BEFORE THE

DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY

In the Matter of: Evan Edgar and Monica White, **Petitioners,** Contra Costa County Local Enforcement Agency, **Respondent,** Keller Canyon Landfill Company, Inc., **Real Party in Interest.**	)))))))))))))))	APPEAL OF CONTRA COSTA COUNTY LOCAL ENFORCEMENT AGENCY HEARING PANEL DECISION ON KELLER CANYON LANDFILL, ISSUED MARCH 25, 2015 **DECISION** Public Resources Code Sections 44307, 45030 et seq.

1. This matter came before the Department based upon an appeal filed pursuant to Public Resources Code (PRC) section 45030. Petitioners, Evan Edgar and Monica White, were represented by Dana Dean, attorney at law. The Contra Costa County Local Enforcement Agency (LEA), was represented by Linda Wilcox, attorney at law. Real Party in Interest, Keller Canyon Landfill Company, Inc. (Keller Canyon), was represented by Scott W. Gordon, attorney at law. As the appeal was filed prior to the appointment the Department's new Director, and due to the volume of the administrative record and the written arguments of the parties, the new Director delegated the authority to render a decision on the appeal to me to avoid undue delay. However, the Director was consulted with and reviewed this decision prior to it being finalized.
2. Petitioners appealed a decision by the Contra Costa County Independent Hearing Panel (Hearing Panel) that they did not show that the LEA failed to act as required by law or

regulation when the LEA approved the Report of Disposal Site Information (RDSI) Amendment and CEQA Notice of Exemption (NOE) for the Keller Canyon Landfill. I determined that Petitioners' appeal raised one or more substantial issues and accepted the appeal. I also decided, pursuant to PRC section 45031(c), that I would review this matter based upon the record before the Hearing Panel and on written arguments submitted by the parties. The written record and arguments were submitted by June 15, 2015. Rebuttal arguments were submitted by June 29, 2015.

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

Relevant Statutes

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

> ...The enforcement agency shall also hold a hearing upon a petition to the enforcement agency from any person requesting the enforcement agency to review an alleged failure of the agency to act as required by this part, Part 5 (commencing with Section 45000), or Part 6 (commencing with Section 45030) or a regulation adopted by the department pursuant to this part, Part 5(commencing with Section 45000), or Part 6 (commencing with Section45030). A hearing shall be held in accordance with the procedures specified in Section 44310.

5. PRC section 44310 provides, in part, that:

> ...(a) (1) The hearing shall be initiated by the filing of a written request for a hearing with a statement of the issues.
> (A) If the hearing request is made by the person subject to the action, the request shall be made within 15 days from the date that person is notified, in writing, of the enforcement agency's intent to act in the manner specified.
> (B) If the hearing request is made by a person alleging that the enforcement agency failed to act as required by law or regulation pursuant to Section 44307, the person shall file a request for a hearing within 30 days from the date the person discovered or reasonably should have discovered, the facts on which the allegation is based.

Hearing Panel Decision

6. The request for hearing was filed by Petitioners on February 13, 2015, alleging that the LEA failed to act as required by law or regulation under PRC section 44307 when it approved Keller Canyon's RDSI Amendment. Specifically, Petitioners alleged that when approving the RDSI Amendment the LEA relied on outdated requirements for alternative daily cover (ADC) use and demonstration projects; failed to comply with current law and its own performance standards, duties, and responsibilities for green waste used as ADC; failed to comply with performance standards and its duties and responsibilities as an enforcement agency; and failed to properly apply the criteria that determines CEQA exemption and whether the proposed changes should have instead required a modification or revision of Keller Canyon's solid waste facility permit.
7. The Hearing Panel heard this matter on March 13, 2015, and March 19, 2015. At the hearing, the Hearing Panel heard testimony from the parties and received evidence regarding the ADC practices at Keller Canyon. The Hearing Panel determined that its decision was limited to events that occurred in the 30 days prior to Petitioners' request for a hearing, which included the LEA's approval of the RDSI Amendment and the adoption of the CEQA NOE.
8. Based on the evidence presented, the Hearing Panel found that the LEA had acted properly when it approved the RDSI Amendment and the CEQA NOE. The Hearing Panel found that evidence related to past alleged improper ADC practices at Keller Canyon were time-barred and had no bearing on the content of the RDSI Amendment. Because the Hearing Panel found that the RDSI Amendment met the requirements of law

and regulation and could not have a significant impact on the environment, the Hearing Panel determined that the LEA had not failed to act as required by law or regulation.

