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BEFORE THE DEPARTMENT OF
RESOURCES RECYCLING AND RECOVERY¹

In the Matter of:)	APPEAL OF THE CITY OF SAN JOSE
)	LOCAL ENFORCEMENT AGENCY
City of Milpitas,)	DECISION TO DENY A HEARING ON
)	NEWBY ISLAND LANDFILL,
Petitioner)	RECYCLERY AND COMPOSTING,
)	SOLID WASTE FACILITY PERMITS AND
City of San Jose Department of Planning,)	OPERATIONS, ISSUED MARCH 11, 2015
Building and Code Enforcement, Local)	
Enforcement Agency,)	DECISION
)	
Respondent)	
)	Public Resources Code Sections 44307,
)	45030 et seq.
)	
)	

1. This matter came before me based upon an appeal filed pursuant to Public Resources Code (PRC) section 45030. Petitioner, the City of Milpitas (Milpitas), was represented by Kelly T. Smith, attorney at law. The City of San Jose Department of Planning, Building and Code Enforcement, Local Enforcement Agency (LEA), was represented by Margo Laskowska, attorney at law. Real Parties in Interest, International Disposal Corporation of California and Browning-Ferris Industries of California, Inc. (Real Parties in Interest) have joined in this appeal and are represented by Thomas M. Bruen, attorney at law.
2. Milpitas appealed a decision by the LEA to not grant and schedule an administrative hearing before the local hearing officer because the LEA found that Milpitas' claim was time-barred; failed to state a discretionary act or failure to act; and the LEA does not have

¹ Petitioner's pleading headings referred to CalRecycle as "The California Department of Recycling Reuse and Recovery." That this heading reflects CalRecycle's actual name: The Department of Resources Recycling and Recovery.

1 jurisdiction to regulate or offer relief on the claims stated. I accepted the appeal solely for
2 the purpose of deciding whether the LEA should have granted and scheduled an
3 administrative hearing before the local hearing officer. I also decided, pursuant to PRC
4 section 45031(c), that I would review this matter based upon written arguments submitted
5 by the parties. The arguments were submitted by April 20, 2015, and rebuttal arguments
6 were submitted by May 4, 2015.
7

- 8 3. Having considered the arguments of legal counsel and the documents submitted by the
9 parties, and for good cause appearing, I have made the following determinations:

10 **LEA Determination**

- 11 4. On March 2, 2015, Milpitas filed a Petition for Administrative Hearing with the LEA
12 alleging that the LEA had failed to act as required by law with regard to solid waste
13 facility permits for the Newby Island Sanitary Landfill (the Landfill), the Newby Island
14 Recyclery Facility (the Recyclery), and the Newby Island Composting Facility (the
15 Composting Facility) (collectively, the Newby Island Facilities).
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17 5. Milpitas alleged that the permits for all three facilities constituted a failure by the LEA
18 and CalRecycle to “require the appropriate design, operation and feedstock revisions to
19 control the severe public odor nuisance caused by the Newby Island Facilities.” (Petition
20 for Administrative Hearing (Petition) at ¶ 2.) According to Milpitas’ Petition, the LEA
21 failed to require revisions to all three facilities’ permits to address odors as well as
22 requiring monitoring, reporting, and abatement to address odors. (*Id.* at ¶ 3.) Finally,
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1 Milpitas alleged that the LEA acted arbitrarily and abused its discretion by failing to
2 revoke the solid waste facility permits for all three facilities.² (*Id.* at ¶ 4.)

- 3 6. The LEA denied Milpitas' request for a hearing because it found that the request was
4 untimely and did not allege a failure to act as required by applicable law or regulation by
5 the LEA within the statutory time period. The LEA also denied Milpitas' Petition because
6 the LEA alleged that it does not have jurisdiction over the odor nuisance allegations set
7 forth in the Petition.
8

9 **Relevant Statutes**

- 10 7. PRC section 44307, under which this matter was filed provides, in part, that:

11 ...The enforcement agency shall also hold a hearing upon a petition to the
12 enforcement agency from any person requesting the enforcement agency to
13 review an alleged failure of the agency to act as required by this part, Part 5
14 (commencing with Section 45000), or Part 6 (commencing with Section 45030) or
15 a regulation adopted by the department pursuant to this part, Part 5 (commencing
16 with Section 45000), or Part 6 (commencing with Section 45030). A hearing shall
17 be held in accordance with the procedures specified in Section 44310.

