**BEFORE THE DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY**

**STATE OF CALIFORNIA**

**IN THE MATTER OF:**

**Orange Citizens to Keep Orange Safe,**

**Appellants,**

**Orange County Solid Waste Local Enforcement Agency and**

**Milan REI X, LLC,**

**Respondents**

**DECISION AND ORDER**

**[Public Resources Code Sections 45030 et seq.]**

## I. INTRODUCTION

This matter came before the Department of Resources Recycling and Recovery (CalRecycle) based on an appeal filed pursuant to Public Resources Code (PRC) section 45030. Appellants, Orange Citizens to Keep Orange Safe (Appellants), were represented by Bonnie Robinson, Kim Plehn, and Dru Whitefeather. The Orange County Solid Waste Local Enforcement Agency (LEA) was represented by the Office of the County Counsel, County of Orange attorney Massoud Shamel. Respondent, Milan REI X, LLC (Milan), was represented by Peter Duchesneau, attorney at law.

On October 19, 2022, Appellants filed a Request for Hearing and Summary Statement of Appeal of an October 12, 2022, written decision by Deborah Pernice Knefel (Knefel) upholding a June 16, 2022, Stipulated Notice and Order by and between the LEA and Milan (Stipulated N&O) concerning portions of real property at 6145 E. Santiago Canyon Road in the City of Orange, owned and operated by Milan. CalRecycle determined that Appellants' appeal raised one or more substantial issues and accepted the appeal.

Having considered documents submitted by the parties and legal argument, and for good cause appearing, CalRecycle has made the following determinations:

## II. FACTS

Milan is the owner and operator of Site located at 6145 East Santiago Canyon Road in the City of Orange, California (Site).

In 2011, the LEA authorized the operation of an Inert Debris Engineered Fill Operation (IDEFO) at the Site. In 2013, the LEA "stopped its regulatory oversight" of the Site although it continued to receive material. (LEA-RIO 0480.014-0480.016.)

The LEA did not regulate the Site from 2014 through 2019.

In January 2020, the LEA received a complaint of illegal dumping at the Site and conducted an inspection of the Site and the operations occurring there. The LEA determined that the operations met the requirements of an Inert Debris Type A Disposal Facility and required Milan to obtain a Registration Permit. (LEA-RIO 0004-0018.)

Milan applied for an Inert Debris Type A Disposal Facility (IDTAF) Registration Permit, and on June 22, 2020, the LEA deemed it "complete and correct". On June 22, 2020, the LEA issued the Registration Permit. (LEA-RIO 0155-0158.)

The Registration Permit was applied for and issued under the mistaken belief that the Site could be listed in the City of Orange's (City) Non-Disposal Facility Site Element (NDFE), a requirement for its issuance. However, on July 23, 2020, Milan and the LEA learned that the Site did not actually qualify for the listing. (LEA-RIO 0160-0163.)

On July 23, 2020, the LEA wrote to Milan that since the issuance of the Permit, it had learned that the Site could not be identified in the City's NDFE. "Based on these facts, the LEA has determined that the Application cannot be deemed complete and correct. This means that the LEA has reasons and the authority to issue a revocation proceeding … to revoke the Registration Permit." The letter went on to say that Appellants would be allowed to voluntarily surrender the Permit in lieu of "instituting a formal revocation process". (LEA-RIO at 0165-0167.)

On August 3, 2020, the LEA issued its Notice and Order of Cease and Desist for Registration Permit for Rio Santiago Facility (CDO) mandating that the Site's operation immediately cease and desist. (LEA-RIO 0760-0813.)

On August 10, 2020, Milan submitted its Enforcement Agency Notification (EAN) and an accompanying operation plan for a new IDEFO at the Site. (LEA-RIO 0631-0734.) The LEA reviewed the operation plan and informed Milan that it did not find the plan to be "complete and correct" as defined in 14 CCR section 18101. (LEA-RIO 0969-0976.)

On August 11, 2020, the LEA issued to Milan its Notice of Intent to Revoke (NIR) the Permit pursuant to Public Resources Code (PRC) section 44306(a) and 14 CCR section 18307. The NIR stated that Milan had the right to request a hearing within 15 days of receipt of the NIR, otherwise the Permit would be revoked "effective August 28, 2020." (LEA-RIO 1510-1511.)

On August 17, 2020, Milan requested a hearing pursuant to PRC section 44310, et seq. regarding the CDO, contending that it was improper. (LEA-RIO 1315-1398.)

On August 25, 2020, Milan requested a hearing on the NIR. However, prior to the hearing on September 14, 2020, Milan returned the permit and withdrew its request for hearing on the NIR. (LEA-RIO 1399-1491.)

Hearing occurred on October 8 and 9, 2020, before Hearing Officer Blum (Blum). At the outset of the hearing, Blum ordered Appellants' Permit revoked. The hearing, however, proceeded as to the validity of the CDO. (CIT 0067-0656.)

At hearing, Milan argued in part that the Site had been receiving and storing inert debris as part of an IDEFO, and therefore the CDO was moot. (LEA-RIO-962.) The LEA argued that the Site did not quality as an IDEFO because it did not observe "activities that are requisite for an IDEFO" during its Site inspections. The LEA noted such activities would include "screening of

[material] in order to separate the unacceptable..., the spreading of the accepted inert debris on land in lifts, and the compacting of the accepted inert debris..." (LEA-RIO at 837.)

Blum issued his written conclusions and findings (Decision) on November 4, 2020. Blum found that "The CDO was validly issued and properly asserted as against [Milan's] operations as an Inert Debris Type A Facility only, i.e., the CDO is limited to its express terms...". Significantly, Blum expressly declined to rule on whether operations at the Site qualified as an IDEFO. (LEA-RIO 0957-0964.)

