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February 13, 2015

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Re: **NOTICE OF APPEAL BY ORANGE COUNTY LOCAL  
ENFORCEMENT AGENCY FOR SOLID WASTE FACILITY  
PERMITS.**

Dear Ms. Mortensen:

On behalf of the Orange County Health Care Agency, Local Enforcement Agency for Solid Waste Facility Permits in Orange County's ("LEA"), we hereby submit this appeal pursuant to Public Resources Code section 45030.

On Wednesday, February 4, 2015, the LEA received the written decision and orders of hearing officer Craig P. Alexander, Esq. ("February 4, 2015 Decision") regarding the Petition for Review by the Ocean View School District of the Decision of the Orange County Health Care Agency on the Five Year Review of the Permit of Rainbow Disposal, Inc. A true and correct copy of the written decision and accompanying exhibit is attached hereto as Exhibit A. The LEA appeals from the February 4, 2015 Decision.

Background Summary

On November 19, 2014, the Ocean View School District ("OVSD") submitted a request for review ("Petition") of the LEA's October 20, 2014 Five Year Permit Review Report regarding Rainbow Disposal, Inc. ("Rainbow.")

OVSD specifically requested: "a hearing to review the OC-LEA's failure to act as required by Public Resources Code and the California Code of Regulations when the OC-LEA issued its determination and 5 Year Permit Review Report on October 20, 2014, regarding the Five Year Permit Review for the Rainbow Facility's Solid Waste Facility Permit."

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The LEA timely set the hearing on the Petition for December 19, 2014. On the eve of the hearing after 5 p.m., counsel for OVSD supplied all parties and the hearing officer with a case citation that OVSD claimed required the hearing officer to recuse himself. At the December 19, 2014 hearing date, the matter was continued to January 12, 2015 to allow the hearing officer time to review the case cited by OVSD and make a determination.

The hearing went forward on January 12, 2015. Testimony did not conclude on that date and the matter was continued to January 30, 2015. After the hearing concluded on January 30, 2015, the hearing officer issued a decision on February 4, 2015.<sup>1</sup>

### **Statement of Issues on Appeal**

The February 4, 2015 Decision is in error because it does not identify any law or regulation that the LEA failed to proceed in accordance with in issuing the Five Year Permit Review Report. This omission is fatal to the February 4, 2015 Decision because the scope of review when a third party, not an operator, petitions for review is limited to whether the LEA failed to act as required by law. (Pub. Res. Code, § 44307). As the administrative record and evidence demonstrates, the LEA complied with the laws governing Five Year Permit Review Reports.

The February 4, 2015 Decision is fundamentally flawed because it improperly, and without reference to legal requirements, enlarges the LEA's regulatory authority by engrafting ad-hoc obligations onto the legally required scope and content of a five year permit review report. The orders contained in the February 4, 2015 Decision are improper because they require the LEA to take actions not required by the law; including revision of the Five Year Permit Review Report for Rainbow in a manner not required by law.

The LEA specifically objects to the following findings and orders contained in the February 4, 2015 Decision:

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<sup>1</sup> Rainbow participated in the hearings as a party through its counsel of record, Thomas M. Bruen.

1. “[T]he LEA abused its discretion in not conducting a complete investigation regarding Rainbow’s operations, specifically regarding the complaints of the OVSD’s witnesses of noise, vector, and dust at the Oak View Elementary School site.” (Decision at p. 29:4-7); AND “[T]he Hearing Officer finds that the LEA abused its discretion in not contacting any of the OVSD personnel or its counsel regarding the OVSD’s concerns as contained in OVSD’s counsel’s letter of June 30, 2014 during the five year review of Rainbow’s permit.” (Decision at p. 32:12-16.)

**Basis for Objection:** These findings are not based on the LEA’s failure to proceed in any manner required by law. The February 4, 2015 Decision did not identify any circumstance where the LEA failed to act as required by law. Moreover, the OVSD was improperly allowed to elicit testimony regarding issues outside the scope of their Petition and the LEA was denied the opportunity to respond to those expanded issues on rebuttal.

Testimony elicited by OVSD from LEA employees focused on the LEA’s response to a letter submitted by Ocean View School District’s attorney on June 30, 2014, the last day of the five year review period. The June 30, 2014 letter (which was a document reviewed by the LEA in preparing the Five Year Permit Review Report and thus was part of the administrative record) primarily contains legal argument about the appropriate outcome of the LEA’s Five Year Permit Review Report for Rainbow. Specifically, the June 30, 2014 letter focused on the argument that the LEA should require enclosure of Rainbow’s facilities and demanded that Rainbow conduct a new environmental review.

During the hearing, the LEA requested that Richard Sanchez, Assistant Director of the OC Health Care Agency (“HCA”), which is the LEA, be allowed to testify to offer rebuttal testimony regarding the LEA’s response to the June 30, 2014 letter. Mr. Sanchez would have testified that he and others met with the Superintendent of OVSD and other officials after the June 30, 2014 letter was received. He further would have testified that at the meeting he requested that OVSD provide additional details regarding health concerns and conditions on-site at the Oak View School, but that OVSD failed to provide such information. The LEA was improperly denied the ability to offer this rebuttal witness.

Finally, contrary to the findings of the February 4, 2015 Decision, the June 30, 2014 letter on its face does not contain complaints from OVSD personnel that the LEA could have investigated. The June 30, 2014 is clearly intended to contain persuasive legal argument, not to request an investigation. The letter did not contain any complaints that the LEA could substantiate through investigation (no dates of specific complaints, no names of complainant witnesses, etc.). Thus, the hearing officer erred

in finding that the LEA abused its discretion by not contacting OVSD personnel regarding the June 30, 2014 letter and further erred by not allowing the LEA to present rebuttal testimony regarding the LEA's response to the June 30, 2014 letter.

2. "The testimony [during the administrative hearing] of the Oak View Elementary personnel is not proof that those conditions actually exist at the school site or that they arise from the operations of the Rainbow facility. However the testimony gives rise to a duty to investigate to determine if these conditions do exist at the school and if it is caused by the operation of the adjoining waste transfer station, and if caused by the transfer station, whether the LEA's decision to re-issue Rainbow's permit would have been impacted." (Decision at p. 36:16-23.)  
"The LEA shall re-open its review/investigation of the Five Year Permit Review of the operation of the Rainbow site . . . for the limited purpose of investigating and determining if the conditions described by the Oak View personnel who testified at the Hearing on this matter can be substantiated or not, and if substantiated, and [sic] whether such facts have any bearing on the LEA's decision to re-issue the permit, revise the permit, etc. as required by law." (Decision at p. 37:4-11.)

**Basis for Objection:** These findings are not based on the LEA's failure to proceed in any manner required by law. The February 4, 2015 Decision did not identify any circumstance where the LEA failed to act as required by law. There is no legal requirement that the LEA investigate claims made for the first time during a hearing in January 2015 for a five year permit review report covering the period June 2009 to June 2014. Even if the testimony taken during the January 2015 hearing could be construed as complaints by teachers and OVSD personnel, the complaints did not identify any specific date on which dust, noise, or birds were present at the Oak View School that the LEA could now substantiate. In fact, the LEA cannot now substantiate specific past occurrences at the Oak View School since those events have passed. The LEA during its inspections in July, August, September, October, November, and December 2014 did not observe the conditions described in the June 30, 2014 letter.

Further, because the testimony occurred outside the five year period at issue in the current Five Year Permit Review Report for Rainbow (June 2009-June 2014), there is no legal basis to require the LEA to revise the five year permit review report with information from this investigation. This order was made despite the hearing officer's apparent recognition that the five year review period ran from June 2009 to June 2014. (Decision at p. 30:18-19.)

3. "The LEA shall issue a final report ("Report") based on this further investigation. The Report of the LEA will reflect its findings from any inspections/investigations regarding the Oak View Elementary School site and will also incorporate its review of the reports, documents and information the LEA requested that Rainbow submit to it by January 15, 2015 . . . as listed at page 0010 of the Administrative Record in the last paragraph under 'Conclusions Re: Permit Status (Revisions/Suspension/Revocation).' The new Report shall be due on or before Monday, June 2, 2015." (Decision at p. 39:10-20.)

**Basis for Objection:** This finding and order contained in the February 4, 2015 Decision constitutes error because it was made without reference to any law that requires the LEA to act in this manner. No law requires the LEA to either produce a new report or amend the October 20, 2014 Five Year Permit Review Report (it is unclear from the February 4, 2015 Decision what is actually required) to include the very documents and information that the LEA required Rainbow submit as a result of its review, which at this point have not been finalized. There simply is no basis in the law for such an order. In fact, the order is contrary to the laws governing the contents of five year review reports and the time periods covered by such reports. Finally, this order appears to allow the hearing officer to retain jurisdiction over the matter, but there is no basis in law for such retention of jurisdiction.

Finally, the February 4, 2015 Decision is internally inconsistent. Despite the finding that none of the witnesses from OVSD "ever contacted the LEA," (Decision at p. 36:6-7), that the "LEA correctly determined that the operational controls of Rainbow regarding Dust Control (27 CCR section 17407.04), Noise Control (27 CCR section 17408.3), Vector, Bird and Animal Control (27 CCR section 17410.4) and Nuisance Control (27 CCR 17408.5) are in place [at Rainbow]" (Decision at p. 31:19-23), and that the "LEA conducted its random monthly inspections in a timely basis," (Decision at p. 31:23-24), the LEA is now ordered to "investigate" the testimony given during the hearing to determine whether the conditions relating to noise, dust and birds exist at the school and whether those conditions are caused by Rainbow. (Decision at p. 36:12-23.) The LEA is then ordered to issue a "Final Report." These orders are not based on any law that the LEA failed to act in accordance with.

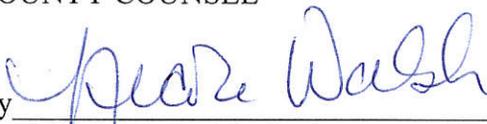
The February 4, 2015 Decision and the orders attendant thereto improperly expand the scope of five year permit review reports and order the LEA to take actions that are not required by law. The February 4, 2015 Decision contains findings and orders that exceed the proper scope of review. The LEA respectfully requests that the February 4, 2015 Decision be set aside in its entirety.

Caroll Mortsensen  
February 13, 2015  
Page 6

The LEA requests an opportunity to submit further legal briefing prior to any hearing. In addition, the LEA is preparing the complete record of proceedings, including the transcripts from the hearings, and can submit a CD/DVD or paper format complete record (consisting thousands of pages) when requested by CalRecycle. Please contact me, Nicole M. Walsh, at (714) 834-6257, with questions or concerns.

Very truly yours,

NICHOLAS S. CHRISOS  
COUNTY COUNSEL

By   
\_\_\_\_\_  
Nicole M. Walsh, Senior Deputy

NMW:da

cc via USPS Mail:

Edmond M. Connor, Esq., Counsel for OVSD

Thomas M. Bruen, Esq., Counsel for Rainbow Disposal, Inc.