- 18 8. PRC section 44310 provides, in part, that:

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

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

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

² The Petition alleges that there was a failure to disclose information related to health and safety issues related to the three Newby Facilities, which, according to Milpitas, should have resulted in the LEA revoking all three permits. However, the faulty pronoun reference in that sentence makes it unclear if the failure to disclose was perpetrated by the LEA or the facilities: "The LEA acted arbitrarily and abused its discretion when it failed to apply Public Resources Code §44306(a) to revoke the solid waste facility permits for the Newby Island Facilities after *it* failed to disclose information relevant to the significant health and safety impacts cause by those operations..." (Petition at 2:4-12.) (emphasis added on the faulty pronoun reference). I do not, however, believe that this grammatical error alters my decision in this matter.

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

4 **Milpitas' Argument**

- 5 9. In its appeal, Milpitas argues that the LEA should have granted and scheduled an
6 administrative hearing before the local hearing officer because the referral of petitions to
7 the local hearing officer is a ministerial rather than a discretionary decision.
8
9 10. Milpitas also argues that the alleged failure of the LEA to investigate, enforce, and
10 disclose with regard to alleged violations at the Newby Island facilities constitutes an
11 ongoing violation. Milpitas argues that the 30-day time limit in PRC section
12 44010(a)(1)(B) should not run specifically from the December 9, 2014 permit revision
13 submittal to CalRecycle because the alleged violations at all three facilities extend
14 beyond the scope of the Landfill's permit revision.
15
16 11. Finally, Milpitas reiterates its argument from its Petition that the LEA cannot dismiss
17 Milpitas' allegations about odor nuisance just because the regional air quality
18 management district is the agency responsible for enforcing air quality minimum
19 standards, including odor. Milpitas argues that the LEA's ongoing to failure to adequately
20 inspect and enforce at and write permits for the Newby Island Facilities is causing the
21 ongoing odor issues.
22

23 **LEA's Argument**

- 24 12. In its reply to Milpitas' appeal, the LEA argues that Milpitas' Petition is not timely to
25 protest the issuance of the revised permit for the Landfill because the last discretionary
26 act of the LEA was its transmittal of the proposed permit revision to CalRecycle for
27 CalRecycle's concurrence on December 8, 2014. According to the LEA, the 30-day time

1 limit in Public Resources Code section 44310(a)(1)(B) should run from that date, which
2 time-bars Milpitas' Petition.

3 13. The LEA also argues that it has no regulatory jurisdiction over odors from the Landfill or
4 the Recyclery because odor regulation is solely within the Bay Area Air Quality
5 Management District's (BAAQMD) jurisdiction. Additionally, the LEA argues that any
6 non-odor allegation raised by Milpitas concerning the Landfill and Recyclery are time-
7 barred.
8

9 14. Finally, the LEA argues that Milpitas' Petition fails to state any acts or omission relating
10 to the compost facility within the 30 days preceding the filing of the Petition.
11

12 DISCUSSION

13 15. Pursuant to Public Resources Code section 45030, any party may appeal to CalRecycle
14 any decision by a local governing body not to direct the local hearing panel or hearing
15 officer to hold a public hearing.

16 16. In this case, CalRecycle accepted Milpitas' appeal and, pursuant to Public Resources
17 Code section 45031(c), must decide the matter on the basis of the record before the
18 hearing panel and on the written arguments submitted by the parties.
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20 17. Because the LEA did not refer Milpitas' underlying Petition to the hearing officer, the
21 evidence before CalRecycle is limited to Milpitas' Petition, the LEA's letter denying
22 Milpitas' Petition (LEA Letter), and the parties' briefs to CalRecycle.

23 18. If Milpitas' Petition raised any allegations that the LEA failed to act as required by the
24 laws and regulations listed in PRC section 44307, the LEA should have granted a hearing
25 on those allegations. The Petition does not need to allege on its face sufficient facts to
26 prove its allegations; rather, the Petition must raise allegations that the LEA failed to act
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1 as required by the specific laws and regulations listed in PRC section 44307, which are
2 Part 4 (commencing with section 43000), Part 5 (commencing with section 45000), or
3 Part 6 (commencing with section 45030) of Division 30 of the Public Resources Code
4 and any regulations promulgated pursuant to those parts.
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6 19. Accordingly, I will first address the timeliness issue that was the reason the LEA rejected
7 many of Milpitas' allegations. Then, I will go through all of the allegations Milpitas
8 raised in its Petition to determine whether the LEA should have ordered a hearing on any
9 of those issues.