Milan submitted a request for hearing and statement for basis for appeal to CalRecycle on November 16, 2020, seeking to overturn Blum's Decision upholding the CDO. (LEA-RIO 0929-0928.)

The Parties submitted the record to CalRecycle on December 4, 2020, and written statements on January 8, 2021. On February 26, 2021, CalRecycle issued its Decision and Order overturning the CDO on the basis that it was inconsistent with applicable law.

On March 26, 2021, the LEA issued a Notice of Violation (NOV) to Milan for illegal disposal of solid waste. (LEA 1743-1745; LEA-RIO-0935-0937.) The NOV noted Milan's right to request a meeting to clarify applicable requirements and determine what actions may be taken to bring the Site into compliance pursuant to PRC section 45010.2(b).

Milan requested a meeting with the LEA, which was held on April 23, 2021. (LEA-RIO-0931-0939.) The LEA expressed concerns regarding the adequacy of Milan's operational records and the nature of material delivered to the Site. The parties, however, agreed to cooperate "toward finalizing an acceptable Operation Plan", a requirement for any IDEFO per 14 CCR 17388.3(c). (LEA-RIO 0932-0933.)

The LEA met with Milan at the Site on May 27, 2021. Christine Lane, Director of Environmental Health Division for the County of Orange observed the following: "[b]ased on the limited view during our tour, I did not see anything other than piles of rocks and concrete along with a lot of vegetation. There are still pits to be filled." (LEA-RIO 2332-2333.)

On August 12, 2021, Milan provided information concerning future development plans for the Site including residential development, recreational uses, and open space. (LEA-RIO 1493-1497.) Milan asserted that "all material in the debris stockpiles is appropriate for use in an IDEFO." (LEA-RIO at 1494-1495.)

On September 2, 2021, the LEA wrote to Milan indicating that "[t]he LEA would like to offer that the parties enter a Stipulated Notice and Order ... regarding the parties' agreement as to a path forward for the Facility." (LEA-RIO at 1505.) The letter outlined potential actions that would eventually be incorporated into the Stipulated N&O, including geotechnical and analytical testing of the Site's soil and closure and post-closure measures, as warranted. (LEA-RIO 1507.)

Over the next year, the LEA and Milan engaged in negotiations regarding the details of the terms of the order, and on June 16, 2022, the LEA and Milan entered into the Stipulated N&O. (LEA-RIO 2335-2394.)

The Stipulated N&O requires Milan to conduct an investigation of the Site's soil that includes analytical testing of the soil below the current grade level (Stipulated N&O Section 3). Milan

must further conduct geotechnical testing of the Site to determine the boundaries of waste units in the Site's soil detected as part of the analytical soil testing (Stipulated N&O Section 4). Finally, it must sample and conduct analytical testing of each of the onsite stockpiles (Stipulated N&O Section 5). Investigations are to be performed by licensed, independent professionals, including professional engineers and geologists pursuant to work plans reviewed and approved by the LEA.

The Stipulated N&O prohibits Milan from conducting operations at the Site, including any IDEFO, prior to completing the investigations and receiving the LEA's approval, including that the stockpiled materials are appropriate for an IDEFO. (Stipulated N&O Par. 3.3, 3.4, 4.2, 4.3, 5.5.1, 5.5.2.) The Stipulated N&O does not preclude additional enforcement actions.

The Stipulated N&O applies only to the lower two-thirds of the Site where activities have been concentrated (Southern Parcel). The Stipulated N&O does not apply to the northern one-third of the Site (Northern Parcel).

On July 17, 2022, Appellants submitted a Request for Hearing and associated Statement of Issues (SI) to the LEA challenging the Stipulated N&O. The SI argued that the Stipulated N&O should apply to the entire Site, not just the Southern Parcel, and that the Stipulated N&O is incomplete as 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

Pursuant to PRC section 44307, Appellants claim that the LEA failed to act as required by law and regulation, and requested amendments to the Stipulated N&O to correct its deficiencies, and if that is not possible, to revoke the Stipulated N&O. (See SI.)

Hearing was held on September 19, 20, and 21, 2022 before Hearing Officer Deborah Pernice Knefel (Knefel).

Knefel issued her written decision (Knefel Decision) on October 12, 2022, finding that Appellants failed to establish that the LEA had failed to act as required by law or regulation as set forth in Public Resources Code (PRC) section 44307. (See Knefel Decision.)

In October 2022, Appellants submitted their written basis of appeal of the Knefel decision to CalRecycle.

A conference was held on October 21, 2022, and a schedule was determined for the submission of the record and written arguments.

The record was timely provided by November 4, 2022, and supplemented on February 15, 2023. Appellants timely submitted their Appeal by November 18, 2022. The LEA and Milan timely

submitted their Oppositions to the Appeal by December 9, 2022. Appellants timely submitted their Reply to the Oppositions by December 16, 2022.

## III. HEARING BEFORE HEARING OFFICER KNEFEL

### A. Witness Examination

Appellants contend that they "were not able to get a fair hearing", alleging that they were "consistently not allowed to ask questions of witnesses due to the insistence of the Hearing Officer that questions be formulated in a legal format." (Appeal at 20-21.)