Petitioner's Argument

9. In their appeal, Petitioners argue that the LEA failed to act as required by law because the RDSI Amendment fails to address the issue that some jurisdictions allow food waste to be comingled with the green material hauled to Keller Canyon for use as ADC. They argue that food waste is not allowed in the green material used for ADC, and the fact that food waste is permitted to be commingled with some of the green material being taken to Keller Canyon results in food waste being improperly included in ADC.

10. Petitioners also argue that the LEA's approval of the RDSI Amendment was improper because the RDSI Amendment fails to preclude food waste from inclusion in green material used as ADC. Further, Petitioners allege that approval of the RDSI Amendment was improper because the Amendment does not adequately address the green material processing methods actually being employed at Keller Canyon.

11. Petitioners argue that the LEA has failed to act as required by law generally because it has allowed Keller Canyon to utilize ADC practices that CalRecycle has not concurred with and because the green material practices at Keller Canyon are inconsistent with state minimum standards.

12. Finally, Petitioners allege that the RDSI amendment should not have been given a categorical exemption under CEQA.

LEA's Argument

13. The LEA argues that Petitioners' appeal does not raise any substantial issues entitling it to an appeal to CalRecycle. The LEA asks CalRecycle to reconsider its determination that Petitioners' appeal raised substantial issues and CalRecycle's decision to grant an appeal.

The LEA supports its argument by arguing that because neither the LEA nor CalRecycle may compel Keller Canyon to submit an application to amend its RDSI, it is not possible for the Petitioners to be granted the relief they request. Additionally, the LEA argues that the CEQA challenge is not reviewable by CalRecycle, the claims regarding the 1999 Demonstration Project are time-barred, and the issues raised by Petitioners are frivolous.

14. The LEA goes on to argue that if CalRecycle determines that there are substantial issues to support the appeal, the LEA acted properly when it approved the RDSI Amendment because the Amendment met the requirements of law and regulation. Specifically, the approval was proper because the RDSI Amendment is consistent with state minimum standards for ADC, it contains a processing method for removing contaminants, including food waste, from green material used as ADC that meets the requirements of law, and CalRecycle did concur with the 1999 Demonstration Project.

Real Party in Interest's Argument

15. Real Party in Interest, Keller Canyon, moves to dismiss Petitioners' appeal arguing that Petitioners' claims are time-barred. Keller Canyon argues that Petitioners had to have brought their claim by March 27, 2014, in order for it to have been timely because Petitioners have made the same or similar claims as those alleged in their petition since at least February 25, 2014.

DISCUSSION

16. After reviewing the record below and the parties' arguments, I agree with the Hearing Panel's determination on the issues raised in the original petition. I will address each of the Hearing Panel's determinations in turn below after first addressing arguments by the

LEA and Keller Canyon against the underlying merits of Petitioners' appeal to CalRecycle.

Whether Appeal Fails to Raise Substantial Issues/Motion to Dismiss

17. The LEA and Real Party in Interest, Keller Canyon, have both claimed that the Petitioners' appeal to CalRecycle does not raise substantial issues and should not be granted review. Keller Canyon also asserts that all of Petitioners' claims are time-barred and therefore moves for dismissal.

18. I find that while not every issue raised by Petitioners is necessarily relevant to their challenge to the LEA's approval of the RDSI Amendment, given that some of the allegations raised by the Petitioners require a review of the record in order to make a determination, the question of whether the LEA properly granted the Amendment warrants review. I therefore uphold my previous decision that the appeal raises substantial issues warranting review by CalRecycle.