Craig P. Alexander, Esq, Hearing Officer

Michael Haubert, Deputy County Counsel, for Hearing Officer

1 **LAW OFFICES OF CRAIG P. ALEXANDER**

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7 Hearing Officer

8 Administrative Hearing

9 In the Matter of:

10 Permit No. 30-AB-0099

11 PETITION FOR REVIEW BY THE OCEAN  
12 VIEW SCHOOL DISTRICT BY THE  
13 DECISION OF THE ORANGE COUNTY  
14 HEALTH CARE AGENCY ON THE FIVE-  
15 YEAR REVIEW OF THE PERMIT OF  
16 RAINBOW DISPOSAL

17 **Decision of Hearing Officer**

18 Hearing Dates: December 19,  
19 2014, January 12, 2015 and  
20 January 30, 2015

21 **FACTUAL AND PROCEDURAL BACKGROUND**

22 On or about May 20, 2014 Rainbow Disposal, Inc. ("Rainbow")  
23 issued to the Orange County Health Agency (also entitled Local  
24 Enforcing Agency or "LEA") its Application for Solid Waste  
25 Facility Permit Discharge Requirements for the Five Year Review as  
required under Public Resources Code section 44015 and 27 CCR  
section 21640. This Application is regarding the facility Rainbow  
operates located at 17121 Nicholas Lane, Huntington Beach, CA  
92647-1026. Ocean View School District ("OVSD") operates Oak View  
Elementary School across the street from the Rainbow facility.

At the time Rainbow submitted this Application, there was on  
file with the Orange County Superior Court an action against  
Rainbow by the OVSD for causes of action for, among other things,

1 nuisance (*Ocean View School District v. Rainbow*  
2 *Transfer/Recycling, Inc., et al* Case No. 30-2013-00692278). The  
3 LEA is not a party to that lawsuit and it is still pending before  
4 the Orange County Superior Court. The law firm of Connor, Fletcher  
5 & Hedenkamp, LLP represents the OVSD in the lawsuit. During the  
6 course of the LEA's Permit Review of the Rainbow Application,  
7 OVSD's counsel Connor, Fletcher & Hedenkamp, LLP communicated to  
8 the LEA via a letter dated June 30 2014 and various electronic e-  
9 mails regarding the OVSD's concerns over the operations of the  
10 Rainbow facility. OVSD alleges Rainbow's operations are having  
11 adverse effects upon Oak View Elementary School, its employees,  
12 students and the surrounding residents in the general vicinity of  
13 Oak View Elementary.<sup>1</sup>

14 OVSD's counsel delivered to the LEA a letter dated June 30,  
15 2014 (AR 2770 - 2779) with enclosures including, but not limited  
16 to, a petition signed by several hundred persons alleging problems  
17 arising from Rainbow's operations at its facility mostly in the  
18 form of odor, bird droppings, dust and noise allegedly creating an  
19 unsafe and unsanitary condition at the school site. The main  
20 thrust of the OVSD's request included, but was not limited to,  
21 requesting the LEA to order Rainbow to fully enclose all of its  
22 operations, prepare and submit a new environmental impact report  
23 and prepare and submit a new CEQA report. An additional letter  
24 was submitted on or about August 27, 2014 that included

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25 <sup>1</sup> The Hearing Officer has only received evidence from OVSD's counsel that it  
represents the OVSD. While OVSD's counsel has mentioned the interests of the  
District's employees, students and residents nearby the Rainbow facility, there  
is no evidence before the Hearing Officer that OVSD's counsel represents any  
other person or entity except OVSD and, by extension, its employees as  
witnesses, in this matter.

1 photographs from an August 5, 2014 inspection of the facility by  
2 OVSD's counsel in connection with the pending Superior Court  
3 nuisance lawsuit and other documents in support of its claims  
4 against Rainbow. (AR 2885 - 3062).

5 While the LEA considered all of the information submitted to  
6 it from the OVSD, the LEA and the OVSD were in dispute regarding  
7 the scope of the LEA regarding its review of the Rainbow facility  
8 in a Five Year Permit Review.

9 On or about October 20, 2014 the LEA issued its "5 Year  
10 Permit Review Report" (Administrative Record ("AR") pages 0008 -  
11 0010). Among other things "...The LEA has determined that the  
12 existing SWFP adequately governs the continued operations at the  
13 facility..." Essentially the LEA found that Rainbow Disposal was  
14 not in violation of its existing Permit to operate.

15 On or about November 19, 2014 Petitioner Ocean View School  
16 District delivered to the LEA its petition for an administrative  
17 hearing of the LEA's October 20, 2014 5 Year Review Report  
18 pursuant to Public Resources Code sections 44307 and 44310. The  
19 OVSD's petition of November 19, 2014 included a "Statement of  
20 Issues" which is a term contained in PRC section 44310 but which  
21 is not defined by that statute or any other statutes or Code of  
22 Regulations the Hearing Officer has located. The OVSD's Statement  
23 of Issues did not contain a list of witnesses that it would or may  
24 call to give testimony at the hearing on this matter.

25 Orange County has in place for this type of hearing its  
Administrative Hearing Rules and the Administrative Hearing  
Procedures. Administrative Hearing Rule 4 provides that a request  
for hearing shall be initiated by written request with a Statement

1 of Issues. Administrative Hearing Rule 11 provides that a  
2 Statement of Issues "shall include:

- 3 a. All issues and contentions of parties that require a  
4 hearing;  
5 b. A summary of evidence to be presented;  
6 c. The names of any witnesses who will or may be called to  
7 testify, together with copies of any documentary evidence  
8 to be offered at the hearing.

9 OVSD's counsel's letter of November 19, 2014 to initiate the  
10 hearing process did not list all of the items required under Rule  
11 11(c).

12 After the Hearing Officer was appointed by the Orange County  
13 Clerk of the Board's office in late November 2014, the Hearing  
14 Officer noted the deficiency in the OVSD's Statement of Issues and  
15 that there was no evidence that a copy of the Orange County  
16 Administrative Hearing Rules or Procedures was delivered to OVSD,  
17 its counsel or that they were posted to the Health Care Agency's  
18 web site.

19 On December 5, 2014 the Hearing Officer and counsel for the  
20 parties conducted a pre-hearing conference pursuant to California  
21 Government Code section 11445.40(b) which provides:

22 (b) In an informal hearing the presiding officer shall  
23 regulate the course of the proceeding. The presiding  
24 officer shall permit the parties and may permit others  
25 to offer written or oral comments on the issues. The  
presiding officer may limit the use of witnesses,  
testimony, evidence, and argument, and may limit or  
eliminate the use of pleadings, intervention,  
discovery, prehearing conferences, and rebuttal.

During that telephone conference the Hearing Officer noted  
that while the County had promulgated the Administrative Rules,

1 including Rule 11, and Administrative Procedures for this  
2 proceeding, there was no evidence that it had made those Rules  
3 publically available. Further there appeared to be no evidence  
4 that the LEA had provided a copy of those Rules to the OVSD even  
5 at the time it had submitted its Petition on November 19, 2014.  
6 Therefore, without knowledge of the Rules, the District would have  
7 been foreclosed from presenting any witnesses upon an enforcement  
8 of Rule 11 since this information was required to be a part of the  
9 District's Statement of Issues at the time of the November 19<sup>th</sup>  
10 Petition.

11 For these reasons, the Hearing Officer granted relief to OVSD  
12 to supplement its Statement of Issues with its list of Witnesses  
13 no later than December 10, 2014.

14 The Hearing Officer also noted that there was a conflict  
15 between PRC section 44310 (b)'s requirement that the Hearing  
16 "shall" begin no later than 30 days after the original Petition  
17 and the County's Administrative Hearing Rule 8 allowing the  
18 Hearing Officer to delay the Hearing for "good cause." The  
19 Hearing Officer noted that if all parties stipulated to a  
20 continuance, it could be granted. While the OVSD requested that  
21 there be continence of the hearing date beyond the 30 days as  
22 stated in PRC section 44310, the LEA did not agree to stipulate to  
23 same. The Hearing Officer found that the requirements of the  
24 State law (PRC section 44310(b)) to hold the hearing within thirty  
25 (30) days of the petition supersede Rule 8 of the Orange County  
Administrative Hearing Rules.

The hearing was set by the LEA for December 19, 2014, the  
thirtieth day following the OVSD's delivery of its Petition to the

1 LEA. The Hearing Officer and the Party's counsel also discussed  
2 the role of Rainbow Disposal and its counsel in the Hearing  
3 process. OVSD objected to Rainbow and its counsel's involvement  
4 in the Hearing process (other than in a very limited manner) both  
5 at the time of the telephone conference and in writing later. At  
6 no time before or during the telephone conference did the OVSD or  
7 any other party state any objections to having the telephone  
conference for any reason.

8 On or about December 10, 2014 the Hearing Officer received  
9 OVSD's witness list that included approximately 25 potential  
10 witnesses, some of whom were expert witnesses and many of whom  
11 were lay witnesses from the Oak View Elementary School and the  
12 surrounding neighborhood. The expert witnesses appeared to be  
13 being offered regarding matters that were in the scope of the  
14 OVSD's pending Nuisance lawsuit in the Superior Court and outside  
15 the jurisdiction of this petition for review. Many of the lay  
16 witnesses appeared to be offering repetitive and overlapping  
17 testimony. Therefore the Hearing Officer requested the Parties  
18 hold a telephone conference for the parties to discuss with the  
19 Hearing Officer the expected areas of testimony of the witnesses  
for both the OVSD and the LEA (whose witness list was received  
shortly after receipt of the Hearing Officers' e-mail to counsel  
on this subject).

20 The telephone conference was held on Monday, December 15,  
21 2014. OVSD's counsel, the LEA's counsel and Rainbow's counsel were  
22 in attendance. During this telephone conference the parties  
23 discussed the expected testimony of both the OVSD's and the LEA's  
24 witnesses. Based upon the representations of the Parties counsel,

1 the Hearing Officer ruled that certain areas of testimony are  
2 outside the scope of the matter before the Hearing Officer in the  
3 District's Petition pursuant to PRC sections 43020 and 43021.  
4 Pursuant to this ruling and Government Code section 11445.4 the  
5 Hearing Officer ordered two of OVSD's expert witnesses excluded  
6 from offering testimony at the Hearing. The parties agreed to a  
7 stipulation as to the third expert witness and to the foundation  
8 of the video offered by the OVSD. That stipulation is within the  
9 records for this hearing process. Upon the representation of the  
10 OVSD's counsel that the lay witnesses might have some overlap in  
11 testimony but not be repetitive, no lay witnesses were ordered  
12 excluded. OVSD also challenged the method of the County's  
13 selecting the Hearing Officer and requested the Hearing Officer  
14 recuse himself from this matter. The Hearing Officer declined to  
15 recuse himself. At no time during the telephone conference did  
16 any party object to the holding of the pre-hearing telephone  
17 conference.

18 On Tuesday, December 16, 2014 the Parties and the Hearing  
19 Officer attended a site inspection of the Rainbow facility which  
20 was made at the request of OVSD's counsel.

21 On Thursday, December 18, 2014 at approximately 5:05 p.m.  
22 OVSD's counsel issued via electronic mail a request for the  
23 Hearing Officer to recuse himself or for the Clerk of the Board of  
24 Orange County to remove the Hearing Officer pursuant to *Haas v.*  
25 *County of San Bernardino* (2002) 27 Cal. 4<sup>th</sup> 1017. OVSD stated that  
it would agree to a continuance of the hearing so that a new  
Hearing Officer could be selected and a new hearing date set.