At the hearing before Knefel, questions posed by Appellants during witness examinations were subject to various legal objections made by the LEA and Milan. For example, objections were made on the basis that the questions posed were 'vague and ambiguous', 'called for speculation', or 'lacked foundation'. (Hearing Transcript (Tr.) 64:8-9, 72:9-10.) A few of the objections were sustained. (Tr. 82:3-6, 250:13-18, 479:10-16, 480:19-21, 590:5-11.). However, in most instances, witnesses were permitted to answer Appellants question notwithstanding the objection. (64:8-10, 262:24-25, 263:1-3, 266:9-20, 289:6-23, 345:13-17, 480:10-13, 481:1-8, 483:13-18, 588:22-25.) In may instances, Appellants were given opportunities to re-phrase unsound questions. (76:22-25, 77, 238:25, 239-241, 264:17-21, 300:3-13.) Further, Knefel often helped Appellants reformulate their questions to overcome legitimate objections. (259:20-25, 260-261, 262:1-8, 296:5-23.) At other times, Appellants simply withdrew their question or chose to move on when faced with an objection despite being given the opportunity to re-phrase it. (61:14-15, 178:6-11, 286:18-25, 287:1-10, 334:19-25, 345:3-10, 589:14-18.)

While the hearing was not required to be conducted according to technical rules relating to evidence and witnesses, Knefel was required to regulate the course of the proceeding. (Gov. Code Section 11513; 11445.40(b).) Evidence shall only be admitted if it is relevant and reliable. (Gov. Code Section 11513.) Knefel was authorized to limit the use of witnesses, testimony, and evidence; indeed, it was within her authority to eliminate cross-examinations entirely. (Gov. Code Section 11445.50; Gov. Code Section 11445.40(b).)

The few instances where Knefel sustained objections were justified, as Knefel was obligated to exclude irrelevant and unreliable evidence. 'Relevant evidence' means evidence having any tendency in reason to prove or disprove any disputed fact of consequence. (Evid. Code Section 210.) Questions that are beyond a witness' expertise, that are vague, that lack foundation, or that call for speculation do not produce relevant and reliable evidence and should not be allowed. Kneffel acted appropriately in excluding such questions when objections were raised.

Moreover, for most of the objections raised, Knefel either allowed the witness to answer or gave Appellants the opportunity to rephrase their question. Appellants complain that they were deprived of an opportunity to meaningfully examine witnesses, but they repeatedly declined to do so when given the chance.

Indeed, Knefel gave Appellants substantial leeway throughout hearing. In an unusual accommodation, she allowed each of the Appellants to make opening statements and to examine and cross-examine every witness, even though the request for hearing was filed on behalf of a single party- Orange Citizens. Knefel allotted three days for the live, in-person hearing in addition to multiple prehearing conferences, a prehearing briefing, and a post-hearing briefing. The hearing lasted three days even though Milan decided not to call its witnesses in the interest

of time. Knefel also allowed the parties to submit post-trial briefs, although Appellants declined to do so. Knefel imposed reasonable limits on the proceeding, which otherwise would have unnecessarily lasted days longer.

B. Participation of Milan

In her August 15, 2022, Minute Order, Knefel granted Milan's motion to intervene and participate in the matter as a Real Party in Interest and denied Appellants' request to exclude Milan's participation. Appellants allege in their appeal here that Milan "should not have been allowed to participate in the hearing." (Appeal at 21.) Appellants do not cite any legal authorities in support of their position. Milan contends that its participation is mandated by constitutional due process protections and that Knefel's decision to allow its participation was authorized. (See Milan Opposition at 5-6.)

Knefel had broad authority under Government code section 11445.40(b) to regulate the proceeding. In her discretion, she determined that Milan should participate. Such a decision was within her authority. (Gov. Code section 11445.40(b).)

Moreover, Milan's participation was mandated by constitutional due process protections. The Fifth Amendment's due process clause requires notice and an opportunity to be heard before the government deprives a person of property through adjudication or some other form of individualized determination. (*United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993).) The protections afforded by the Fifth Amendment apply to administrative hearings (*Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal.App.4th 81, 90 (2003).)

Here, Appellants seek to overturn the Stipulated N&O- the subject of which is Milan's real property. It is undisputed that Milan's property interest is at stake, therefore, Milan's participation was guaranteed by due process.

## IV. STANDARD OF REVIEW

A. Appeal to Local Enforcement Agency

On July 17, 2022, Appellants submitted a request for hearing to the LEA to challenge the Stipulated N&O pursuant to PRC section 44307. Section 44307 states that:

> "From the date of issuance of a permit that imposes conditions that are inappropriate, as contended by the applicant, or after the taking of any enforcement action pursuant to Part 5 (commencing with Section 45000) by the enforcement agency, the enforcement agency shall hold a hearing, if requested to do so, by the person subject to the action. The 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 this part, Part 5 (commencing with Section 45000), or Part 6 (commencing with Section 45030) or a regulation adopted by the department pursuant to this part, Part 5 (commencing with Section 45000), or Part 6 (commencing with Section 45030). A hearing shall be held in accordance with the procedures specified in Section 44310." (PRC section 44307.)

A hearing was held, and on October 12, 2022, Knefel issued a written decision holding that the scope of review is limited under PRC section 44307 to whether the LEA abused its discretion by

failing to act as required by law or regulation. (Decision, 6.) The Decision further finds that a "failure to act as required by law or regulation" means that "the agency has abused its discretion" (*In Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v. County of Solano Department of Resource Management*, 167 Cal.App.4th 1350, 1362 (2008).) The Decision notes that "[a] manifest abuse of discretion exists if [the action of the agency] was arbitrary, capricious, or patently abusive. If reasonable minds could differ over the appropriateness of [the action], there is no manifest abuse of discretion." (citing *Oduyale v. California State Board of Pharmacy*, 41 Cal.App.5th 101, 117-118 (2019).)

In her written Decision, Hearing Officer Knefel found that: "[b]ased 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 [Sections] 43200, 45011, and 14 C.C.R. [Section] 18304. LEA did not abuse of [sic] its discretion. The resulting Stipulated N&O is not legally deficient or invalid. The LEA's decision to agree to the Stipulated N&O was not arbitrary, capricious, or patently abusive and the LEA proceeded in the manner required by law." (Decision, 7.)

Knefel's written Decision properly sets forth the scope of appeal and the legal standard for review.

