/permitting/tiers/tasks/>)

The LEA has a wide discretion to select from amongst the various administrative orders specified in Chapter 1 of Part 5 of PRC (commencing with 45000) and Title 14 Regulations sections 18304 and 18304.1, as the LEA deems appropriate and necessary for a specific violation. Title 14 Regulations section 18304 sets forth the elements that an administrative order must contain. Specifically, section I 8304(b) and (c) provide, as follows:

(b) The notice and order shall contain the following information:

- (1) The identity of the EA.
- (2) The name or names of each person or entity to whom it is directed.
- (3) A description of the facility, operation or site where the violation was documented with a specific description of the location of the violation
- (4) A description of the violation.
- (5) The statutes, regulations, or permit terms or conditions the EA has determined are being violated.
- (6) A schedule, as described in section 18304.1(a), by which the operator is to take specified action(s).
- (7) The penalty for not complying within the specified schedule, as described in section 18304.1(b).
- (8) A notice informing the owner/operator of their right to appeal the notice and

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order to the hearing panel or hearing officer under PRC 44307.

(9) The date of issuance and signature of an authorized officer or employee of the EA.

(c) The notice and order shall be accompanied by a declaration or affidavit under penalty of perjury of an employee or officer of the EA stating that the allegations contained in the notice and order are based either on personal knowledge or information and belief. If the basis of the allegations is the personal knowledge of the declarant or affiant, the declaration or affidavit shall state generally how such knowledge was obtained, including the date of any inspection. If the basis of the allegations is information and belief, the declaration or affidavit shall state generally the source of the information; however, in no case shall the identity of an informant be required to be revealed.

However, the above elements are applicable to orders that are issued by the LEA without a stipulation by the violator to comply with the LEA's requirements. This is rather apparent from the text of Title 14 Regulations section 18304(b), (d). For instance, section 18304(b)(8) requires that the administrative order includes a notice of the right to appeal the administrative order under PRC section 44307. The right of appeal is aptly applicable in a situation wherein the LEA is not successful to obtain voluntary compliance on the part of violator and then is compelled to issue an administrative order. The violator then has the right to contest the LEA's position and seek a hearing as to whether the LEA is correct with respect to its enforcement position and demands. In contrast, when the LEA and the violator enter into an agreement and memorialize the agreement in a stipulated administrative order, the right to appeal no longer applies. Moreover, Title 14 Regulations section 18304(d) states, "[w]ithin five business days of issuance of the notice and order, it shall be served on the owner and operator of the site, facility or operation, or person as applicable, in the following manner...."

In a stipulation, the formality of a service does not apply. The violator voluntarily agrees to the LEA's demands and executes the stipulated administrative order. The same rationale applies to the remaining elements specified in Title 14 Regulations section 18304(b) and (c).

Even if these elements were superficially applied to stipulated administrative orders, the SNO complies with section 18304. The SNO includes a description of the Site, lists the alleged violations and their corresponding statutory and regulatory provisions, sets forth the timelines for compliance with each of the requirements, and reserves the right to the LEA to seek enforcement of the requirements in the event Milan fails to comply with the requirements. The notice of right to appeal and declaration items are not applicable in that Milan is voluntarily agreeing to comply with the requirements set forth in the stipulated notice and order. Moreover, the "Cal Recycle Notice and Order Tool Kit" specifically has a section that is titled, "Each Stipulated Agreement Must Include." The items listed under this section are:

- Terms and conditions subject to agreement.

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- Justification.
- Changes required to address temporary emergency.
- Terms of the agreement including:
  - Commencement date.
  - Termination date.
- Action taken by operator to revise permit or modify operations.
- Action LEA will take.
- Operator and LEA signatures.

With the exception of "changes required to address temporary emergency," which is not applicable to the SNO, all the remaining elements listed above are included in the SNO.

As elaborated above, the SNO more than adequately embraces the issues and secures these regulatory concerns asserted by Citizens.

Petitioners, Citizens have not met their burden of showing LEA's failure to act as required by law or regulation or deficiencies or flaws in the SNO that rise to the level of abuse of discretion or failure to adhere to the applicable laws as circumscribed under PRC §44307.

DECISION:

Based on all of the foregoing findings:

The Stipulated Notice and Order, dated June 16, 2022, entered between the Local Enforcement Agency for the County of Orange and Milan REI X, LLC is valid.

The relief sought by Petitioners in their Statement of Issues, dated July 17, 2022, is denied.

Sincerely,

*Deborah Pernice Knefel*

Deborah Pernice Knefel  
Hearing Officer