19. Secondly, while Keller Canyon is correct that some of Petitioners' claims are time-barred, I disagree that the entirety of Petitioners' underlying petition is time-barred. I agree with the Hearing Panel that any allegation related to an act or omission by the LEA prior to January 14, 2015 is time-barred and rule accordingly below. However, as the Hearing Panel properly determined, allegations related to the LEA's approval of the RDSI Amendment do fall within the statutory time frame. These allegations are therefore addressed in detail below.

Inspection and Enforcement Actions

20. The Hearing Panel determined that any of Petitioners' allegations related to enforcement or inspection actions or omissions by the LEA prior to January 14, 2015, were time-

barred because they occurred prior to the 30-day time limitation for appeals specified in PRC section 44310(a)(1)(B). I agree and uphold the Hearing Panel's determination.

21. The statutory limitation at issue herein is explicit: "...the person **shall file a request for a hearing within 30 days** from the date the person discovered or reasonably should have discovered, the facts on which the allegation is based." (PRC § 44310(a)(1)(B), emphasis added). As such, any allegation related to actions or inactions by the LEA that were known or should have been known to the Petitioners prior to January 14, 2015, were properly excluded.

Spreading ADC on Active Face before Taking out Contaminants

22. The Hearing Panel next determined that Petitioners did not show by a preponderance of the evidence that the LEA failed to act as required by law or regulation with regard to Petitioners' allegation that the RDSI Amendment should have addressed an isolated incident where Keller Canyon employees were observed removing contaminants from ADC after it had been spread on the active face of the landfill. I agree and uphold the Hearing Panel's determination.

23. Petitioners allege that there is a current practice at Keller Canyon of removing contaminants from ADC after the ADC has been applied to the active face of the landfill. (See, e.g., Petitioners' Request for Hearing at 8; Petitioners' Notice of Appeal at 9; Petitioners' Opening Brief at 16 and 23.) However, the RDSI Amendment describes the process for removing contaminants as follows: "In accordance with Section 20690(a)(11) [of Title 27 of the California Code of Regulations (CCR)], KCL staff spread and sort the material to remove contaminants and oversized materials.... After the material has been determined to meet the ADC performance requirements, it will be spread over the compacted working face towards the end of the operational day." (Record at 0052-0053.) This provision in the RDSI Amendment meets the standard laid out in section Title 27 of

the CCR, section 20690(b)(3)(B), which requires green material used for ADC be processed prior to being applied to the active face.

24. It appears that the entire support for Petitioners' argument is the November 19, 2014, inspection report in which an inspector describes Keller Canyon employees removing contaminants from the ADC after it had been applied to the active face. As stated in that report, such an activity is inconsistent with ADC protocols. As the RDSI Amendment is written, such practices continue to be inconsistent. The RDSI Amendment need not describe every possible action that would be a violation of its procedures. Here, the RDSI Amendment describes a procedure for processing ADC that meets the state minimum standards. Any past or future violation of this procedure is outside the scope of this appeal.

25. It also bears noting, since so much of the Petitioner's arguments relate to food waste being commingled with green waste, that nothing in that inspection report, either narrative or pictures, indicate any food waste commingled in the green waste ADC. The contaminants being removed that were mentioned were "plastics, papers, children's toys, cardboard, bottles, etc." and then goes on to reiterate the operator's description that "food waste is not allowed … for ADC use." In fact, the inspection report explicitly states "**No food waste was observed in the ADC**." (emphasis added)

Alternative Processing

26. Next, the Hearing Panel determined that Petitioners were unable to show by a preponderance of the evidence that the LEA failed to act as required by law or regulation with regard to Petitioners' allegation that the alternative processing method for ADC used at Keller Canyon was not approved. I agree and uphold the Hearing Panel's determination.