B. Appeal to CalRecycle

PRC section 45030(a) provides that "a party to a hearing held pursuant to Chapter 4 … may appeal to [CalRecycle] to review the written decision of the … hearing officer".

PRC section 45032(a) provides that:

> "[i]n [CalRecycle's] hearing on the appeal, the evidence before [CalRecycle] shall consist of the record before the … hearing officer, relevant facts as to any actions or inactions not subject to review by …the hearing officer, the record before the local enforcement agency, written and oral arguments submitted by the parties, and any other relevant evidence that, in the judgment of the [CalRecycle], should be considered to effectuate and implement the policies of this division." (PRC section 45032(a).)

PRC section 45032(b) provides, in part, that CalRecycle: "may only overturn an enforcement action, and any administrative civil penalty, by a local enforcement agency if it finds, based on substantial evidence, that the action was inconsistent with this division." (PRC section 45032(b).)

Substantial evidence is evidence "'of ponderable legal significance,'" which is reasonable in nature, credible and of solid value. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633; *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 305, fn. 28.)

C. Burden of Proof

Absent a statute or other authority fixing a different standard, the burden of proof requires proof by a preponderance of the evidence. (Evidence Code section 115.) Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. (Evid. Code section 500.)

Here, Appellants meet their burden of proof by establishing substantial evidence that the LEA's action was inconsistent with applicable law.

## V. LEGAL CONCLUSIONS

### A. Authority and Duty of Local Enforcement Agency

Division 30 of the Public Resources Code concerns waste management and is known as the California Waste Management Act of 1989. (PRC section 40050; "Act".) The purpose of the Act, in part, is to reduce, recycle and reuse solid waste generated in California to the maximum extent feasible in an efficient and cost-effective manner to conserve natural resources and to protect the environment. (PRC section 40052.) The Legislature has declared that the responsibility for solid waste management is a shared responsibility between the state and local governments. (PRC section 40001(a).) The state and local enforcement agencies must promote waste management practices including environmentally safe land disposal (PRC section 40051.)

The Act broadly authorizes a designated enforcement agency to take action in connection with solid waste facilities. (PRC section 43200.5(a).) An enforcement agency is to implement permitting programs, enforce the terms and conditions of permits, and enforce provisions of the Act within its jurisdiction. (PRC section 43209, subdivisions (a) and (d).) Chief among those provisions is PRC section 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 [Division 30]." (PRC section 44000.5.)

An enforcement agency is authorized to issue a broad range of orders where there has been a disposal of solid waste in violation of section 44000.5. The enforcement agency may issue a corrective action order (PRC section 45000(a).), a cease and desist order (PRC section 45005.), or an order imposing a civil penalty (PRC section 45010.1.) It may also issue an order "establishing a time schedule to which the ... site shall be brought into compliance" with the Act. (PRC section 45011.) An enforcement agency is not necessarily mandated to issue any particular order; rather, it *may issue an order* depending on the circumstances and in its discretion. (PRC section 45000(a); PRC section 45010.1; PRC section 45005; PRC section 45011.)

An enforcement agency may also require the operator or owner of a disposal site to address site-specific conditions as part of any closure plan. (27 CCR section 21100(a).) Illegal or abandoned disposal sites which pose a threat to public health and safety or the environment shall implement the provisions of Closure and post-closure regulations as required by the enforcement agency. (27 CCR 21100(d).)

### B. The Process Used to Develop the Stipulated N&O is Consistent with the Act

Following the invalidation of its CDO on February 26, 2021, the Site was left without a regulatory framework. The LEA considered the Site to be an unpermitted solid waste disposal facility pursuant to Section 44000.5, therefore it was incumbent upon the LEA to take action to bring the Site into compliance. However, before the LEA could proceed with an any enforcement order, it was required to notify Milan that it was in violation.

PRC section 45010.2(a) provides: "Before the [LEA] issues an order under this chapter ... the [LEA] shall...: (a) Notify the owner or operator of the solid waste facility or ... the disposal site, that the facility or site is in violation..." (PRC section 45010.2(a).)

Accordingly, on March 26, 2021, the LEA notified Milan by letter that it was in violation for illegal disposal of solid waste (Notice Letter). The Notice Letter specifically asserted that the Site did not have the required permit to store the Stockpiles. (LEA-RIO 1841-1843.)

The Notice Letter went on to state that "you may request to schedule a meeting to clarify the requirements and to determine what action, if any, that you may take to bring the Facility into compliance by the earliest feasible date." It provided contact information and a deadline to schedule the meeting. (LEA-RIO at 1843.)

The LEA's offer to meet with Milan reflects another requirement of Section 45010.2. It states: "upon the request of the owner or operator, the LEA must meet to clarify the applicable requirements and to determine what actions, if any, the operator or owner may voluntarily take to bring the facility or site into compliance by the earliest feasible date." (PRC section 45010.2(b).).

Milan availed itself of its right to meet and a meeting occurred on April 23, 2021. At the meeting, the parties continued to disagree about nature of the operations at the Site- Milan asserted that it could operate as an IDEFO while the LEA considered the Site an unregistered Inert Debris Type A Disposal Facility. At the core of this dispute was whether the stockpiled debris was appropriate for an IDEFO. The LEA asserted that it was not an IDEFO, based, in part, upon its observations of material it considered to be inappropriate for an IDEFO at the Site in early 2020, i.e., shingles and pool plaster. The LEA further maintained that records provided by Milan did not "specify the types of solid waste received at the [Site]" and did not provide tonnage information. (LEA-RIO-1739-1741.)

While the March 26 meeting did not resolve the parties' core dispute regarding the nature of the operation, the meeting marked the beginning of a process of communication and exchange of information aimed at bringing the Site into compliance.