10 **Timeliness of Request for Hearing on the Revised Landfill Permit**

11 20. The LEA's first reason for denying Milpitas' Petition was that the request for hearing was
12 untimely with regard to the revisions to the solid waste facility permit for the Landfill.
13 The LEA correctly identifies the standard for timeliness: "...a person alleging that the
14 enforcement agency failed to act as required by law or regulation pursuant to Section
15 44307...shall file a request for hearing within 30 days from the date the person
16 discovered or reasonably should have discovered the facts upon which the allegation is
17 based. (Pub. Resources Code § 44310(a)(1)(B).)
18

19 21. According to the LEA Letter, Milpitas knew or reasonably should have known that the
20 LEA had submitted the proposed permit and supporting documentation to CalRecycle for
21 CalRecycle concurrence on December 9, 2014. According to the LEA, the December 9,
22 2014³, date is significant because it marks the LEA's "last discretionary action." (LEA
23 Opening Argument 2, line 7.)
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³ The revised permit was sent to CalRecycle for concurrence electronically on December 8, 2014, and in hard copy on December 9, 2014.

1 22. I do not doubt that Milpitas was aware of the date that the LEA submitted the proposed
2 permit to CalRecycle for concurrence because, as the LEA points out, Milpitas submitted
3 written comments on the permit application and attending the public hearing at
4 CalRecycle on December 16, 2014, where the revised permit was on the hearing agenda.
5 Nevertheless, I do not agree that December 9, 2014 (or December 8, 2014), was the date
6 that started the 30-day deadline for requesting a hearing on the revised permit.
7

8 23. The LEA argues that its actual issuance of the revised permit, which took place on
9 February 9, 2015, was a ministerial act and thus does not rise to the level of an action
10 required by law, which is the only type of action or inaction reviewable under PRC
11 section 44307. According to the LEA, once CalRecycle has concurred with the issuance
12 of a permit, the LEA must issue the permit. Following this line of reasoning, once the
13 LEA submits the proposed permit to CalRecycle, the LEA's discretionary decision-
14 making over the permit is complete. All that remains is for CalRecycle to concur and the
15 LEA to issue the permit. While the LEA's discussion of the law of ministerial and
16 discretionary acts is correct and it is true that once CalRecycle concurs the LEA must
17 issue the permit, that discussion does not support the conclusion that the 30-day time
18 limit under PRC section 44310(a)(1)(B) runs from the date the LEA submits a permit to
19 CalRecycle for concurrence. Rather, the LEA's actions are not ministerial until
20 CalRecycle's concurrence.
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23 24. When CalRecycle receives a proposed permit, CalRecycle has 60 days to concur with or
24 object to the permit's issuance. If CalRecycle objects, it must submit its objections to the
25 LEA for the LEA's consideration. The LEA would then, presumably, modify the
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1 proposed permit based on CalRecycle's objections and re-seek CalRecycle's
2 concurrence.

3 25. Until concurrence the proposed permit is not final and the LEA may modify it if directed
4 to by CalRecycle. (See Title 47 CCR section 21685(c) and (e).) In addition, as a practical
5 matter, if we required a party wishing to petition for a hearing on the proposed permit to
6 file its petition for hearing to the LEA within 30 days of the LEA's transmittal of the
7 proposed permit to CalRecycle, the LEA would not be able to schedule a hearing to
8 review the permit because any protest of the permit would not yet be ripe. Because
9 CalRecycle has 60 days to concur or object with the terms of the proposed permit,
10 according to the LEA's argument, a party objecting under section 44307 would have to
11 file its petition for hearing with the LEA before it even knows if CalRecycle is going to
12 concur with or object to the terms of the permit. If CalRecycle were to object and send
13 the permit back to the LEA, the grounds for the objecting party's petition may have
14 changed or become moot. Any hearing on the permit's terms would be a waste of the
15 hearing panel's or officer's time because, in the case of an objection by CalRecycle, the
16 LEA would be altering the permit's terms and re-submitting it to CalRecycle. To require
17 persons to continually re-file their petitions for hearing with an LEA every time an LEA
18 submits a proposed permit to CalRecycle for concurrence just in case CalRecycle does
19 concur and the permit is issued as submitted to CalRecycle, would be a waste of time and
20 resources for both the LEA and a person trying to request a hearing on the permit's terms.