27. Petitioners do little in their appeal to challenge the Hearing Panel's determination on this issue. In their opening argument, they state that unprocessed green material is not an

approved cover material for ADC and that alternative processing must undergo site specific demonstration projects. (See, e.g., Petitioners' Opening Argument at 17.) Presumably, Petitioners are alleging that the processing method in the RDSI Amendment either improperly allows for the use of unprocessed green material as ADC or that it includes an unapproved alternative processing method for green material used as ADC. Either allegation fails here.

28. Title 27 of the CCR, section 20690(b)(3)(A) defines processed green material and states that it "shall be ground, shredded, screened, source separated for grain size, or **otherwise processed**." (emphasis added) The regulation doesn't detail what processing methods fall into the "otherwise processed" category, but I agree with the LEA that the processing method described in the RDSI Amendment qualifies.

29. According to the language in the RDSI Amendment, all green material that comes to Keller Canyon for use as ADC "[r]egardless of the material source" goes through a manual processing procedure to ensure that it meets ADC performance requirements. (Record at 0052 and paragraph 23 above.) No convincing evidence has been presented to show that this processing method does not produce ADC that meets ADC performance requirements.

30. Accordingly, the Hearing Panel properly determined that the LEA did not fail to act as required by law or regulation when it approved the RDSI Amendment with its processing methods for green material used as ADC.

ADC that Contains Food Material as Green Waste

31. The Hearing Panel determined that there was no evidence that Keller Canyon applies green material mixed with food waste and therefore found that Petitioners failed to show

that the LEA had failed to act as required by law or regulation with respect to this issue. I agree and uphold the Hearing Panel's determination.

32. Petitioners claim that the green material used as ADC at Keller Canyon improperly contains food waste. However, the evidence in the record does not support this assertion. (See paragraph 25 above). It should also be noted that CalRecycle staff has inspected this site seven times in the past 7 years and has never documented food waste being included in the green waste ADC. Further, Petitioners' challenge is to the LEA's approval of the RDSI Amendment, and the RDSI Amendment does not state that food material is included in the green material used as ADC.

33. Accordingly, the Hearing Panel correctly found that the LEA properly approved the RDSI Amendment because the Amendment does not improperly allow food waste to be mixed with green material used as ADC.

RDSI Amendment Should Exclude Food Material from Green Material as Referenced in the California Code of Regulations, Title 14, Section 17852(a)(21)

34. Petitioners claim that the Hearing Panel's decision is in error because the RDSI Amendment did not exclude the presence of food waste in green material used as ADC. The Hearing Panel found that Petitioners had failed to show by a preponderance of the evidence that the LEA failed to act as required by law or regulation with regard to this issue. I agree and uphold the Hearing Panel's determination.

35. There is much discussion in the record and in the arguments presented to me about the definitions of "green material" and "food material" as they relate to ADC. However, as I will describe below, such evidence and arguments are irrelevant to the sufficiency of the

RDSI Amendment. Moreover, the RDSI Amendment does not propose using green waste commingled with food waste.[1]

36. Under Title 27 of the CCR, section 21665(c), the standard for an LEA's approval of an RDSI Amendment is whether the following conditions are met:

> (1) the EA finds that the proposed change is consistent with all applicable certified and/or adopted CEQA documents in that no subsequent EIR or Negative Declaration or supplemental EIR is warranted pursuant to Title 14, Chapter 3, Article 11, §§15162 or 15163, or if the EA finds the change being requested is exempt from the requirements of CEQA pursuant to Title 14, Chapter 3, Article 5, §§15060 and 15061;
> (2) the EA has deemed the proposed change acceptable and consistent with, but not limited to, State minimum standards pursuant to Chapter 3 of this subdivision or applicable minimum standards in Title 14 (commencing with §17200), and including financial assurances and operating liability criteria pursuant to Chapter 6 of this subdivision if applicable; and
> (3) the EA finds the changes do not conflict with the terms and conditions in the current solid waste facilities permit.