1           At the start of the hearing of Friday, December 19, 2014 the  
2 Hearing Officer noted that the electronic communication including  
3 the reference to the *Haas* case had been received the night before  
4 after hours. Further that the Clerk of the Board's office had not  
5 had sufficient notice to review this demand by the OVSD. However  
6 the Hearing Officer noted differences and similarities between the  
7 *Haas* case and the situation presented in this matter and needed  
8 more time to consider the facts and the law as stated in the *Haas*  
9 case. In addition, the Hearing Officer wished to allow the other  
10 parties to the hearing process have a chance to respond. The  
11 Hearing Officer ordered that the Hearing be continued to Monday,  
12 January 12, 2015 and gave the LEA and Rainbow's counsel until  
13 Tuesday, December 30, 2014 to submit any response to OVSD's  
14 challenge on this matter.

15           OVSD's Counsel orally made an additional motion to have the  
16 Hearing Officer recuse himself alleging actual bias by the Hearing  
17 Officer against the OVSD's Counsel. The Hearing Officer denied  
18 that motion noting no bias only disappointment with the timing of  
19 the OVSD's motion in relation to the December 19, 2014 hearing  
20 date. The OVSD's counsel moved that the hearing move forward that  
21 day with the presentation of witnesses and documentary evidence.  
22 The Hearing Officer asked if the OVSD was withdrawing its recusal  
23 motion / request. Counsel for the District declined to withdraw  
24 its motion. The Hearing Officer denied the request to call  
25 witnesses noting that to move forward would require an entire day  
of testimony at a significant cost to all parties and if the  
Hearing Officer and/or the Clerk of the Board were to agree with  
the motion of the OVSD under the *Haas* case, the entire proceedings

1 would have to be repeated. In addition, it was the OVSD that  
2 communicated its acceptance of a continuance should it be  
3 necessary due to its motion.

4 Ultimately the Hearing Officer, upon review of the *Haas* case  
5 and the facts of this matter, denied OVSD's motion to recuse. The  
6 Hearing Officer was never advised by the Clerk of the Board's  
7 office that it was removing him from this matter. The Hearing  
8 Officer's decision in this regard is contained in his letter to  
the Parties of January 8, 2015 as is attached hereto as Exhibit A.

9 **OVSD'S OBJECTIONS SUBMITTED AT THE HEARING OF JANUARY 12, 2015**

10 At the beginning of the Hearing of Monday, January 12, 2015,  
11 the OVSD through its counsel Mr. Douglas Hedenkamp submitted  
12 written objections and orally renewed its request that the Hearing  
13 Officer recuse himself from this matter. In sum the OVSD's motion  
14 was (1) an allegation that the pre-hearing telephone conference of  
15 December 15, 2014 was not held in accordance with the Brown Act  
and (2) that the December 19, 2014 hearing should have gone  
forward pursuant to Public Resources Code section 44310(b).

16 The Hearing Officer advised all present that he would not  
17 rule on the five page objections raised for the first time at the  
18 beginning of the hearing, the hearing would continue forward and  
19 the ruling on said objections would be made at a later date. The  
20 Hearing Officer's rulings on those objections and motion to recuse  
are made in this Decision.

21 **HEARINGS OF JANUARY 12, 2015 AND JANUARY 30, 2015**

22 The hearing on the OVSD's Petition was held on Monday,  
23 January 12, 2015 and Friday, January 30, 2015. Counsel presented  
24 their opening statements, the direct and cross examination of ten

1 (10) witnesses, seven (7) who were employees of the District and  
2 three (3) who were employees of the LEA. Rainbow elected not to  
3 present testimony from any witnesses. Members of the public were  
4 invited to address the Hearing Officer on this matter on both days  
5 of the hearing. One member of the public, a teacher at Oak View  
6 Elementary School did address the Hearing Officer on January 12,  
7 2015. The LEA provided an administrative record consisting of  
8 over three thousand (3000) pages. OVSD also submitted documentary  
9 evidence including photographs, a video and various letters,  
10 electronic mailings and reports. At the beginning of the hearing  
11 of January 30, 2015 the Hearing Officer announced that the  
12 objections / motion of OVSD submitted on January 12, 2015 were  
13 denied and the reasoning would be incorporated into this decision.  
14 No additional objections were made at that time.

15 **I. RULING ON OVSD'S JANUARY 12, 2015 OBJECTIONS / MOTION TO RECUSE**

16 As noted in the Background of this matter, the first time  
17 OVSD brought up the objections based upon the Brown Act and Public  
18 Resources Code section 44310(b) was at the beginning of the  
19 hearing of January 12, 2015. The objections of the OVSD were  
20 solely regarding the telephone conference of the Parties and the  
21 Hearing Officer of December 15, 2014 and the hearing of Friday,  
22 December 19, 2014 not being fully conducted on that date. OVSD  
23 also made vague allegations of bias by the Hearing Officer in  
24 favor of the LEA. OVSD did not make any objections regarding the  
25 Brown Act during the telephone conference of December 5, 2014 (at  
which the OVSD received relief from the requirements of the  
County's Administrative Rules) or the site inspection it requested  
which took place on December 16, 2014.

1           The Hearing Officer overrules the objections and denies the  
2 motion to recuse on several grounds including the non-  
3 applicability of the Brown Act to pre-hearing telephone  
4 conferences conducted pursuant to California Government Code  
5 section 11445.40, waiver, invited error and lack of evidence.

6           A. NON-APPLICABILITY OF THE BROWN ACT AND WAIVER REGARDING THE DECEMBER  
7           15, 2014 TELECONFERENCE CALL

8           OVSD objects to the second teleconference held on December  
9 15, 2014, arguing that the hearing officer failed to schedule the  
10 gathering as a "public hearing" (citing to the Brown Act's  
11 requirement for 72 hours advance notice of open meetings [Gov't  
12 Code 54956]). Moreover, OVSD cites to PRC 44305 as requiring the  
13 Brown Act's application "to these administrative proceedings."  
14 Ultimately, OVSD argues that the failure to notice and hold the  
15 teleconference in a public setting undermines the Hearing  
16 Officer's decision to limit the use of certain OVSD witnesses.

17                           The Brown Act's Purpose

18           The purpose of the Brown Act is "to facilitate public  
19 participation in local government decisions and to curb misuse of  
20 the democratic process by secret legislation by public bodies."  
21 See *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 555.  
22 To achieve this, the Brown Act requires legislative bodies to hold  
23 "open meetings" under certain circumstances. Gov't Code Section  
24

1 54953 (a); *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th  
2 1109, 1116.

3 Brown Act's Application to These Proceedings

4 To support its argument that the second teleconference was  
5 subject to the Brown Act, OVSD cites to several provisions of the  
6 hearing procedures and related Government Code sections pertaining  
7 to open meetings under the Brown Act. Specifically, OVSD cites to  
8 Rule 14 of the Hearing Rules provided by the HCA-LEA. That  
9 section reads in its entirety:

10 In making its decision, the Hearing Officer must  
11 consider only evidence and testimony received during the  
12 proceeding. Statements of the parties or their attorneys  
13 not made under oath are not evidence, unless otherwise  
14 permitted by the Hearing Officer. Exhibits not entered  
15 into evidence are also not evidence. A Hearing Officer  
16 may not conduct personal experiments or engage in a  
17 personal fact-finding mission. Similarly, a Hearing  
18 Officer may not engage in off-the-record, private  
19 communications with parties, witnesses or other members  
20 regarding the matter under consideration. Such  
21 communication may result in a decision based on  
22 information not on the record of proceeding. (Emphasis  
23 added.)

24 Next, OVSD cites to the Administrative Hearing Procedures at  
25 Article V, Sections 4 and 5, which read respectively: "All  
portions of the meetings and of the hearing process will comply  
with all applicable provisions of the law regarding meetings of  
public agencies."... "An agenda for each meeting or hearing shall be  
posted as required by law."



1  
2 Section 54953 of the Brown Act provides that all  
3 meetings of a legislative body shall be open to the  
4 public, and all persons should be entitled to attend.  
5 Even though the Hearing Officer does not constitute a  
6 legislative body, PRC section 44305 makes it clear that  
7 the Brown Act is applicable to these administrative  
8 proceedings, referring to a 'public hearing'.  
9 The Brown Act allows closed sessions, where all members  
10 of the public are excluded from the hearing, under  
11 certain circumstances. (Footnote and headings omitted.  
12 Emphasis added.)

#### 13 Brown Act Analysis

14 The second teleconference held on December 15, 2014 was not a  
15 "meeting" or "hearing" as contemplated by the administrative  
16 rules, the PRC sections or the Government Code sections that  
17 emphasize the use of an "informal hearing" procedure. As  
18 discussed below, the Brown Act requirements for public notice did  
19 not apply to the teleconference. Instead, the second  
20 teleconference, which the OVSD fully participated in, was a  
21 prehearing activity within the hearing officer's authority and was  
22 contemplated in the law to be held outside of the public arena.  
23 There has been no showing by OVSD that the adoption of the Brown  
24 Act's public notice and public hearing requirements were intended  
25 to apply to such a pre-hearing gathering. Such requirements only  
apply to the hearing itself. Moreover, forcing such requirements  
would frustrate the purpose of applicable statutes (Government  
Code sections 11445.10 to 11445.60 and Public Resources Code  
section 44310) that require an informal hearing environment.

1 Accordingly, OVSD's objection based on the failure to publicly  
2 notice and publicly hold the second teleconference are overruled.

3 The Hearing Officer Had the Authority to Call a Prehearing  
4 Conference and to Limit Witnesses; Such Actions Do Not  
5 Violate the Brown Act

6 The Hearing Officer has authority over prehearing conferences  
7 and may limit the use of witnesses. See Government Code Section  
8 11445.40(b), stating in relevant part, "In an informal hearing the  
9 presiding officer shall regulate the course of the proceeding. The  
10 presiding officer shall permit the parties and may permit others  
11 to offer written or oral comments on the issues. The presiding  
12 officer may limit the use of witnesses, testimony, evidence, and  
13 argument, and may limit or eliminate the use of pleadings,  
14 intervention, discovery, prehearing conferences, and rebuttal."

15 (Emphasis added.)

16 The Government Code contemplates prehearing conferences.  
17 Such conferences are not deemed a necessity, but are discretionary  
18 as 11445.40 suggest that they may be limited or eliminated.  
19 Moreover, the Hearing Officer has authority over the scheduling of  
20 such matters. A discussion and decision to "limit the use of  
21 witnesses, testimony, evidence," etc. is expressly provided for by  
22 11445.40(b). Further, the second teleconference was not an "off-  
23 the-record, private communication[] with parties, witnesses or  
24 other members regarding the matter under consideration." Instead,  
25 it was a pre-hearing conference as contemplated under the

1     aforementioned GC 11445.40(b). All parties were represented and  
2     fully participated in the conference. Therefore, scheduling the  
3     teleconference and the purpose behind it to discuss such matters  
4     were valid actions by the Hearing Officer, none of which were  
5     required to take place in a public setting.

6             OVSD Provided No Legal Support for its Argument that the  
7             Teleconference Required Public Notice

8             OVSD has failed to show that the second teleconference was an  
9     activity requiring public notice. OVSD has not provided any case  
10    law or statutory interpretation that would analogize the second  
11    teleconference to a situation where the Brown Act notice  
12    requirements would need to be satisfied. Nor has OVSD shown that  
13    the County of Orange has demonstrated any intent to apply the  
14    Brown Act to such prehearing discussions.