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24 26. Nevertheless, the LEA is correct that once CalRecycle concurs in a permit, the LEA's
25 subsequent issuance of the permit is ministerial. (See PRC § 44014(a).) However, until
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1 CalRecycle concurs, the permit terms can be revised; therefore, the permit is not ripe for
2 challenge until CalRecycle concurs.

3 27. Accordingly, in order for a challenge to a permit issuance to be ripe, the 30-day time
4 period begins when the CalRecycle concurs with the issuance of a permit. In this case,
5 that date was February 5, 2015, making Milpitas' March 2, 2015 Petition timely with
6 regard to allegations concerning the Landfill's revised permit.
7

8 **Issues Raised by Milpitas' Petition**

9 28. Beginning with paragraph 46 of its Petition, Milpitas raises multiple allegations against
10 the LEA. In its Letter, the LEA summarily dismissed these issues; however, I note that
11 under PRC section 44307, the Petition merely needs to raise allegations that the LEA
12 failed to act as required by the laws listed in that section. The Petition does not need to
13 present a full evidentiary argument in support of each allegation raised. If the Petition
14 raises allegations that do not fail on their face, the LEA must order a hearing to decide if
15 those allegations have merit. With that in mind, I will examine each of the issues raised in
16 Milpitas's Petition.
17

18 I. "The LEA failed to reject or condition the Newby Island Sanitary Landfill permit to
19 require operations which address the facilities' [sic] persistent, significant odors and
20 related nuisance conditions off site. The LEA's failure to act on this impact includes the
21 failure to review and condition the 2015 landfill permit proposed to CalRecycle for
22 design and operational controls over putrescible solid waste, including but not limited to
23 the storage and transfer of putrescibles between the landfill and the Recyclery and the
24 Composting Facility. The applicant failed at multiple opportunities to provide such
information and the LEA failed to require it. The LEA thereby failed to perform its duty
to place "primary consideration" on the public's health and safety as required by PRC §
44012(a)." (Milpitas' Petition at ¶ 46a.)

25 29. In its Letter, the LEA rejects this allegation in part because it does not state an allegation
26 that the LEA failed to act as required by applicable law. The LEA is correct in this
27 determination because, as was addressed by CalRecycle during the process of concurring

1 with the Landfill permit revision, the LEA does not have jurisdiction over odors at
2 landfills. That responsibility falls squarely within the jurisdiction of the Air Resources
3 Board and, in this case, BAAQMD. I hereby take judicial notice of the January 30, 2015
4 CalRecycle Staff Report on the Revised Solid Waste Facility Permit for the landfill,
5 which stated in part:
6

7 The Department is prohibited under California law from regulating or enforcing
8 odor standards at landfills. Assembly Bill 1220, known as the "Solid Waste
9 Disposal Regulatory Reform Act of 1993," (Public Resources Code (PRC)
10 Sections 43100 et seq.) was designed to eliminate regulatory overlap, conflict, and
11 duplication between state agencies and state and local agencies. The Act specified
12 that: "A clear and concise division of authority shall be maintained in both statute
13 and regulation to remove all areas of overlap, duplication, and conflict between
14 the board and the state water board and regional water boards, or between the
15 board and any other state agency..." (PRC 43101(c)(1)).

16 The Act further revised the Integrated Waste Management Board's (now the
17 Department's) regulatory authority to expressly remove its authority to
18 promulgate standards that were within the jurisdiction of the Air Board and Air
19 Districts. Specifically, PRC 43020 states that the Department "shall not include
20 [in its regulations] any requirements that are already under the authority of the
21 State Air Resources Board for the prevention of air pollution or of the state water
22 board for the prevention of water pollution." Moreover, PRC 43021 states that the
23 Department's regulations "shall not include aspects of solid waste handling or
24 disposal which are solely of local concern or which are within the jurisdiction of
25 the State Air Resources Board, air pollution control districts and air quality
26 management districts..."