Following the April 23 meeting, the parties continued to engage with each other and exchange information. In August 2021, Milan provided substantive information about its plans for the Site, including building homes, recreational uses, and open space. (LEA-RIO 1493.) Milan further informed the LEA that it planned to use the stockpiled material for filling and compaction. (LEA-RIO 1493-1495.) Also in the summer of 2021, CalRecycle provided technical assistance to the LEA, clarifying that 'pool plaster' composed of cement, water, and silica is an acceptable material for an IDEFO. CalRecycle further informed the LEA that 'clay or concrete shingles' would also be acceptable material for an IDEFO, provided that they were composed of acceptable materials, i.e., "cement, sand, and water". (LEA-RIO 0940-0942.)

After consideration of this new information, and in light of other information exchanged between the parties following the April 23 meeting, the LEA concluded that a Stipulated order could provide the required framework to bring the Site into compliance. (LEA-RIO-2331; 1503-1504.) On September 2, 2021, the LEA wrote to Milan offering that the parties enter into a stipulation, but reserving the right to bring an enforcement order should the parties be unable to agree to terms. (LEA-RIO-1505-1509.) Over the next many months, the parties negotiated the terms of the proposed stipulation, and the Stipulated N&O was finalized effective June 16, 2022.

The process used to develop the Stipulated N&O, as described above, is consistent with the Act and its regulations. Before it could proceed with an enforcement order, the LEA was required to meet with Milan to discuss *voluntary compliance actions*. (PRC section 45010.2.(a).) In other

words, the LEA was required to explore noncompulsory measures to achieve compliance, i.e., an agreement. The April 23 meeting represented a good faith effort by the parties to achieve compliance cooperatively. While it didn't resolve all disputes, it initiated an earnest and robust effort to that end which culminated with the Stipulated N&O.

As set forth in the 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 ... the settlement may be on any terms the parties determine are appropriate." (Gov. Code section 11415.60(a).) When carrying out its statutory duty, the LEA is deemed to be carrying out a state function. (PRC section 43200.5(a), (b).) The LEA's decision to pursue a stipulation is authorized by and consistent with applicable law.

C. The Stipulated N&O is Consistent with Solid Waste Law

As described above, the LEA considered the Site to be an Inert Debris Type A Disposal Facility requiring a registration permit. Milan, on the other hand, asserted that only IDEFO debris had been stockpiled. (LEA-RIO-1748-1839; TR. 153:22-156:13.) Nonetheless, the LEA recognized that it did not have complete records in connection with the stockpiled material, and that it could potentially be used in an IDEFO on the Site if certain conditions were met (LEA-RIO 2335-2394). The Stipulated N&O represents the LEA's reasoned effort to fill in gaps in its records and make an informed determination regarding whether an IDEFO can proceed.

To that end, the Stipulated N&O requires Milan to conduct analytical investigation and testing of the stockpiled material to identify contamination. (Stipulated N&O Par. 5.5.) If contamination is detected, Milan shall develop and implement a workplan for safe removal of the contaminated stockpiles, or contaminated parts thereof. (Stipulated N&O Par. 5.5.6.)

The Stipulated N&O further requires analytical testing of the Site's soil below current grade for various contaminants and for any solid waste; it also requires geotechnical testing to determine the exact boundaries of any waste units detected. (Stipulated N&O Pars. 3.1, 3.2, 4.1.) To the extent that the tests reveal contamination, Milan must develop and implement a remediation plan including applicable closure and post closure maintenance measures "as consistent with 27 CCR, sections 21090-21200, including section 21190." (Stipulated N&O Par. 3.9.)

On the other hand, if the testing does not reveal contamination, the stockpile (or part thereof) may remain on the Site to be utilized in an IDEFO. (Stipulated N&O Par. 5.5.5.) However, its use must meet certain time limits (Stipulated N&O Par. 5.5.7), and moreover, Milan must submit a letter written and signed by a Registered Civil Engineer (or similar professional license) that "specifically states which of the stockpiles ... are suitable for use in an IDEFO, as defined in 14 CCR, section 17388, subdivision (l)." (Stipulated N&O Par. 5.6.) Indeed, Milan can only begin operating an IDEFO at the Site after all the investigations and testing required by the Stipulated N&O have been completed in synchronization with the LEA and the material has been deemed suitable for use at an IDEFO- including submittal of an operation plan for the IDEFO meeting the requirements of 14 CCR, sections 17386 and 17383.7(e)-(k). (Stipulated N&O Pars. 5.5.6, 5.5.7, 5.6, 7.1, 7.2.) Milan may only remove stockpiled material offsite upon LEA approval of a workplan "in accordance with applicable regulations." (Stipulated N&O Par. 5.5.5.) Any "processing" of material, as defined at 14 CCR section 17381, shall be consistent with and meet the requirements specified in 14 CCR, sections 17386 and 17383.7(e)-(k). (Stipulated N&O Pars. 6.1, 6.4.)

The Stipulated N&O applies only to the southern two-thirds of the Site where Milan's operations involving the handling, storage, and fill of inert debris have occurred. The remaining one-third of the Site, North of the Rio Santiago Creek, is not subject to the Stipulated N&O (Northern Parcel). (Stipulated N&O A, 2, Attachments A and B; MILAN-0024-0051.)

The Stipulated N&O doesn't authorize Milan to conduct any activities on the Northern Parcel. To the extent that Milan will operate an IDEFO on the Northern Parcel, it agrees to submit the appropriate EAN and the accompanying operational plan as required by 14 CCR section 17388.3. (Stipulated N&O Section 2.) The Stipulated N&O does not waive any statutory or regulatory requirements that may apply to the Northern Parcel.