37. The requirements for the contents of an RDSI regarding ADC are stated in Title 27 of the CCR at section 21600(b)(6)(B):

> (B) Alternative Daily Cover and Beneficial Reuse--Describe alternative daily cover and beneficial reuse waste types, processing methods, alternative processing or grain size specifications if applicable, operations methods, and applicable engineering, or other standard practices that will be used to ensure compliance with §§20690 and 20695. Estimate the range in tons of these materials that are anticipated to be used, based on waste types, applicable cover to waste volume ratios, applicable density conversion factors, engineering specifications, methods to minimize contamination, or other pertinent information. Materials accepted at the landfill to be used as alternative daily cover or for beneficial reuse shall be weighed upon receipt at landfills which have scales but need not be weighed again prior to placement at the landfill. Appropriate conversion factors for specific materials based on industry standards are acceptable for tracking materials received at landfills which do not have scales.

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[1] As there does seem to be confusion as to applicable regulatory requirements, and notwithstanding any prior interpretations by the Department, the definitions of "food material" and "green material" in 14 CCR § 17852(a)(20) and (21) apply to compostable materials handling operations and facilities. For purposes of ADC requirements, the parameters of green material are described in 27 CCR § 20690(b)(3)(A).

38. As the aforementioned sections demonstrate, there is no requirement for an RDSI Amendment to restate prohibitions that may already be contained in statute or regulation, whether they relate to food material or green material or otherwise. Furthermore, there is no regulatory requirement for an RDSI Amendment to list every possible type of contaminant that will be removed from processed green material. In fact, the description of green material in the RDSI is essentially a direct quote of the definition contained in the regulations.[2]

39. Petitioners have presented no evidence to demonstrate that the RDSI Amendment was deficient in meeting the aforementioned regulatory conditions for RDSI approval by the LEA. To the extent that the operator may or may not be complying with particular regulatory requirements, that is an enforcement matter for the LEA and is outside the scope of this appeal as it does not relate to the sufficiency of the RDSI Amendment itself.

CalRecycle Never Concurred in Writing with the 1999 Demonstration Project

40. The Hearing Panel determined that the issue of CalRecycle concurrence with the 1999 Demonstration Project is irrelevant because the project was approved by the LEA prior to January 14, 2015, and is therefore time-barred. The Hearing Panel went on to determine that, in any event, there are no specific requirements that CalRecycle concur in writing and CalRecycle implicitly concurred because it was aware of and relied on the LEA's approval of the 1999 Demonstration Project. I agree and uphold the Hearing Panel's determination.

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[2] "Green material includes, but is not limited to, yard trimmings, untreated wood wastes, paper products, and natural fiber products. Green material does not include treated wood waste (TWW), mixed demolition or mixed construction debris, manure and plant waste from the food processing industry, alone or blended with soil." With the exception of the acronym "TWW," this is a direct quote from Title 27 CCR section 20690(b)(3)(A).

41. Because the 1999 Demonstration Project and its subsequent findings were approved by the LEA and known to the Petitioners well before January 14, 2015, any challenge to the LEA's actions in this regard are time-barred.

Revised or Modified Solid Waste Facilities Permit

42. The Hearing Panel determined that Petitioners failed to show that the RDSI Amendment required a modification or revision to the Keller Canyon solid waste facility permit because the changes in the RDSI Amendment meet the requirements of 27 CCR section 21665(c)(1)-(3). I agree and uphold the Hearing Panel's determination.

43. As discussed above, Title 27 of the CCR, section 21665(c) allows an LEA to approve a proposed change in a RDSI as an amendment without revising or modifying the solid waste facilities permit if the amendment meets the following criteria: (1) the LEA finds that the proposed change is consistent with existing CEQA or is exempt from CEQA; (2) the LEA determines that the proposed change is acceptable and consistent with state minimum standards pursuant to Chapter 3 of subdivision 1 of Title 27 or applicable minimum standards in Title 14; and (3) the LEA finds that the proposed change does not conflict with the terms and conditions in the current solid waste facilities permit. Petitioners only challenge the first two of these requirements.