15            On the contrary, the code sections and administrative hearing  
16    rules contemplate Brown Act notification rules to apply to the  
17    hearing where witnesses and evidence are actually presented, not  
18    matters of procedure that fall within prehearing discussions. For  
19    example, PRC Section 44305 refers to a "public hearing before a  
20    hearing panel or a hearing officer." PRC 44310(b) states, "The  
21    hearing shall be held no later than 30 days after receiving the  
22    request for a hearing on the merits of the issues presented, in  
23    accordance with the procedures specified in Article 10 (commencing  
24    with Section 11445.10) of Chapter 4.5 of Part 1 of Division 3 of  
25    Title 2 of the Government Code."



1 procedures set forth below." As discussed below, the rules can be  
2 so harmonized, but only if one recognizes and upholds the  
3 difference between a "prehearing" and a "hearing" or "meeting."  
4 (It should be noted that the Brown Act's application to this  
5 proceeding was adopted by the County even though the cited PRC and  
6 Government Code sections make no express reference to the Brown  
7 Act or its role in such proceedings. Nevertheless, the County has  
8 concluded that the PRC requires applicability of the Brown Act and  
9 it will be presumed that the Act does in fact apply. However, a  
10 discussion on a "conflict" between these rules, if any, is not  
11 warranted at this time because they can be harmonized as stated  
12 below.)

13 As stated above, the December 15, 2014 conference was a  
14 "prehearing" event. OVSD would seek to harmonize the Brown Act  
15 notice requirements with Government Code Sections that allow for  
16 prehearings by applying the notice requirements to both  
17 prehearings and hearings. If the Brown Act applied to both  
18 hearings and prehearings, there would be no need for the use of  
19 the term "prehearing" in 11445.40(b). However, state law draws a  
20 distinction between "prehearing conferences" and "hearings" and  
21 "meetings." Therefore, these terms must be read as intending  
22 different purposes.

23 A "prehearing" appears to be intended to cover procedural  
24 matters discussed by the parties prior to the "hearing" or

1 "meeting" whereas the hearing or meeting appears to refer to the  
2 actual presentation of evidence, argument, and public  
3 participation. (See PRC section 44305 calling for "a public  
4 hearing before a hearing panel or a hearing officer appointed  
5 pursuant to Section 44308 or 44309, in accordance with the  
6 procedures set forth in Section 44310"; Gov't Code Section  
7 11445.10(b)(3): "The informal hearing procedure provides a forum  
8 that may accommodate a hearing where by regulation or statute a  
9 member of the public may participate without appearing or  
10 intervening as a party." Emphases added.) The statutes can be  
11 harmonized by concluding that the Brown Act's requirements apply  
12 to hearings and meetings, but not to prehearings such as the  
13 December 15, 2014 teleconference.

14 To find that each and every procedural nook and cranny  
15 requires public notice and public participation—as OVSD would have  
16 it—would also undermine the statutory intent to hold informal  
17 proceedings, especially if the 30 day requirement is to be  
18 enforced with timeliness. To harmonize the Brown Act with the  
19 relevant state laws at play here, one must apply the public notice  
20 and public hearing rules to the hearing, not to the prehearing  
21 conference on December 15, 2014. (See also the 1995 Law Revision  
22 Commission Comments to Gov't Code Section 11445.40, "Section  
23 11445.40 is drawn from 1981 Model State APA § 4-402. The section  
24 indicates that the informal hearing is a simplified version of a

1 formal hearing. The informal hearing need not have a prehearing  
2 conference, discovery, or testimony of anyone other than the  
3 parties. However, it is intended to permit agencies to allow  
4 public participation where appropriate. Section 11445.10 (purpose  
5 of informal hearing procedure). [25 Cal.L.Rev.Comm. Reports 55  
6 (1995)]." Emphasis added.)

7 Accordingly, OVSD's objection is denied because the December  
8 15, 2014 teleconference did not require compliance with the Brown  
9 Act's notice and public hearing requirements.

10 OVSD WAIVED ANY OBJECTIONS TO BROWN ACT COMPLIANCE  
11 AS TO THE SECOND TELECONFERENCE

12 OVSD's objection to the second teleconference came on January  
13 12, 2015, the second scheduled hearing date for this matter. OVSD  
14 fully participated in the December 15, 2014 teleconference and  
15 made no objection prior to, during, or immediately after that  
16 teleconference. Nor did OVSD object to the December 15, 2014  
17 teleconference at the December 19, 2014 hearing date, despite  
18 lodging other objections. Therefore, the objection is waived  
19 because it was raised in an untimely fashion. (See, e.g. *Rayii v.*  
20 *Gatica* (2013) 218 Cal.App.4<sup>th</sup> 1402.)

21 B. OVSD'S OBJECTIONS UNDER PUBLIC RESOURCES CODE SECTION 44310 (B)

22 REGARDING THE DECEMBER 19, 2014 HEARING ARE DENIED DUE TO IT'S

23 WAVIER AND UNDER THE DOCTRINE OF INVITED ERROR

24 OVSD objects to the alleged failure of the Hearing to proceed  
25 forward at the scheduled date of Friday, December 19, 2014 under

1 PRC section 44310(b) which provides: "The hearing shall be held no  
2 later than 30 days after receiving the request for a hearing on  
3 the merits of the issues presented, in accordance with the  
4 procedures specified in Article 10 (commencing with Section  
5 11445.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the  
6 Government Code."

7 At the hearing of December 19, 2014, OVSD did not make any  
8 objections under PRC 44310(b) to the continuance of the December  
9 19, 2014 hearing due to the OVSD's own motion of December 18, 2014  
10 (which was accompanied by the District's agreement to a  
11 continuance of the December 19, 2014 hearing).

12 As such the OVSD has waived any objections to the continuance  
13 of the December 19<sup>th</sup> hearing for untimeliness. See, e.g. *Rayii*,  
14 *supra*.

15 An additional and separate basis for the denial of the OVSD's  
16 motion is under the Doctrine of Invited Error. While this  
17 doctrine is normally applied to matters on appeal, the Hearing  
18 Officer finds the logic of this doctrine also applies to this  
19 matter. Under the Doctrine of Invited Error, when a party, by its  
20 own conduct, induces the commission of error, it may not claim on  
21 appeal that the judgment should be reversed because of that error.  
22 *Mary M. v. City of Los Angeles* (1991) 54 Cal. 3d 202, 212,  
23 *Transport Ins. Co. v. TIG Inc. Co.* (2012) 202 Cal. App. 4<sup>th</sup> 984,  
24 1000, *McCarty v. State Dept. of Transportation* (2008) 164 Cal.  
25 App. 4<sup>th</sup> 995.

26 Here, it was the conduct of the OVSD by waiting until the  
27 evening prior to the December 19, 2014 hearing to make objections  
28 regarding the selection process of the Hearing Officer by the

1 County of Orange (specifically the Clerk of the Board's office)  
2 with a citation to the *Haas* case. It is the OVSD that stated in  
3 its counsel's electronic communication that its request for  
4 recusal also carried with it the agreement to a stipulation for a  
5 continuance so that a new Hearing Officer could be appointed and a  
6 new hearing date scheduled.

7 At the hearing of December 19, 2014, counsel for the OVSD  
8 stated that he expected the Hearing Officer to outright deny the  
9 motion for recusal and proceed with the hearing. Apparently  
10 counsel for OVSD did not anticipate that the Hearing Officer would  
11 feel compelled to continue the hearing of December 19<sup>th</sup> in order to  
12 give due consideration to the serious charges leveled against the  
13 Hearing Officer selection process employed by the County. This is  
14 compounded by the OVSD's own request, contained within its  
15 December 18, 2014 electronic communication, that the Clerk of the  
16 Board remove the Hearing Officer. As the Hearing Officer pointed  
17 out during the December 19, 2014 hearing, when an electronic  
18 communication sent to the Clerk of the Board's office at 5:05 p.m.  
19 for the hearing set to take place the next day at 9:00 a.m., it is  
20 patently unreasonable to expect a considered response by 9:00 a.m.  
21 the next morning when a thorough review of the *Haas* case and the  
22 facts and circumstances surrounding the selection process at issue  
23 in the *Haas* case and as set in place by the County of Orange is  
24 required.

25 The Hearing Officer does not find any error in continuing the  
hearing of December 19, 2014 due to the circumstances placed  
before him and the other Parties by the actions and recusal motion  
of the OVSD the evening before the hearing. However, even if

1 there were an error in the continuance of the December 19<sup>th</sup> hearing  
2 and even if the OVSD had properly preserved its objection on PRC  
3 section 44310 (b), OVSD waived and is estopped from making this  
4 objection under the Doctrine of Invited Error.

5 C. OVSD PRESENTED NO EVIDENCE THAT THE HEARING OFFICER IS  
6 BIAS IN FAVOR OF THE LEA

7 The OVSD also makes an unsubstantiated claim of actual bias  
8 by the Hearing Officer in favor of the LEA but points to no  
9 evidence other than the vague allegation that in some situations  
10 the Hearing Officer has ruled in favor of the LEA. The primary  
11 example by the OVSD of this alleged prejudice for the LEA is the  
12 issue of the continuance of the December 19, 2014 hearing. The  
13 OVSD points to no prejudice it suffered by the continuance other  
14 than its own inconvenience - a continuance it sought earlier and  
15 it created by the timing of its objections of December 18<sup>th</sup> as  
16 noted above. The Hearing Officer denies any such subjective  
17 prejudice in favor of any Party or against any Party or counsel  
18 for a Party in this matter and, therefore, denies the motion to  
19 recuse.

20 **II. RULING ON OVSD'S PETITION FOR REVIEW PURSUANT TO PUBLIC RESOURCES CODE**  
21 **SECTION 44307**

22 **A. Applicable Statutes and Regulations:**

23 Public Recourses Code section 44307 provides:

24 From the date of issuance of a permit that  
25 imposes conditions that are inappropriate, as

1 contended by the applicant, or after the taking of any  
2 enforcement action pursuant to Part 5 (commencing with  
3 Section 45000) by the enforcement agency, the  
4 enforcement agency shall hold a hearing, if requested  
5 to do so, by the person subject to the action. The  
6 enforcement agency shall also hold a hearing upon a  
7 petition to the enforcement agency from any person  
8 requesting the enforcement agency to review an alleged  
9 failure of the agency to act as required by this part,  
10 Part 5 (commencing with Section 45000), or Part 6  
11 (commencing with Section 45030) or a regulation  
12 adopted by the department pursuant to this part, Part  
13 5 (commencing with Section 45000), or Part 6  
14 (commencing with Section 45030). A hearing shall be  
15 held in accordance with the procedures specified in  
16 Section 44310. [Emphasis added]

9 Public Resources Code section 44310 provides:

10 All hearings conducted pursuant to this chapter shall  
11 be based on the following procedures:

12 (a)(1) The hearing shall be initiated by the filing of  
13 a written request for a hearing with a statement of  
14 the issues.

15 (A) If the hearing request is made by the person  
16 subject to the action, the request shall be made  
17 within 15 days from the date that person is notified,  
18 in writing, of the enforcement agency's intent to act  
19 in the manner specified.