27 Odor is defined under in those sections of the Health and Safety Code (HSC)
under Air Board jurisdiction as a type of air contaminant (HSC 39013). [footnote
omitted] HSC 41700 [footnote omitted] states that prevention of the discharge of
air contaminants is within the jurisdiction and authority of the Air Boards and Air
Districts and therefore, the Department is prohibited from promulgating
regulations and standards regarding the control of odors at solid waste facilities
(with the exception of agricultural operations and compost facilities for which the
Department has been given express authority in HSC 41705 [footnote omitted]
and PRC 43209.1 [footnote omitted]).

Some comments have cited to a section in 27 CCR regarding ADC that uses the
word "odor" and conclude that the Department therefore has associated regulatory
authority to address this issue. However, this section must be read in context with
other applicable laws. The Administrative Procedure Act provides that a state

1 agency may not adopt a regulation that alters, amends or enlarges the scope of the
2 power conferred upon it. Therefore, any CalRecycle regulation must be read in
concert with the statutes that provide its regulatory authority.

3 Based upon the statutes cited above, CalRecycle has no authority to adopt
4 standards to control odors from landfills because that is within the jurisdiction of
5 the Air Board and Districts. One of the purposes of cover (including ADC) is to
6 prevent odors and so that term was included in the Department's regulations to
7 ensure an accurate description of what cover is designed to accomplish, but in
8 doing so, the Department was not establishing a standard that it could enforce
9 because that would be enlarging the scope of the power conferred on it. The
10 Initial Statement of Reasons for this regulatory section in fact states this,
11 expressly noting that, "Odor issues at solid waste landfills are the jurisdiction of
12 the State Air Resources Board and air pollution control districts or air quality
management district." Likewise, in response to a comment during the rulemaking
for these regulations stating that Enforcement Agencies should have ADC odor
enforcement authority and an ADC odor performance standard, the Integrated
Waste Management Board (now the Department) responded that "the local air
districts have jurisdiction as per AB 1220."

13 Accordingly, the LEA properly denied a hearing on this allegation because it fails
14 to state an allegation that the LEA failed to act as required by Part 4 (commencing
15 with section 43000), Part 5 (commencing with section 45000), or Part 6
16 (commencing with section 45030) of Division 30 of the Public Resources Code
17 and any regulations promulgated pursuant to those parts.

18 II. "The LEA failed to review, suspend or revoke the Newby Island Composting Facility
19 solid waste facility permit pursuant to Public Resources Code § 44004 for design,
20 operation and feedstock failures which result in persistent, ongoing and significant
21 nuisances, including but not limited to dust, odors and runoff. The LEA thereby failed to
22 comply with PRC § 43209(h)(1)(D). These impacts require significant revision to the
23 composting operations, including environmental review under the California
24 Environmental Quality Act ("CEQA"), with analysis of the alternative of enclosing the
25 operations to protect the public health and welfare. The operator failed on multiple
occasions to provide notice of changes to feedstocks composted, of the use of
unpermitted feedstocks, of stockpiling, and of operations resulting in odors offsite. The
LEA failed to require the Composting Facility permit be properly revised every five years
as required pursuant to § 44015." (Milpitas' Petition at ¶ 46b.)

26 30. The LEA rejected this issue because it found that the issue did not raise an allegation that
27 the LEA failed to act as required by law. In its Opening Argument, the LEA also argues

1 that the Petition failed to state any acts or omissions related to the compost facility that
2 occurred in the 30-day statutory time period prior to when Milpitas filed its Petition.

3 31. As stated above, Milpitas as the petitioner does not bear the burden of fully proving its
4 allegations in its Petition. Rather, Milpitas needed to only state an allegation that the LEA
5 failed to act as required by the laws listed in PRC section 44307. Here, Milpitas is
6 alleging the LEA should have reviewed, suspended, or revoked the Compost Facility's
7 permit pursuant to PRC section 44004. The Petition alleges significant operating changes
8 at the Compost Facility causing dust, odor, and runoff nuisances. Without an
9 administrative record before me, it is impossible for me to determine the merit of these
10 allegations and whether they are time barred. These determinations can only be made
11 after conducting the fact-finding that takes place at an administrative hearing.
12