The Stipulated N&O resolves various disputes between the parties related to operations occurring on the Site from 2011 to 2020. (Stipulated N&O Recitals A—X.) However, the parties expressly maintain their rights in connection with implementation of the Stipulated N&O. The LEA maintains its rights to take an enforcement action to enforce the Stipulated N&O and to enforce other or future violations, and Milan maintains its rights to challenge any action including requesting an administrative hearing. (Stipulated N&O Par 3.9, Section 15, Section 16.)

The Stipulated N&O provides a comprehensive regulatory framework reasonably aimed at moving the Site into compliance. It requires comprehensive testing of the Site's Stockpiles and soil. Contaminated materials must be removed, and use of the materials in an IDEFO is only allowed where testing has been completed and the material deemed suitable. The Stipulated N&O addresses the gaps in the LEA's records in a methodical and well-reasoned manner. It is not arbitrary, capricious or patently abusive. Rather, it is consistent with the Act, including provisions related to closure and post-closure maintenance and IDEFO requirements.

D. Appellants Have not Presented Substantial Evidence that the Stipulated N&O is Inconsistent with the Act or its Regulations

   a. *Appellants have not presented substantial evidence that LEA abused its discretion as to the geographic scope of the Stipulated N&O.*

Appellants assert that the LEA abused its discretion in excluding the Northern Parcel of the Site from the Stipulated N&O. "The entire site needs to be fully assessed due to lack of records [during Milan's operations], as well as past history/past use of the site by multiple parties." (Appeal P. 7.) However, Appellants have provided no evidence that the LEA's decision to exclude the Northern Parcel from the Stipulated N&O was inconsistent with the Act or its regulations.

Indeed, the LEA's decision to exclude the Northern Parcel from Stipulated N&O is rational and consistent with applicable law. To begin, the exclusion is consistent with the solid waste operating area identified in Milan's Registration Permit application and its Closure/Post-Closure Plan. (see Figure 2 in Type A Disposal Facility Plan (May 5, 2020) at MILAN-00107; see also Figure 2 in Closure Plan/Post-Closure Maintenance Plan (May 5, 2020) at MILAN-00193; Tr. 122:23-124:16, 184:22-186:13, 473:15-474:18, 511:3-515:17.) As described in the Stipulated N&O:

"On or about May 5, 2020, Milan's consultant, AD, also submitted to CalRecycle a Type A Disposal Facility Plan and a Closure Plan/Post-Closure Maintenance Plan … which contained a

map … that identified the boundaries of certain areas that correspond to the boundaries of the [Southern Parcel] as depicted on Attachment "B." (Stipulated N&O at I; see also: LEA-RIO-0041; LEA-RIO-0080.)

As the Stipulated N&O is intended to bring the facility into compliance given the recission of the Registration Permit, it is appropriate for the Stipulated N&O to apply to the same boundaries as the solid waste operating area of the Permit, i.e, to the Southern Parcel only.

Moreover, LEA staff made a collective decision to exclude the Northern Parcel based on their inspections and observations of Milan's operations, maps, and information from Milan, among other things. (Tr. 185:24-186:13, 191:16-193:2, 194:16-195:18, 228:18-230:19 (J. Nguyen); Tr. 263:7-19, 273:13-275:17 (D. Cheng); Tr. 288:6-12 (C. Lane); Tr. 396:4-20, 401:6-402:18, 461:9-463:14, 474:3-21 (S. Rajagopal.)) The LEA staff has decades of experience and varied expertise. (Rajagopal holds a bachelor's degree in civil engineering and a master's degree in environmental engineering- Tr. 53:6-9; Cheng holds a bachelor's degree in microbiology and a law degree and is a registered environmental health specialist- R. 258:15-19; Lane hold a bachelor's degree in food science and a master's degree in public administration and is a registered environmental health specialist- Tr. 285:12-16; Escobedo holds a bachelor's degree in geology and is a registered professional geologist and a certified engineering geologist- Tr. 569:4-13.)

Appellants cite various reports and documents in support of their argument that the LEA abused its discretion in excluding the Northern Parcel from the Stipulated N&O. (CITIZEN 0729-0740, 0747, 0749, 0750, 0974-1556, 1561-1838, 1845, 1865, 1908.) However, Appellants do not present evidence that the LEA abused its discretion by not including the Northern Parcel or that the exclusion was inconsistent with the Act or its regulations. Appellants merely present excerpts of the reports without context and without any meaningful explanation of their relevance.

In their Statement of Issues (SI), Appellants cite extensively to the Phase I Environmental Site Assessment report prepared for Milan, dated August 6, 2009 (CIT 1561-1838, "Phase I Report") and the Phase II report by TAIT, dated May 16, 2011 (CIT 0974-1556, "Phase II Report"). They note that the reports document historical uses of the Site like silt ponds, underground storage tanks, agriculture, mulch recycling, and equipment maintenance. (SI at 7-8.) However, Appellants do not explain how these historical uses support expanding testing to the Northern Parcel. Rather, Appellants merely provide excerpts from the reports without context or supporting argument. For example, Appellants note: "Results of the research conducted for this Phase I ESA indicate that there is a high probability that the 110 acre site contains a recognized environmental condition relative to hazardous materials. Further testing and analysis … is warranted and recommended." (SI at 5 quoting the Phase I Report.) However, the Phase I Report only recommends testing on the Southern Parcel- where the historical uses were concentrated. (CIT 1609.)

At hearing, LEA witnesses testified that they reviewed the Phase I and Phase II Reports cited by Appellants. (Tr. 246:21-250:6 (G. Higgins); TR 363:4-364:12 (L. Robinson), (Tr. 461:6-462:19 (S. Rajagopal); 9Tr. 573:1-13, 593:13594:7 (T. Escobedo.) They confirmed their belief that the exclusion of the Northern Parcel was appropriate considering the information contained in the reports. (TR 363:4-364:12 (L. Robinson). (Tr. 461:6-462:19 (S. Rajagopal)).