20 (B) If the hearing request is made by a person  
21 alleging that the enforcement agency failed to act as  
22 required by law or regulation pursuant to Section  
23 44307, the person shall file a request for a hearing  
24 within 30 days from the date the person discovered or  
25 reasonably should have discovered, the facts on which  
the allegation is based.

(2) The enforcement agency shall, within 15 days from  
the date of receipt of a request for a hearing,  
provide written notice to the person filing the  
request notifying the person of the date, time, and  
place of the hearing.

1  
2 (3) If that person fails to request a hearing or to  
3 timely file a statement of issues, the enforcement  
4 agency may take the proposed action without a hearing  
5 or may, at its discretion, proceed with a hearing  
6 before taking the proposed action.

7  
8 (4) The enforcement agency shall file its written  
9 response to the statement of issues filed by the  
10 person requesting the hearing with the hearing panel  
11 or the hearing officer, and provide a copy to the  
12 person requesting the hearing, not less than 15 days  
13 prior to the date of the hearing.

14  
15 (b) The hearing shall be held no later than 30 days  
16 after receiving the request for a hearing on the  
17 merits of the issues presented, in accordance with the  
18 procedures specified in Article 10 (commencing with  
19 Section 11445.10) of Chapter 4.5 of Part 1 of Division  
20 3 of Title 2 of the Government Code.

21  
22 (c) Within five days from the conclusion of the  
23 hearing, the hearing panel or hearing officer shall  
24 issue its decision. The decision shall become  
25 effective as provided in Section 45017.

Public Resources Code section 44015 provides:

Review and Revision of Permits: A solid waste  
facilities permit issued or revised under this chapter  
shall be reviewed and, if necessary, revised at least  
once every five years.

Public Resources Code section 43020 provides:

Minimum standards for solid waste handling and  
disposal  
The board shall adopt and revise regulations which set  
forth minimum standards for solid waste handling,  
transfer, composting, transformation, and disposal, in  
accordance with this division, and Section 117590 of,  
and Chapter 6.5 (commencing with Section 25100) of  
Division 20 of, the Health and Safety Code. The board  
shall not include any requirements that are already  
under the authority of the State Air Resources Board  
for the prevention of air pollution or of the state  
water board for the prevention of water pollution.

1  
2 Public Resources Code section 43021 provides:

3 Regulations shall include standards for the design,  
4 operation, maintenance, and ultimate reuse of solid  
5 waste facilities, but shall not include aspects of  
6 solid waste handling or disposal which are solely of  
7 local concern or which are within the jurisdiction of  
8 the State Air Resources Board, air pollution control  
9 districts and air quality management districts, or the  
10 state water board or regional water boards.

11 California Code of Regulations section 21640 provides:

12 CalRecycle - Review of Permits.

13 (a) Except as provided in §21680, all full SWFPs shall  
14 be reviewed and, if necessary, revised, from the date  
15 of last issuance at least once every five years.

16 (b) No less than 150 days before the permit is due for  
17 review, the operator shall submit an application for  
18 permit review. The application shall be made in the  
19 manner specified in §§21570 and 21590 and shall  
20 contain the following:

21 (1) Identify the proposed changes in design and  
22 operation; and

23 (2) Updated amendments to the Report of Facility  
24 Information (RFI);

25 (3) For disposal sites only, the updated amendments  
shall include an estimate of the remaining site life  
and capacity;

(4) For disposal sites only, an amended closure plan  
as specified in §§21780, 21865, and 21890.

(5) For disposal sites, a copy of the most recently  
submitted detailed written estimate or latest approved  
estimate, whichever identifies the greatest cost, to  
cover the cost of known or reasonably foreseeable  
corrective action activities, pursuant to §22101.

#### B. SCOPE OF REVIEW OF THE LEA'S FIVE YEAR PERMIT REVIEW

21 The LEA (and Rainbow) argues that the scope of review by the  
22 LEA for a Five Year Permit Review is narrow and limited to an  
23 abuse of discretion in reviewing the permit for certain changes

1 such as tonnage, hours of operation, and permitted acreage. PRC  
2 44004 (substantial changes in design/operation of solid waste  
3 facility) and 27 CCR section 21620. The LEA also argues that it  
4 was tasked with determining if operational controls for noise,  
5 dust, vector (birds and other vermin) and nuisances are in place  
6 by the Rainbow Disposal entity and that they through their  
7 inspections and review of documents at Rainbow satisfied itself  
8 that those controls are in place.

9 OVSD urges that the LEA has broad authority to determine that  
10 Rainbow is not complying with state law and their evidence that a  
11 nuisance is taking place shows Rainbow is violating the law, the  
12 state minimum standards and seeks relief in the form of an order  
13 that Rainbow must a.) fully re-design and enclose its operations,  
14 b.) prepare and submit a new EIR or modified EIR and c.) cease any  
15 operation that is causing a nuisance or is otherwise in violation  
16 of the state minimum standards. In OVSD's closing arguments at  
17 the hearing of January 30, 2015 OVSD also advocated for a "do  
18 over" order which the Hearing Officer interprets as a request for  
19 the LEA to re-start the Review process from the beginning.

20 The Court of Appeal, in *Sustainability of Parks, Recycling*  
21 *and Wildlife Legal Defense Fund v. County of Solano* (2008) 167  
22 Cal. App. 4<sup>th</sup> 1350, 1360 (in reviewing a similar petition by the  
23 third party under PRC section 44307) stated:

24 Section 44307 authorizes an applicant to challenge  
25 conditions imposed on a permit if the applicant deems

1 them to be "inappropriate." It allows any other person  
2 to challenge only an agency's failure to "act as  
3 required by law or regulation." The right accorded to  
4 non-applicants is therefore narrower than an  
5 applicant's right to a hearing to challenge  
6 "inappropriate" conditions irrespective of whether  
7 they resulted from an agency's failure to act as  
8 legally required.

9 The Court went on to state:

10 "But judicial decisions that apply to other parts of  
11 the Public Resources Code have used the phrase "as  
12 required by law," and we have no reason to ascribe a  
13 materially different meaning to that phrase in the  
14 context of section 44307. In decisions that review  
15 agency determinations under the California Environment  
16 Quality Act (§ 21000 et seq.), the courts have stated  
17 that the failure of an agency to "proceed as required  
18 by law" **means the agency has abused its discretion.**  
19 (See *Lincoln Place Tenants Assn. v. City of Los*  
20 *Angeles* (2005) 130 Cal.App.4th 1491, 1503, 31  
21 Cal.Rptr.3d 353.)" *Sustainability*, supra at page 1362.  
22 [Emphasis added].

23 Thus the scope of review by a Hearing Officer upon a petition  
24 from a third party (here OVSD) to the agency's (here the LEA)  
25 decision as recorded in its Five Year Review Report issued  
pursuant to PRC section 44307 and 27 CCR section 21640 is whether  
or not the agency acted within the law and within its discretion  
in its investigation and conclusions in the issuance of its report  
of October 20, 2014.

#### 26 C. FINDINGS

27 In short, the Hearing Officer finds that the LEA is correct  
28 in its interpretation of the scope of its role in a Five Year  
29 Permit Review and that the LEA has discretion in the methods and  
30 means of its inspections and investigations to determine whether  
31 or not an applicant such as Rainbow Disposal, Inc. has and is

1 operating with the operational controls in place and if it has or  
2 has not exceeded its allowed operations under its permit. The  
3 Hearing Officer, for reasons set forth below, also finds that the  
4 LEA abused its discretion in not conducting a complete  
5 investigation regarding Rainbow's operations, specifically  
6 regarding the complaints of the OVSD's witnesses of noise, vector  
7 and dust at the Oak View Elementary School site. This is due to  
8 the LEA's not following its own procedures for addressing  
9 complaints from the public as stated at the hearing.

9 1. TIMELINESS

10 Rainbow Disposal timely issued to the LEA its application for  
11 a Five Year Permit Review on or about May 20, 2014. (27 CCR  
12 section 21640). The LEA filed its report on the Five Year Permit  
13 Review on or about October 20, 2014 which was timely. (27 CCR  
14 section 21640).

15 OVSD timely filed its Petition for review of the LEA's Five  
16 Year Permit Review Report on November 19, 2014. The LEA timely  
17 set the initial hearing date for this matter for Friday, December  
18 19, 2014 pursuant to PRC section 44310 (b).

19 2. SCOPE OF REVIEW / JURISDICTION OVER AIR QUALITY AND WATER QUALITY  
20 MATTERS BY THE LEA

21 Pursuant to PRC sections 43020 and 43021 and 27 CCR section  
22 20005 the Hearing Officer finds that the issues of air quality and  
23 water quality are specifically reserved for other state agencies  
24 such as the State Air Resources Board and the applicable State and  
25 Regional Water Quality Control boards and not the LEA. The  
District introduced evidence of alleged violations cited by the  
State Air Resources Board on October 24, 2014 after the Five Year

1 Review Period. It is quite obvious that the State Air Resources  
2 Board ("SARB") is not only capable of enforcing its own Standards  
3 and Rules, it is actually doing so at this time regarding Rainbow.  
4 It is within that forum that the issue of whether or not Rainbow  
5 is in violation of the SARB's regulations or conditions of  
6 operation should be decided.

7 3. RULE 410 AND AN "OBLIGATION" TO FULLY ENCLOSE RAINBOW'S OPERATIONAL  
8 FACILITIES

9 Contained within the Administrative Record is the condition  
10 of operation for Rainbow that it may increase its operation from  
11 2,800 tons per day to up to 4,000 tons per day as long as it re-  
12 designs and fully encloses its operational buildings. There was  
13 no evidence that Rainbow has exceeded the allowed 2,800 tons per  
14 day for three continuous months to trigger the undisputed  
15 requirement that Rainbow redesign and fully enclose its  
16 operational facilities. The Hearing Officer noted the evidence  
17 presented by the OVSD that the South Coast Air Quality Management  
18 District has issued a Notice of Violation on October 24, 2014 that  
19 cites its Rule 410 calling for full enclosure of the Rainbow  
20 facility.

21 This Notice of Violation was issued after the Five Year  
22 Review Period of June 2009 to June 2014 for this facility. In  
23 addition, as noted above, the enforcement of this Rule 410 as now  
24 interpreted by the state agency issuing the Notice, is within the  
25 purview of the SCAQMD not the LEA. The Hearing Officer finds that  
the SCAQMD is very capable of enforcing its own Rules and  
regulations. Also, there was no evidence presented at the hearing  
that this state body has made any such final determination or that

1 the Notice of Violation occurred within the Five Year Review  
2 Period. Therefore, the Hearing Officer finds the LEA acted within  
3 its discretion and within the law by not ordering a modification  
4 to Rainbow's permit on the basis of this Notice of Violation by  
5 the SCAQMD issued after the LEA's October 20, 2014 report.

6 4. OVSD'S NUISANCE CLAIMS AND THE PENDING SUPERIOR COURT LAWSUIT AGAINST  
7 RAINBOW

8 OVSD has presented evidence that it has filed a civil lawsuit  
9 against Rainbow Disposal, et al. This action is pending in the  
10 Orange County Superior Court. OVSD is apparently claiming  
11 Rainbow's operation of its facility at this location is being  
12 operated in the manner of a public nuisance.