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14 32. I must, however, exclude the CEQA allegation included in this issue. The CEQA
15 allegation fails on its face to assert an allegation that the LEA failed to act as required by
16 the laws listed in PRC section 44307 because CEQA is not included in Part 4
17 (commencing with section 43000), Part 5 (commencing with section 45000), or Part 6
18 (commencing with section 45030) of Division 30 of the Public Resources Code or any
19 regulations promulgated pursuant to those parts.
20

21 33. I would also like to note that clarity is needed with regard to the allegation that the LEA
22 failed to require the Composting Facility be revised every five years as required by PRC
23 section 44015. Section 44015 does not require a solid waste facility permit be revised
24 every five years; rather, it requires that the permit "be reviewed and, if necessary, revised
25 at least once every five years." If the Petition is alleging that the Compost Facility's
26 permit should have been revised at the time of its last review, then such a claim is time-
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1 barred (the last review having been completed in July 2012.) I hereby take Judicial
2 Notice of the July 2012 Five Year Permit Review for the Composting Facility.

3 34. Accordingly, with the exception of the CEQA allegation, I find that the LEA should have
4 granted a hearing to determine the merits of the allegations raised in this issue.
5

6 III. "The LEA failed to review, suspend or revoke the Newby Island Recyclery solid
7 waste facility permit pursuant to Public Resources Code § 44004 to correct or modify
8 design, operations and putrescible materials accepted which attract vectors, create health
9 and safety impacts upon the residents of Milpitas, and which violate state minimum
10 standards which prohibit the stockpiling of solid waste for more than 48 hours. The LEA
11 thereby violated 14 CCR § 18081(d). The LEA on multiple inspections knowingly failed
12 to require or obtain information about such practices and to require the operator to submit
13 for revision of the permit as required. The LEA thereby violated 14 CCR § 18081(c). The
14 LEA failed to require the Composting Facility [sic – I assume the Petitioner meant
15 Recyclery] permit be revised properly every five years as required pursuant to PRC §
16 44015." (Milpitas' Petition at ¶ 46c.)

17 35. As with the previous issue, on its face, this issue does raise allegations that the LEA
18 failed to act as required by applicable law. Without the evidentiary support and fact-
19 finding of an administrative hearing, it is impossible for me to determine whether these
20 allegations have merit. I therefore find that the LEA should have granted a hearing to
21 determine the merits of the allegations raised in this issue.
22

23 36. I would like to add the caveat that the allegation is referred back to the LEA insofar as it
24 relates to non-odor issues. As with the Landfill, the LEA does not have jurisdiction over
25 odors at the Recyclery for the same reasons stated above in the discussion about Landfill
26 odors. While this issue does not specifically refer to odors, elsewhere in the Petition there
27 are allegations that all three of the Newby Facilities are causing an odor nuisance. I want
to be clear that with the exception of the Composting Facility, the LEA does not have
jurisdiction over odors at the Newby Island Facilities.

37. Additionally, I have the same comment as above with regard to the section 44015
allegation. Again, section 44015 does not require a solid waste facility permit be revised

1 every five years; rather, it requires that the permit "be reviewed and, if necessary, revised
2 at least once every five years." If the Petition is alleging that the Recyclery's permit
3 should have been revised at the time of its last review, then such a claim is time-barred
4 (the last review having been completed in December 2014.) I hereby take Judicial Notice
5 of the December 2014 Five Year Permit Review for the Recyclery.

6 38. Based on the foregoing, with the exception of any odor allegation at the Recyclery, I find
7 that the LEA should have granted a hearing to determine the merits of the allegations
8 raised in this issue.

9
10 IV. "The Joint Technical Document submitted in support of the 2015 landfill permit
11 application fails to demonstrate that the landfill's alternative daily cover (ADC) and
12 intermediate cover will control odors. Nothing in the odors section of the JTD
13 demonstrates ADC and intermediate cover sufficiently control odors from the facility.
14 The ADC thicknesses suggested by the JTD do not meet the requirements of regulation.
15 Specific feedstocks used for ADC and intermediate cover have never been successfully
16 demonstrated. The feedstock are unsuccessful due to their odors and the sloughing of
17 alternative daily and intermediate cover after application to the landfill slope, exposing
18 waste, promoting odors and other nuisance." (Milpitas' Petition at ¶ 46d.)