In their Appeal to CalRecycle, Appellants cite the "TAIT Response to the City of Orange Environmental Comments", a supplementary follow-up report to the Phase I and II Reports. (CIT 0729-0740- "TAIT Response"; Appeal at 8-9.) Again, Appellants provide excerpts without necessary context and without explaining the excerpts' relevance. They note that the TAIT Response indicates past uses of the Site including agriculture, an asphalt batch plant, and green waste recycling. (Appeal at 8.) "The [TAIT Response] also cites undocumented fill material in mining excavations ..., (sic) a pond containing silt and some organic material". (Appeal at 9.) Appellants go on to note that the TAIT Response "also cites impacts from former asphalt plants, associated maintenance buildings, diesel spray racks, storage drums, solvent degreasers, chemical storage shed, oil and water separator." (Appeal at 9). However, the TAIT Response expressly provides that maintenance buildings, the asphalt plant, the material recycling area, and diesel spray racks were all located on the Southern Parcel. (CIT-0733.) Appellants offer no explanation how these historical uses, concentrated on the Southern Parcel, support expanded testing.

In another example, Appellants assert that the TAIT Response "cites undocumented fill material in mining excavations, possibly including asbestos..." (Appeal at 8-9; Request at 6.) Again, Appellants provide no context or other relevant information connecting this issue to expanded testing. Indeed, the broader context here is critical; the Response provides: "[a]n entry ... indicates that OCHCA personnel returned to the Site and collected three samples in the area though to be where the [asbestos-containing material] was buried. Analytical results indicated non-detect for asbestos. A [subsequent entry] indicates that, because asbestos was not detected in surface samples collected and there is no evidence of asbestos other than one person's statement, OCHCA will be closing the case." (CIT at 0733-0734.) In short, the TAIT Response indicates that there's no significant evidence of asbestos contamination. Ultimately, it's not clear why Appellants chose to highlight this information, but the omitted context naturally leads to an unsupported inference that there is asbestos contamination at the Site.

Appellants cite other issues in the same cursory manner- without explanation and without context: equipment left over from asphalt plant (Statement of Issues at 6-7), abandoned tank (SOI at 7, Appeal at 9), piping manifold (Appeal at 9.), historical aerial photos (Appeal at 10.), and unlabeled drum (SOI at 7). Appellants also complain that testing done in connection with the Phase II Report was incomplete (SOI at 8, Appeal at 9). The significance of these issues is not clear from the record, and Appellants do not explain their significance other than to say that they support expanding the reach of the Stipulated N&O.

CalRecycle may only overturn the LEA's enforcement action where it finds, based on substantial evidence, that the action was inconsistent with the Act and its regulations. (PRC section 45032(b).) "'Substantial evidence' means that evidence which, when viewed in light of the entire record, is of solid probative value, maintains its credibility and inspires confidence that the ultimate fact it addresses has been justly determined." (*People v. Conner* (1983) 34 Cal.3d 141, 149.) As explained above, the probative value of Appellants' evidence has not been established.

Appellants have not set forth substantial evidence of solid waste disposal on the Northern Parcel that would require the LEA to expand the reach of the Stipulated N&O. The LEA "may issue an administrative order requiring the owner or operator of a solid waste facility or disposal site or a person in violation of Section 44000.5, to take corrective action as necessary to abate a nuisance, or to protect human health and safety or the environment." (PRC section 45000(a); see also 14

CCR section 18304.) Appellants have not demonstrated that any conditions exist from the disposal of solid waste on the Northern Parcel that constitute a nuisance or threat to public health and safety and that the LEA abused its discretion by not issuing an order as mandated by law or regulation.

*b. Processing*

Appellants express concerns regarding potential processing of material at the Site. "The residents in the surrounding neighborhoods are extremely concerned about the dust, toxins, and sound of crushing on site." (SOI at 11.)

The Stipulated N&O requires that any processing of the stockpiles occur in accordance with applicable regulatory requirements, i.e., 14 CCR section 17380 et seq. Section 6 of the Stipulated N&O- *Processing the Stockpiled Solid Waste*- requires Milan to obtain an LEA-approved operation plan for any activity falling under the broad definition of 'processing' provided by 14 CCR section 17381. The operation plan must be consistent with and meet the requirements of 14 CCR sections 17386 and 17383.7, subdivisions (e) through (k). (Stipulated N&O at Par. 6.)

Further, no processing can occur before the debris has been determined to be appropriate for use in an IDEFO. (Stipulated N&O Pars. 4, 5, 6, 7.) All future operations are subject to all applicable laws and regulations, including from the LEA and other agencies such as the Regional Water Quality Control Board and Air Quality Management District. (Stipulated N&O Pars. 6.5, 18.1.)

Appellants have provided no evidence that 'processing' as provided by the Stipulated N&O, is inconsistent with applicable law.

*c. CalRecycle Notice and Order Tool Kit*

In their Statement of Issues, Appellants cross-reference the Stipulated N&O with a "CalRecycle Notice and Order Tool Kit" in an attempt to identify legal deficiencies with the Stipulated N&O. However, the 'Tool Kit' is not a recitation of legal requirements, but rather appears to be an order drafting-guide provided by CalRecycle to local enforcement agencies. The issues identified by Appellants in this context do not warrant further action, as described below.

i. Site Description

Appellants complain that "boundaries are blurry and unclear on the maps attached to the [Stipulated N&O]" and "[w]ithout an engineering degree … the legal descriptions are of little help to the public." (SI at 4; Appeal at 11.) Appellants acknowledge that clear maps were filed with the local county assessor and were made part of the record here. (Appeal at 12.) Nonetheless, Appellants contend that clear maps "need to be formally included in the [Stipulated N&O] and published for the Public on the OC Health website." (Appeal at 12.)