13 Having submitted the entire nuisance matter to the Superior  
14 Court in its pending lawsuit (which the LEA is not a party to),  
15 the Hearing Officer finds that the OVSD's request that he find and  
16 declare that the Rainbow facility is a public nuisance is beyond  
17 the proper scope of this petition. Further that the OVSD has  
18 already chosen the forum in which to fully adjudicate this matter  
19 with the full rights of discovery under the Code of Civil  
20 Procedure.

21 5. SCOPE OF FINDINGS BY THE LEA

22 The Hearing Officer finds that the LEA correctly determined  
23 that the operational controls of Rainbow regarding Dust Control  
24 (27 CCR section 17407.04), Noise Control (27 CCR section 17408.3),  
25 Vector, Bird and Animal Control (27 CCR section 17410.4 and  
Nuisance Control (27 CCR section 17408.5) are in place. Further,  
that the LEA conducted its random monthly inspections in a timely  
basis.

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6. DISCRETION OF THE LEA

The LEA enjoys discretion in the manner and frequency of its inspections. This includes the timing of its inspections and the manner in which they are conducted. The evidence from the LEA's personnel during the hearing was that all inspections were conducted randomly and without notice to Rainbow. OVSD's counsel inquired of LEA's inspection personnel at length that the inspections never took place at night. Yet no evidence was presented during the hearing that any complaints regarding evening operations were logged by Rainbow personnel or communicated directly to the LEA. No members of the public who live nearby the Rainbow facility came and addressed the Hearing Officer regarding this matter.

However, the Hearing Officer finds that the LEA abused its discretion in not contacting any of the OVSD personnel or its counsel regarding the OVSD's concerns as contained in OVSD's counsel's letter of June 30, 2014 during the five year review of Rainbow's permit. During the hearing Kathryn Cross, the head of the LEA, testified as follows:

Testimony of Kathryn Cross, Transcript p. 229:10 - p. 230:24, January 12, 2015.

Q Well, you're aware, of course, that the letters that my law firm sent that -- that said -- that listed the number of complaints; right?

A Yes.

Q Did you instruct Mr. Clarke, Strozier, or Bright or anyone else in your agency to conduct an independent third-party neutral examination of those concerns raised in my letter by going out and talking to members of the public?

1  
2 A No.

3 HEARING OFFICER ALEXANDER: I'd like to ask a  
4 question. "Members of the public" is a little bit  
5 vague. How about people -- the people who are making  
6 the complaints?

7 THE WITNESS: If someone was complaining to us, yes,  
8 we would have investigated it.

9 HEARING OFFICER ALEXANDER: Okay. So if Jane Doe had  
10 called, you would have had your people talk to Jane  
11 Doe?

12 THE WITNESS: That's correct.

13 HEARING OFFICER ALEXANDER: Okay. Thank you. Mr.  
14 Connor.

15 BY MR. CONNOR:

16 Q Did you talk to me? Am I -- I'm kind of John  
17 Doe. Did you talk to me?

18 A No.

19 Q No. Did you -- since you know that I was  
20 representing the School District, did you talk to  
21 anyone at the school district? Now get around their  
22 lawyer. Forget about me, as a lawyer. Did you go  
23 right to the source and say, "I'd like to talk to  
24 somebody at the -- at the district office or at the  
25 school such as Ms. Dale-Pash, the principal"? Did you  
do -- tell your people to do that?

A No. Only my management talked to the School  
District.

Q Who at your management talked to the School  
District?

A I don't know.

Q When did they talk to the School District?

A I don't know.

1 P. 248; 19 - 25

2 Q Did you respond to any of the letters or concerns  
3 that we raised?

4 A The LEA, myself, no.

5 Q Okay. Obviously, you, Kathryn Cross -- didn't  
6 you know anyone else at the LEA who responded to any  
7 of the concerns that we raised?

8 A I'm not aware of anyone else, if they did.

9 p. 249: 13 to p. 250:

10 HEARING OFFICER ALEXANDER: I'm -- I'm going to  
11 overrule the objection but then ask the question a  
12 different way. Sorry, Mr. Connor. Take away your  
13 thunder. When a member of the public, whether that  
14 member of the public is a lawyer or a school district  
15 or a human being, sends a complaint --

16 THE WITNESS: Uh-huh.

17 HEARING OFFICER ALEXANDER: -- what's the standard  
18 operating procedure of your office for responding to  
19 those complaints?

20 THE WITNESS: We usually respond within 24 hours.

21 HEARING OFFICER ALEXANDER: Okay. When it's a letter  
22 like the one that was received from Mr. Connor's  
23 office --

24 THE WITNESS: Uh-huh.

25 HEARING OFFICER ALEXANDER: -- is there a standard  
operating procedure regarding any kind of written  
response?

THE WITNESS: No, there's not.

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

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

1 HEARING OFFICER ALEXANDER: And what would that be?

2 THE WITNESS: Two I -- I mentioned, respond back to  
3 the public and make sure to make contact with them and  
4 tell what came of the investigation, of the complaint.

5 HEARING OFFICER ALEXANDER: Okay. Mr. Connor, your  
6 witness.

7 BY MR. CONNOR:

8 Q Okay. And with that foundation, ma'am, did you  
9 respond to my law firm within 24 hours?

10 A I did not. I referred your communication to my  
11 upper management.

12 Q Do you know if they responded to my law firm?

13 A I do not.

14 p. 266: 8 - 12

15 By Ms. Walsh:

16 Q So do you have a standard operating procedure  
17 about how you handle letters from lawyers versus  
18 letters from the principal of the school directly or  
19 any member of the public?

20 A No.

21 At the Hearing of January 12, 2015 several OVSD employees who  
22 are teachers at Oak View Elementary School plus the school's  
23 principal testified regarding alleged conditions regarding noise,  
24 dust and birds (and other vermin) at the Oak View Elementary  
25 School allegedly arising from the Rainbow facility. Most of the  
Oak View personnel reported observing children suffering from  
various medical conditions which, in their opinion, were caused by  
the dust, noise, birds, and other conditions arising from the  
Rainbow facility.

1           None of the teachers or the principal testified that they  
2 have any medical or engineering training. No documentary evidence  
3 was presented connecting any medical conditions of any child or  
4 adult at Oak View Elementary to any alleged conditions arising  
5 from Rainbow's facilities operations. All of the witnesses from  
6 Oak View Elementary testified that no one from the LEA contacted  
7 them to discuss their concerns. None of them testified that they  
8 ever contacted the LEA.

9           Both of the LEA's inspectors Mr. Clarke and Mr. Stozier  
10 testified that they never contacted anyone at the OVSD or the Oak  
11 View Elementary School or OVSD's counsel at any time. Neither of  
12 them sought access to the Oak View Elementary School site to  
13 inspect it at any time.

14           Given the testimony of Ms. Cross, that the standard operating  
15 procedure when complaints are received is to contact the  
16 complaining party within 24 hours of the complaint, the failure of  
17 the LEA to contact anyone from the OVSD's counsel's office or the  
18 OVSD itself to discuss the complaints of the OVSD was a breach of  
19 its own procedures. The testimony of the Oak View Elementary  
20 personnel is not proof that those conditions actually exist at the  
21 school site or that they arise from the operations of the Rainbow  
22 facility. However the testimony gives rise to a duty to  
23 investigate to determine if these conditions do exist at the  
24 school and if it is caused by the operation of the adjoining waste  
25 transfer station, and if caused by the transfer station, whether  
the LEA's decision to re-issue Rainbow's permit would have been  
impacted. The failure to follow their own procedures was a breach

1 of the LEA's own protocol for the investigation of complaints and  
2 gives rise to an abuse of discretion.

3 **ORDERS BY THE HEARING OFFICER**

4 1. The LEA shall re-open its review / investigation of the Five  
5 Year Permit Review of the operation of the Rainbow site by  
6 Rainbow Disposal, Inc., et al. for the limited purpose of  
7 investigating and determining if the conditions described by  
8 the Oak View Elementary personnel who testified at the  
9 Hearing on this matter can be substantiated or not, and if  
10 substantiated, and whether such facts have any bearing on the  
11 LEA's decision to re-issue the permit, revise the permit,  
12 etc. as required by law. This includes an investigation as  
13 to whether or not the conditions being described arise from  
14 the operation of the Rainbow facility or not. To assist with  
15 this investigation, the LEA has the discretion of conducting  
16 this investigation solely using the testimony of January 12,  
17 2015 of the persons from the Oak View Elementary School who  
18 have already testified under oath and/or it may also  
19 interview other Oak View Elementary School personnel if the  
20 LEA chooses to do so and the OVSD identifies additional OVSD  
21 personnel who may wish to give further information to the  
22 LEA. Any such additional interviews shall be conducted  
23 informally without the presence of any parties' or non-  
24 parties' attorney(s).

25 2. Within fourteen (14) days from the date of this order, the  
Ocean View School District shall notify the LEA of the name,  
address, telephone number and electronic address of the OVSD  
contact for the purpose of making arrangements for the LEA's

1 investigation. Said OVSD contact shall be an OVSD employee  
2 (not an outside counsel or a litigation consultant).

3 3. Within fourteen (14) days from the date of this Order, the  
4 Ocean View School District shall supply to the LEA any  
5 maintenance documents and/or any other photographic or video  
6 evidence of the Oak View Elementary School that in its  
7 opinion shows the conditions it claims exist at the school  
8 arising from the operations of Rainbow that existed during  
9 the time relevant to the Five Year Permit Review. A copy of  
said documents shall also be provided to Rainbow Disposal.

10 4. Within fourteen (14) days from the date of this Order,  
11 Rainbow Disposal shall notify the LEA of the name, address,  
12 telephone number and electronic address of the Rainbow  
contact for this further investigation.

13 5. The Ocean View School District shall make available to the  
14 LEA the Oak View Elementary School site for any type or  
15 number of inspections the LEA, in its discretion, may choose  
16 to make at the school's site.<sup>2</sup> The LEA's inspection  
17 personnel shall contact the OVSD contact person to arrange  
18 for any inspections the LEA determines is necessary.  
19 Rainbow's contact person shall be notified of any inspection  
20 of the Oak View Elementary school site. All inspections at  
the school site shall comply with the school's policies and  
21 procedures regarding visitors to its campus.

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22 <sup>2</sup> At the time of the site inspection of December 16, 2014, the Oak View  
23 Elementary School site was partially closed due to asbestos removal efforts by  
24 OVSD. There was no evidence presented and no allegations made by OVSD that the  
operations of Rainbow were in any way the cause of any asbestos contamination  
at the Oak View Elementary school site.

1 6. The OVSD and Rainbow may have personnel accompany the LEA  
2 while its inspectors are inspecting the Oak View Elementary  
3 School site but may not direct, interfere, or otherwise impede  
4 the LEA in its investigation or unreasonably interrupt school  
5 activities. Any party may photograph and/or videotape the  
6 inspections but not in a manner to obstruct the inspections  
7 or unreasonably interrupt school activities. No attorneys or  
8 their employees, consultants, experts or contractors of any  
9 party or non-party may be present or participate in these  
10 inspections.

11 7. The LEA shall issue a final report ("Report") based on this  
12 further investigation. The Report of the LEA will reflect  
13 its findings from any inspections / investigations regarding  
14 the Oak View Elementary School site and will also incorporate  
15 its review of the reports, documents and information the LEA  
16 requested that Rainbow submit to it by January 15, 2015  
17 (which was apparently received by the LEA on January 16,  
18 2015) as listed at page 0010 of the Administrative Record in  
19 the last paragraph under "Conclusions Re: Permit Status  
20 (Revision/Suspension/Revocation)." The new Report shall be  
21 due on or before **Monday, June 2, 2015**. A copy shall be  
22 transmitted via Electronic Mail or U.S. Mail to Counsel for  
23 OVSD and Rainbow.