19 39. The LEA properly denied referring this issue to the hearing officer because it fails to state
20 an allegation that the LEA failed to act as required by Part 4 (commencing with section
21 43000), Part 5 (commencing with section 45000), or Part 6 (commencing with section
22 45030) of Division 30 of the Public Resources Code and any regulations promulgated
23 pursuant to those parts because this issue raised odor nuisance allegations. (Pub.
24 Resources Code § 44307.) As discussed above, odors are outside the scope of the LEA's
25 jurisdiction and thus also cannot be challenged under section 44307.

26 40. Accordingly, I find that the LEA properly denied referring the allegations brought under
27 this issue to the hearing officer.

V. "The LEA failed to act to correct violations by the Newby Island Facilities of 27 CCR
§ 20690(a)(9): 'Storage and handling of waste derived materials at the landfill for use as
alternative daily cover shall be conducted in a manner to protect public health and safety

1 and the environment, and control vectors, fires, odors, blowing litter, scavenging, and
2 nuisances.[']” (emphasis added by petitioner) (Milpitas’ Petition at ¶ 46e.)

3 41. This issue does, for the most part, state an allegation that the LEA failed to act as
4 required by Part 4 (commencing with section 43000), Part 5 (commencing with section
5 45000), or Part 6 (commencing with section 45030) of Division 30 of the Public
6 Resources Code and any regulations promulgated pursuant to those parts. (Pub.
7 Resources Code § 44307.) However, to the extent that this allegation is directed at odor
8 issues at the Landfill and the Recyclery, as discussed previously, such allegations are
9 outside the scope of the LEA’s jurisdiction. Nevertheless, with the record before me
10 limited to Petition, the LEA Letter, and the parties’ arguments, it is impossible for me to
11 determine whether the remainder of this allegation is meritorious; therefore, I find that
12 the LEA should have granted a hearing to determine the merits of the allegations raised in
13 this issue.
14

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16 VI. “The LEA failed to reject or condition the landfill permit application on the basis that
17 it misstated, improperly counted, or otherwise misrepresented materials counted as
18 alternative daily cover, recycling or beneficial use, in violation of state regulations,
19 statutes or policies. The proposed permitted level of tonnage accepted for disposal is
20 therefore inaccurate and fails to properly state the expected landfilled tonnages into the
21 facility. This failure is compounded by the failure to require that the Composting Facility
22 and Recyclery account for materials moving between them and the landfill such as, but
23 not limited to, biosolids used in the compost and then for daily cover.” (Milpitas’ Petition
24 at ¶ 46f.)

25 42. This issue appears to raise two allegations. First, it alleges failures by the LEA to reject or
26 condition the Landfill permit application because of inaccurate tonnage. The LEA
27 rejected all allegations related to the Landfill’s revised permit because the LEA
determined challenges to the Landfill permit revision to be time-barred by the 30 day
time limit of PRC section 44310(a)(1)(B). As discussed previously, the Petition’s

1 challenges to the Landfill permit revision are not time-barred. Accordingly, I direct the
2 LEA to include this with the issues referred to the hearing officer for consideration.

3 43. The second allegation in this issue is that the Composting Facility and Recyclery failed to
4 account for materials moving between all three of the Newby Facilities, and this alleged
5 failure compounded the alleged inaccurate tonnages in the revised permit for the Landfill.
6 For the reasons described above, insofar as this allegation relates to the Landfill revised
7 permit, it is not time-barred. Additionally, with the limited record before me, it is
8 impossible for me to determine the merits of this allegation. I direct it to be included with
9 the issues being returned to the LEA for the LEA to schedule an administrative hearing.
10

11 **Continuing Violations**

12 44. I would like to add a note about the use of alleged continuing violations to toll the 30-day
13 filing requirement of section 44310(a)(1)(B). Milpitas' Opening Argument repeatedly
14 asserts that many of the alleged violations at the three facilities are continuing and
15 ongoing (see, e.g., Milpitas Opening Argument, page 3, lines 10 and 25, page 4, lines 11
16 and 26.) I want to be clear that allegations of an alleged continuing violation do not toll
17 the 30-day filing deadline. CalRecycle has consistently held that the statutory limitation
18 in section 44310(a)(1)(B) is explicit. In a case where a party is alleging that the LEA
19 failed to act, as Milpitas is alleging here in all instances except that of the issuance of the
20 revised landfill permit, reading the statute to allow filing for hearing at any time during
21 an alleged continuing violation would effectively eliminate the 30-day limitation entirely.
22 Rather, the statute clearly requires a request for hearing be filed within 30 days from the
23 date that the person "discovered or reasonably should have discovered" the basis for the
24 allegation. In other words, regardless of how long an alleged violation continues, the time
25
26
27