Appellants do not cite any statute, regulation, or other legal authority in support of their demand to publish "clear maps" to the web. Furthermore, the Northern Parcel, Southern Parcel, and Site are all described in metes and bounds, i.e., a 'legal description', and with reference to Assessor's Parcel Numbers. The descriptions provided are accurate and Appellants have not presented substantial evidence that the descriptions are inconsistent with the Act or its regulations.

ii. Violation Description and Schedule of Compliance

Appellants complain that the Stipulated N&O "does not identify violations nor does it state how the steps outlined in the [Stipulated N&O] are going to bring the facility into compliance." (Statement of Issues at 9.)

Again, Appellants do not cite any statute, regulation, or other legal authority in support of their position that the Stipulated N&O must "identify violations" and "state how the steps outlined in the [Stipulated N&O] are going to bring the facility into compliance." In fact, the Stipulated N&O describes alleged violations in its Recitals. (Stipulated N&O Par. E, G, Q, U.) Further, the Stipulated N&O provides a comprehensive testing protocol intended to bring the Site into compliance. Appellants' complaint is without merit.

iii. Penalty

Appellants argue that "clear dates and consequences for failure of required actions should be tied to specific penalties." (Statement of Issue at 10.) Again, Appellants fail to cite any legal authority in support of their argument. In fact, the Stipulated N&O provides detailed schedules for submission of testing plans and reports, as well as approvals or comments in connection with geotechnical testing and analytic investigation of the Site's soil, as well as in connection with the Stockpiles. (Stipulated N&O Pars. 3, 4, 5) Further, the LEA has reserved its right to bring an enforcement action to enforce compliance with the Stipulated N&O and any future violations. (Stipulated N&O Sections 15, 16.) Appellants 's argument is without merit.

iv. Right to Appeal

Appellants state that "[a]dequate notice of Right to Appeal was not provided to residents who will be impacted by any and all decision made in the area." (Statement of Issue at 10.) However, 14 CCR section 18304(b)(8) only requires informing the owner or operator—not third parties—of their right to appeal a notice and order. Here, Milan waived its right to appeal. (Stipulated N&O Par. 15.) Therefore, no notice was necessary.

v. Declaration

Appellants complain that the Stipulated N&O doesn't include a declaration. (Statement of Issues at 10.). 14 CCR section 18304(c) provides:

> "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." (14 CCR section 183049(c).)

The declaration required by section 183049 provides information regarding the basis of allegations contained in the notice, and is provided for the benefit of the owner/operator. Here,

Milan agreed to the Stipulated N&O and waived its right to appeal (Stipulated N&O Par. 11.) Therefore, no declaration was required.

vi. Financial Assurance

Appellants argues that "[d]ue to Milan's past violations and malfeasance, and the possibility of abandoning the site before proper cleanup, it is critical that financial assurance is in place to cover the cost of cleanup, closure, and post closure maintenance, if required." (SOI at 10.) In support of this assertion, Appellants cite to Title 14 CCR section 17388.4(e).

Section 17388.4 applies to Inert Debris Type A disposal facilities. However, the Stipulated N&O does not contemplate that the Site could be characterized as an IDTA. Section 17388.4 is inapplicable, and Appellants have not provided other legal authority or supporting evidence indicating the need for financial assurance.

E. Claims outside scope of appeal

Appellants argue that the Site must "have" and "follow" CEQA, the California Environmental Quality Act. (SOI at 11, Appeal 17-18.) They assert that an off-Site lot addressed in the Stipulated N&O is "home to an identified Water of the State (wetland) and habitat for endangered and threatened species." (SOI at 11.) Appellants asserts that "[t]rucks may not cross the creek." (SOI at 11.) Such arguments are improper and beyond the limited scope of this appeal.

CalRecycle may only review whether LEA action is consistent with the Act and its regulations. Appellants did not elicit testimony relating to CEQA during the three-day hearing, nor have they demonstrated how such claims are proper for the limited scope of this appeal.

F. Arguments not Raised at Hearing Pursuant to PRC section 44307 are Waived

In their appeal to CalRecycle pursuant to PRC section 45030(a) Appellants raises claims for the first time:

1. From 2011 to 2013, "[T]he LEA did not require the operator to report the total amount of inert debris deposited by March 1 for the previous year per CCR Title 14, Section 17388.3(e)." (Appeal at 4.)
2. "The LEA closed and archived the IDEFO at the site with CalRecycle but did not require the operator to follow CCR Title 14, Section 17388(f) once activities of the IDEFO had ceased for more than one year in which the LEA should have required the operator to comply with Title 27, Section 21170(a)(1-3)." (Appeal at 4.)

Generally, new claims may not be raised for the first time on appeal. (*Bardis v. Oates* (2004) 119 Cal.App.4th.) The claims presented here were not presented at the hearing below, and the parties were not given an opportunity to develop evidence in response to claims. Furthermore, the relevance of these issues is not clear.

Further, PRC section 45030(a) expressly provides that it is the 'written decision' of the Hearing officer that may be appealed. The issues presented here were never presented below, and therefore not addressed by the written decision. The issues are waived.

## VI. CONCLUSION

Appellants have not presented substantial evidence that the Stipulated N&O is inconsistent with the Act or its regulations.

## ORDER

CalRecycle hereby determines that the Stipulated Notice and Order of June 16, 2022, entered into between the Orange County Local Enforcement Agency and Milan REI X, LLC is consistent with Division 30 of the California Public Resources Code and its regulations. Therefore, it is upheld in full.

This Decision shall be effective upon service.

Dated: June 30, 2023

Douglas C. Jensen
Attorney IV
CalRecycle
Hearing Officer