24 8. If the OVSD does not comply with order numbers 2 and/or 5  
25 and/or 6 above, the LEA may complete and finalize its new  
Five Year Permit Review Report based upon the information it  
has at that time, taking into account whether or not it has  
been able to verify if the conditions described by the OVSD

1 presence at the hearing can be substantiated and said  
2 said conditions arise from the operations of the R...  
3 fact that...

4 Pursuant to PRD section 10.1(c), this decision is final and  
5 effective immediately.

6 Date: February 4, 2015 LAW OFFICES OF CRAIG P. ALEXANDER

7  
8 By:   
9 Craig P. Alexander  
10 Hearing Officer

EXHIBIT "A"

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**VIA ELECTRONIC MAIL ONLY**

January 8, 2015

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In Re The Motions of Petitioner Ocean View School District ("OVSD") to Recuse / Disqualify the Hearing Officer in the matter of OVSD v. Orange County Health Care Agency ("HCA") - Five Year Review of the Permit of Rainbow Disposal, Inc., et al; Permit 30-AB-0099

Dear Counsel,

**BACKGROUND:**

On or about November 19, 2014 the OVSD filed with the County of Orange a petition under Public Resources Code sections 44307 and 44310 for a hearing regarding the results of the HCA's Five Year Review of Permit 30-AB-0099 of Rainbow Disposal, Inc., et al, ("Rainbow") pursuant to 27 CCR section 21640. Pursuant to the PRC and Government Code sections 11445.10 to 11445.60, the HCA notified the Clerk of the Board (COB) of Supervisors office of the petition and requested that the COB appoint a Hearing Officer for this matter.

I currently serve as Hearing Officer for various administrative proceedings involving the County of Orange. I am not an employee of the County, but operate as an independent contractor pursuant to a contract. I have never previously served as a Hearing Officer involving petitions such as the one filed by the OVSD in this matter. On or about November

25, 2014 I was contacted by the COB's office to determine if I was available to serve as a Hearing Officer in this matter. I was advised that another potential Hearing Officer declined the assignment due to a professional conflict of interest.

I advised the COB's representative Ms. Jamie Ross that I was available to serve in this capacity and did not have any professional or personal conflicts of interest that would prevent me from serving as the Hearing Officer. However, I did advise Ms. Ross that I know, as an acquaintance, OVSD Trustee John Briscoe, that this would not affect my ability to serve as the Hearing Officer but that I would disclose this to all parties in the case. This was done via my assigned Deputy County Counsel Michael Haubert on December 2, 2014. As part of that disclosure, I requested that if any party objected to my acting as the Hearing Officer due to this issue, to please forward any such objections to my attention no later than Monday, December 8, 2014 or fifteen days prior to the hearing date, whichever is the longer period. Shortly thereafter the hearing date of Friday, December 19, 2014 was set by the HCA pursuant to the applicable PRC codes. At no time has any objection on this basis been received.

On Friday, December 5, 2014 a pre-hearing telephone conference with counsel for OVSD, HCA and Rainbow was held to discuss several items including procedural issues. Among other issues, OVSD requested to continue the matter. Based on my interpretation of the law, I concluded that the hearing "shall" take place within 30 days per Public Resources Code Section 44310 (b) and did not find it within my authority to grant a continuance unless the parties mutually stipulated. HCA objected to a continuance. As such, the hearing remained on calendar for December 19, 2014. There was no inquiry regarding the manner of selection of a Hearing Officer by the County of Orange at that time.

On December 10, 2014 I requested and set a pre-hearing telephone conference regarding, among other things, a review of witnesses the OVSD and the HCA would be presenting at the December 19, 2014 hearing. I noted in my notice to the attorneys, that it was possible that I may order a witness and/or documents to be excluded or limited pursuant to my responsibilities under Government Code section 11445.40. The telephone conference was scheduled for Monday, December 15, 2014.

On Sunday evening December 14, 2014 Mr. Connor for the OVSD sent an e-mail inquiring into the details of the selection by the County of a Hearing Officer and the contract between the County of Orange and me for this service. During the pre-hearing telephone conference, pursuant to Government Code section 11445.40 I ordered that two of the OVSD witnesses be excluded from testifying. Also during that telephone conference, sometime after I had issued the order to exclude two of OVSD's prospective witnesses and after some discussion on the Hearing Officer selection process by the Clerk of the Board's office, Mr. Connor demanded that I recuse myself as the Hearing Officer in this case. He stated that there was a California Supreme Court case that required this action. I recall advising Mr.

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I am advised that there has been in place an "ethical" wall between Mr. Haubert and Ms. Nicole Vail who represents the HCA in this matter. Since the Petition was received by the HCA, I have not been advised by anyone that this ethical wall has been breached.

Connor to forward the case or its citation to me. Apparently he does not recall my request for this case or its citation.

I also advised Mr. Connor that the County would respond to his request for a copy of my contract and details about the manner in which Hearing Officers are selected separately. During that telephone conference I declined to recuse myself as Hearing Officer in this matter. Within the next few days the COB's office responded to each of Mr. Connor's requests for information including providing him with a copy of my contract with the County for Hearing Officer services.

On Thursday, December 18, 2014 at 5:05 p.m. Mr. Connor sent Ms. Ross of the COB's office, all counsel in this matter, and me an e-mail in which he cited the case of *Hass v. County of San Bernardino* (2002) 27 Cal. 4th 1017 for the proposition that either I must recuse myself or the COB must remove me as the Hearing Officer. The OVSD also stated that it would stipulate / agree to a continuance of the hearing while a new Hearing Officer was appointed. During the evening of Thursday, December 18, 2014 I read the *Hass* case. However, the Clerk of the Board's office was closed at that time and presumably had no time to review and respond to the OVSD's motion to remove me as the Hearing Officer in this case by the opening of the hearing the next morning.

Based upon my review of the case, I ordered that the hearing be postponed until Monday, January 12, 2015 in order to review the *Huas* case more thoroughly as well as to allow the COB an opportunity to review that case law, the fact surrounding the issue of the appointment of a Hearing Officer and to allow the HCA and Rainbow to submit their positions, if any, on this matter no later than Tuesday, December 30, 2014. I also ordered that until this issue is resolved, no communications regarding the substantive issues of the underlying petition for review were to occur.

At the hearing Mr. Connor also moved to have me recuse myself on the basis of his belief that I did not respect him due to his perception of a facial expression in response to his question regarding witnesses just prior to the December 19, 2014 hearing starting. I denied that motion and the allegation that I was prejudiced against Mr. Connor. I stand by that denial.

On Saturday, December 20, 2014 Mr. Connor issued an e-mail to myself and all counsel in which he stated that I did not ask him, during the December 15<sup>th</sup> telephone conference, for a copy of the at that time unnamed *Haas* case or its citation. Mr. Connor again moved for my recusal.

After the timely receipt of the letter briefs from the HCA and Rainbow on December 30, 2014, Mr. Connor submitted another e-mail setting forth the allegation that due to comments by Ms. Walsh and I at the December 19<sup>th</sup> hearing, that were allegedly printed in two newspaper articles, his reputation had been called into question. He demanded me to

recuse myself and submit some type of public apology and/or retraction. No copies of the newspaper articles were submitted with this e-mail.<sup>2</sup>

PERTINENT FACTS IN THE HAAS CASE:

In the *Haas* case, the Hearing Officer was selected and appointed by the San Bernardino County Counsel's office; in fact, the very member of the County Counsel's office who appointed the Hearing Officer also represented the County agency revoking the license of the petitioner at the hearing. The Hearing Officer may have been selected and appointed by that same member of the County Counsel's office for other cases in the future but there was no guarantee of such appointment. The petitioner / licensee objected to the appointment and selection of the Hearing Officer at each and every step in the process. There were only two Hearing Officers available to conduct the hearing and one of them had a calendar conflict. The County Counsel's office paid the Hearing Officer directly for her services as a Hearing Officer in each case assigned and appointed.

PERTINENT FACTS IN THIS MATTER:

In this matter, the Hearing Officers available for the County of Orange are selected and appointed by the Clerk of the Board's office, not the County Counsel's office or the HCA. The Clerk of the Board's office receives and processes for payment the Hearing Officer's invoice for services. The OVSD waited until approximately five days prior to the hearing on December 19, 2011 to raise concerns and objections to the manner and method of the selection of a Hearing Officer and notably not until adverse rulings were made by the Hearing Officer.

Prior to this matter, I have never had any hearings for the County of Orange that involved the HCA. It is my understanding that this is the second or third hearing regarding a permit review by the HCA of a licensee. I was not selected as the Hearing Officer for any prior similar hearings and I do not know any of the parties or facts of those prior matters. In the contract I have with the County of Orange for Hearing Officer services, it requires me to act in a fair and impartial manner (Section VI under General Duties). It also requires me to perform my duties as a Hearing Officer as an Independent Contractor (Section IX) and to avoid any Conflicts of Interest (Section IV). The Contract does provide under Section II on Availability that "The COUNTY is under no obligation to submit cases to CONTRACTOR, but may do so at its pleasure and in its sole discretion." My own experience regarding the appointment and selection as a Hearing Officer for other matters (Barking Dog Hearings and Assessment Appeal Hearings) have all been under the County of Orange, Clerk of the Board's office, not the County's Animal Control Department or the County Assessor's office.

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For reasons set forth below, Mr. Connor's motion for recusal and an apology and/or retraction is denied. Counsel are instructed that the Hearing Officer finds that these newspaper articles are not relevant to the matters before this hearing and to please not submit copies of them unless counsel for one of the parties wishes to place them in the Administrative record of this Petition solely for the purpose of a possible appeal.

DISCUSSION:

The relevant portions of the *Haas* case to this matter are as follows:

The rule declared in these civil and criminal cases also applies to administrative proceedings. In this context, the high court has written: "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.... It has also come to be the prevailing view that '[m]ost of the law concerning disqualification because of interest applies with equal force to ... administrative adjudicators.'" (*Gibson v. Berryhill, supra*, 411 U.S. 564, 579 [93 S.Ct. 1689, 1698].) Certainly due process allows more flexibility in administrative process than judicial process, even in the matter of selecting hearing officers. But the rule disqualifying adjudicators with pecuniary interests applies with full force. The high court has taken pains to make this clear, even while holding that due process permits, for example, the combination of investigative and adjudicative functions in administrative proceedings. (*Withrow v. Larkin, supra*, 421 U.S. 35.) An assertion of bias based on that combination of functions, the *Withrow* court explained, needs to "overcome a presumption of honesty and integrity in those serving as adjudicators." (*Id.* at p. 47 [95 S.Ct. at p. 1464].) In contrast, the adjudicator's financial interest in the outcome presents a "situation[] ... in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." (*Ibid.*) On this point, the court has applied the same rules to administrative hearing officers and judges alike. (See, e.g., *id.* at pp. 46-47 [95 S.Ct. at pp. 1463-1465]; *Gibson v. Berryhill, supra*, 411 U.S. at p. 579 [93 S.Ct. at p. 1698].)