1 for filing is when that violation began or when the party bringing the allegation
2 reasonably should have known the violation began. Reading that provision as Milpitas
3 has suggested would render the plain language of the statute of limitations as
4 meaningless.
5

6 45. Accordingly, any allegations by Milpitas that relate to ongoing violations are time-barred
7 unless those began or were reasonably known by Milpitas to have begun, within the 30-
8 day time period prior to the date Milpitas filed its Petition with the LEA. It is up to the
9 hearing officer to make this determination with regard to the allegations that fall within
10 the hearing officer's purview.
11

12 ORDER

13 Based upon the foregoing, I hereby uphold the LEA's determination in part and reject it in part.

14 Specifically I uphold the following determinations:

- 15 1. The LEA does not have jurisdiction over odors at the landfill; therefore, any request for a
16 hearing on allegations of odor nuisance at the Landfill were properly denied by the LEA.
- 17 2. The LEA does not have jurisdiction over odors at the Recyclery; therefore, any request
18 for a hearing on allegations of odor nuisance at the Recyclery were properly denied by
19 the LEA.
- 20 3. The LEA does not have jurisdiction over CEQA; therefore, any request for a hearing on
21 allegations related to CEQA were properly denied by the LEA.
- 22 4. The LEA does not have jurisdiction over odors at the landfill; therefore, any request for a
23 hearing on allegations of deficiencies in the JTD with regard to odor were properly
24 denied by the LEA.
25
26
27

1 And I reject the following determinations and refer them to LEA with the direction that the LEA
2 schedule an administrative hearing:

- 3 5. Milpitas' request for a hearing on allegations of failure to act by the LEA as required by
4 applicable laws and regulations with regard to the issuance of the revised permit for the
5 Landfill were not barred by the 30-day limitation period of section 44310(a)(1)(B). I
6 return this appeal to the LEA to schedule a hearing on those issues.
7
- 8 6. Milpitas' request for a hearing on allegations that the LEA failed to act as required by
9 applicable laws and regulations with regard to the Recyclery may not be time-barred and,
10 other than those odor allegations, may be within the LEA's jurisdiction. I return this
11 appeal to the LEA to schedule a hearing on those issues.
12
- 13 7. Milpitas' request for a hearing on allegations that the LEA failed to act as required by
14 application laws and regulations with regard to the Compost Facility may not be time-
15 barred and may be within the LEA's jurisdiction. I return this appeal to the LEA to
16 schedule a hearing on those issues.

17 This Decision shall be effective upon service.
18
19

20
21 Dated: June 9, 2015

22  for
23 Carol Mortensen, Director

24 Department of Resources Recycling and Recovery (CalRecycle)
25
26
27

DECLARATION OF SERVICE BY MAIL

Case Name: **IN THE MATTER OF: APPEAL OF THE CITY OF SAN JOSE LOCAL ENFORCEMENT AGENCY
DECISION TO DENY A HEARING ON NEWBY ISLAND LANDFILL, RECYCLERY AND COMPOSTING,
SOLID WASTE FACILITY PERMITS AND OPERATIONS, ISSUED MARCH 11, 2015**

I declare:

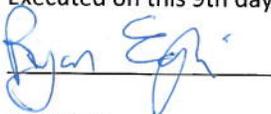
I am employed in the Legal Office of the California Department of Resources Recycling and Recovery, which is the office of a member of the California State Bar under which member's direction this service is made. My business address is California Department of Resources Recycling and Resources, 1001 I Street, MS 24B, Sacramento, CA 95814. I am 18 years of age or older and not a party to this matter.

On June 9, 2015, I served the attached **DECISION** by electronic mail by sending a true copy of the document identified above to the following persons at the indicated email addresses, which transmission was reported as complete and without error:

Margo Laskowska
Office of the City Attorney
City of San Jose
200 E. Santa Clara St. 16th Floor
San Jose, CA 95113
margo.laskowska@sanjoseca.gov
Attorneys For Respondent

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

Executed on this 9th day of June, 2015, at Sacramento, California.



Declarant

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