*Haas v. Cnty. of San Bernardino*, 27 Cal. 4th 1017, 1026-27, 45 P 3d 280 (2002)

The compensation system at issue in the case before us is functionally similar to the system condemned in *Brown, supra*, 637 F.2d 272, and the other fee system cases (*Doss v. Long, supra*, 629 F.Supp. 127; *State ex rel. McLeod v. Crowe, supra*, 249 S.E.2d 772; *State ex rel. Shrewsbury v. Poteet, supra*, 202 S.E.2d 628). *Here, as there, the prosecuting authority may select its adjudicator at will*, the only formal restriction here being that the person selected must have been licensed to practice law for at least five years. (Gov. Code, § 27724.) *Here, as there, while the adjudicator's pay is not formally dependent on the outcome of the litigation, his or her future income as an adjudicator is entirely dependent on the goodwill of a prosecuting agency that is free to select its adjudicators and that must, therefore, be presumed to favor its own rational self-interest by preferring those who tend to issue favorable rulings.* Finally, adjudicators selected and paid in this manner, for the same reason here as there, have a "possible temptation, not to hold the balance nice, clear and true." (*Tumey, supra*, 273 U.S. 510, 532

[47 S.Ct. 437, 444]; see *Ward, supra*, 409 U.S. 57-60, and *Brown, supra*, 637 F.2d at p. 280.)

Haas v. Cnty. of San Bernardino, 27 Cal. 4th 1017, 1029-30, 45 P.3d 280 (2002) (footnote omitted). [Emphasis added]

Certainly due process does not forbid the government to pay an adjudicator when it must provide someone with a hearing before taking away a protected liberty or property interest. Indeed, the government must ordinarily pay the adjudicator in such cases to avoid burdening the affected person's right to a hearing. (*California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 337-357 [84 Cal.Rptr.2d 425, 975 P.2d 622].) Furthermore, no generally applicable principle of constitutional law permits the affected person in such a case to select the adjudicator. Haas does not argue to the contrary. Neither payment nor selection, considered in isolation, is the problem.

Haas v. Cnty. of San Bernardino, 27 Cal. 4th 1017, 1031, 45 P.3d 280 (2002)

But we adopt no such standard by giving full effect to the cases mandating disqualification for financial interest. The appearance of bias that has constitutional significance is not a party's *subjective, unilateral* perception; it is the *objective* appearance that arises from financial circumstances that would offer a possible temptation to the average person as adjudicator. A procedure holding out to the adjudicator, even implicitly, the possibility of future employment in exchange for favorable decisions creates such a temptation and, thus, an objective, constitutionally impermissible appearance and risk of bias. (*Brown, supra*, 637 F.2d 272, 284.)

Haas v. Cnty. of San Bernardino, 27 Cal. 4th 1017, 1034, 45 P.3d 280 (2002) Joining the County on this point, amici curiae assert that many local governments and school boards appoint temporary hearing officers under similar ad hoc procedures and will incur additional costs and inefficiencies if their own procedures are disapproved as a result of today's decision. *We do not consider the constitutional validity of any rule or practice not presently before us.* Moreover, speculation about the possible outcome of hypothetical cases cannot justify tolerating a practice that we have considered and found to create a constitutionally unacceptable risk of bias.

Haas v. Cnty. of San Bernardino, 27 Cal. 4th 1017, 1036, 45 P.3d 280 (2002) (footnote omitted). [Emphasis added]

In any event, the problem we address here is limited in scope, and constitutional methods for selecting administrative hearing officers are readily available.

Haas v. Cnty. of San Bernardino, 27 Cal. 4th 1017, 1036, 45 P.3d 280 (2002)

The problem we address in this case arises only when counties forgo these options and, instead, hire temporary hearing officers under Government Code section 27724. Because that section imposes only the requirement that a person selected as hearing officer have been licensed to practice law for at least five years, *counties by default have much freedom to experiment and to adopt selection procedures adapted to their individual needs.* To satisfy due process, all a county need do is exercise whatever authority the statute confers in a manner that *does not create the risk that hearing officers will be rewarded with future remunerative employment for decisions favorable to the county.* (1d) The requirements of due process are flexible, especially where administrative procedure is concerned, but they are strict in condemning the risk of bias that arises when an *adjudicator's future income from judging depends on the goodwill of frequent litigants who pay the adjudicator's fee.*

Haas v. Cnty. of San Bernardino, 27 Cal. 4th 1017, 1037, 45 P.3d 280 (2002)  
(Footnote omitted). [Emphasis added]

The critical difference between this matter and the *Haas* case is that my selection as the Hearing Officer was by the COB's office without any impute from any other department of the County. There is no evidence whatsoever that any other department in the County will have any decision making authority over whether or not I will receive any future assignments as a Hearing Officer for the County of Orange. In all of the time I have acted as a Hearing Officer for the County of Orange I have never been advised that any future assignments were dependent upon my making findings in favor of the County or any department of the County.

In addition, it is the COB's office that intakes any invoice I send to the County for my services and the COB's office processes the invoice for payment. I have never been advised by anyone at the County of Orange that any other department of the County have any influence or decision making over the payment of my Hearing Officer invoices. By contrast, in the *Haas* case the same County Counsel who represented the County against the petitioner / licensee also directly hired the Hearing Officer for the hearing. It also appears the County Counsel's office controlled if the Hearing Officer received future Hearing Officer assignments and also approved for payment the Hearing Officer's invoice for services in the case before her.

The *Haas* Court found these factors created a constitutionally unacceptable risk of bias (the Court noted that actual bias need not be shown), but it did so under the facts of that case ("In any event, the problem we address here is limited in scope, and constitutional methods for selecting administrative hearing officers are readily available." *Haas* at page 1036). The Court did not declare that a County cannot appoint Hearing Officers pursuant to Government Code

section 27724, only that the method the County uses under this section must eliminate the potential of the risk of bias.

The terms and conditions of my contract with the County also support that I (and presumably all other Hearing Officers) are not subject to the risk of bias the Court found in the *Haas* case. This includes that I am to perform my duties to act in a fair and impartial manner, without conflicts of interest and as an independent contractor. The sentence from Section II quoted by counsel for OVSD does not reveal an inherent risk of bias. This is because the Department that retains, and selects for each hearing needed, Hearing Officers for the County for matters such as this (as infrequently as these HCA matters apparently come up) is neither the Department whose actions are in question (the HCA) or the County Counsel's office that represents the HCA in the hearing.

I find that the system and process instituted by the County for the retention and selection of Hearing Officers to be free from the inherent risk of bias at issue in the *Haas* case. For the reasons outlined above, I find this matter to be distinguishable from *Haas* and deny OVSD's request to recuse myself pursuant to its reliance on the *Haas* case.

#### CHARGES ACTUAL BIAS:

The OVSD's counsel made a charge during the hearing of December 19, 2014 that I am bias against its counsel Mr. Connor from my interaction with him just prior to the hearing. As stated at the hearing, I reject and deny any such charge of bias. I was disappointed with counsel for the OVSD waiting until five days prior to the hearing to bring up the issues of the selection of Hearing Officers and wait to deliver to all parties and I the citation to the *Haas* case the evening prior to the December 19<sup>th</sup> hearing so that this could have been considered and hopefully resolved prior to the December 19<sup>th</sup> hearing. That does not, and did not, mean that I am biased against counsel for OVSD. Only that I am disappointed with not being able to move forward with the hearing of December 19, 2014.

On Saturday, December 20, 2014, Mr. Connor claimed, on behalf of OVSD, that my statement (at the December 19, 2014 hearing the day before) that I asked him to send me the *Haas* case citation on Monday, December 15, 2014 telephone conference was not true. Mr. Connor essentially repeated this in his e-mail of December 30, 2014. He cited no legal authority for the proposition that this requires a recusal of the Hearing Officer. While I do recall during that telephone conversation of December 15, 2014 that I asked Mr. Connor to provide all present with a copy of the California Supreme Court case he was referring to (but not naming the title of the case then), this issue is irrelevant to the matter before me as the Hearing Officer regarding the HCA's Five Year Review of Rainbow's license.

I also find that the tone and wording of Mr. Connor's e-mails of December 20, 2014 and December 30, 2014, if either of both of them had been made in Court before and about a Superior Court judge, would likely be found to be in contempt of the Court. I remind Mr. Connor of his duty of civility towards all parties to this matter. (*People v. Chong* (1999) 76 Cal. App. 4th 232, 243 "Accordingly, an attorney 'however zealous in his client's behalf, has, as an officer of the court, a paramount obligation to the due and orderly administration of

justice..." [citation.] An attorney must not willfully disobey a court's order and *must maintain a respectful attitude toward the court.* [Citations.] " [Emphasis added!]

Also, in Mr. Connor's Tuesday, December 30, 2014 e-mail, he demanded, among other things that I recuse myself due to some alleged reports about this matter in two newspapers. Again, Mr. Connor presented no citation to authorities that require recusal of a Hearing Officer in this situation. The matters before the Hearing Officer are the actions or omissions that are alleged regarding the findings of the HCA on the five year review of the Rainbow permit. They are not regarding the actions of the attorney retained by the OVSD or the reports about the hearing process in the newspapers, whatever they may be. Once again, I deny the allegation of bias and the alleged newspaper articles are not relevant to the issues before the me HCA's Five Year Review on Rainbow's license.

Accordingly, I deny Mr. Connor's charge of actual bias and decline to recuse myself based on that premise.

The Hearing of January 12, 2015 shall go forward as planned at 9:00 a.m. as set forth in my e-mail to counsel of January 6, 2015 and my prior orders regarding evidence in this case.

Very Truly Yours,



Craig D. Alexander

cc: Michael Haubert, Esq. (via electronic mail only)  
Susan Novak (via electronic mail only)  
Jamie Ross (via electronic mail only)

**DECLARATION OF SERVICE**  
**BY UNITED STATES MAIL AND**  
**PERSONAL SERVICE**

FFR 1 7 2015

I do hereby declare that I am a citizen of the United States employed in the County of Orange, over 18 years old and that my business address is 10 Civic Center Plaza, 4<sup>th</sup> Floor, Santa Ana, California 92701. I am not a party to the within action.

On February 17, 2015, I served the foregoing **NOTICE OF APPEAL BY ORANGE COUNTY LOCAL ENFORCEMENT AGENCY FOR SOLID WASTE FACILITY PERMITS** on all other parties to this action by placing a true copy of said document in a sealed envelope in the following manner:

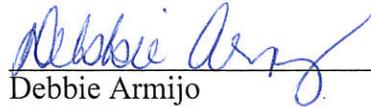
(BY U.S. MAIL) I placed such envelope(s) addressed as shown below for collection and mailing at Santa Ana, California, following our ordinary business practices. I am readily familiar with this office's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

(BY OVERNIGHT DELIVERY) I placed such envelope(s) addressed as shown below for collection and delivery with delivery fees paid or provided for in accordance with this office's practice. I am readily familiar with this office's practice for processing correspondence for delivery the following day by overnight delivery.

(BY PERSONAL SERVICE) I caused such envelope(s) to be hand-delivered to the addressee(s) shown below.

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

(FEDERAL) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

  
Debbie Armijo

**NAME AND ADDRESS TO WHOM SERVICE WAS MADE**

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Hand-delivered (for Hearing Officer)