44. Petitioners allege that the categorical exemption under CEQA was improper, but, as discussed below, CEQA review is beyond the scope of a PRC section 44307 hearing.

45. Petitioners also allege that the proposed change is not acceptable and is inconsistent with applicable state minimum standards for the following reasons:

    a. Failure to process green material for use as ADC prior to applying the material to the active face of the landfill;

b. Food waste is not an approved ADC material;

c. Food waste has not undergone a site specific demonstration project to determine its suitability as ADC;

d. The presence of food waste within green material used as ADC violates section 20690(a)(2) of Title 27 because it attracts vectors, causes odors, promotes scavenging, and presents a threat to human health and the environment; and

e. The presence of food waste within green material used as ADC is prohibited. (Petitioners' Opening Brief at 23.)

46. All of Petitioners' alleged deficiencies with regard to applicable state minimum standards fail for the reasons laid out in previous sections of this decision. As discussed above, the RDSI Amendment is at issue here, and the RDSI Amendment does not allow any of the above-listed practices. It does not allow green material used for ADC to be spread on the active face of the landfill until it has been processed and all contaminants removed. It does not state that food waste is an approved ADC material. As such, the fact that food waste has not undergone a site specific demonstration project to determine its suitability as ADC is irrelevant. And, because the RDSI Amendment does not specify that food waste is included in the green material being used as ADC, the alleged violation of section 20960(a)(2) of Title 27 is unfounded. This issue is also irrelevant to the RDSI Amendment because the Amendment does not state that food waste is being included in green material ADC.

47. Accordingly, I agree with the Hearing Panel that the LEA did not err when it approved the RDSI Amendment without requiring a revision or modification to Keller Canyon's solid waste facility permit.

CEQA Categorical Exemption

48. Finally, the Hearing Panel determined that the categorical exemption under CEQA for the RDSI Amendment was proper because the RDSI Amendment describes existing operations and does not cause a significant impact on the environment. I uphold the Hearing Panel's determination that Petitioners fail on this allegation; however I do so on a different basis.

49. The CEQA allegation fails on its face because CEQA is not a law or regulation challengeable under PRC section 44307. Under PRC section 44307, Petitioners must assert an allegation that the LEA failed to act as required by the laws listed in PRC section 44307, which are Part 4 (commencing with section 43000), Part 5 (commencing with section 45000), or Part 6 (commencing with section 45030) of Division 30 of the Public Resources Code or any regulations promulgated pursuant to those parts. CEQA is not within these code sections.

CLARIFICATIONS

50. As noted above, I found that this appeal raised substantial issues. Given the findings above, I believe it is important to clarify what that does and does not mean. Statute does not provide a definition of "substantial issue" for these appeals. As such, it has been the practice of this Department (formerly the Board) to accept appeals that alleged issues which could potentially be addressed in an appeal if the facts alleged were true. The only appeals that were rejected were those which did not contain a valid appeal on their face. For example, the Board rejected one appeal as not raising substantial issues because the remedy sought (to include inter-county hauling fees in a Solid Waste Facilities Permit) was not something that the Board had the authority to require. The finding that a

substantial issue has been raised in an appeal does not mean that the Petitioners had a valid case, or a good case. I wanted to clarify this so that my finding of a substantial issue is not mischaracterized.

51. In addition, the Department has been and will continue to be concerned about food waste being mixed with green waste ADC, and this Decision should in no way be interpreted to indicate otherwise. This Decision simply means that there was no evidence presented to show that this practice is authorized or occurring at Keller Canyon Landfill.

ORDER

Based upon the foregoing, I hereby uphold the LEA's determination that the LEA did not fail to act as required by law or regulation.

This Decision shall be effective upon service.

Dated: 8/10/15

Elliot W. Block

Elliot Block, Chief Counsel
Department of Resources Recycling and Recovery (CalRecycle)

DECLARATION OF SERVICE BY MAIL

Case Name: **IN THE MATTER OF: APPEAL OF CONTRA COSTA COUNTY LOCAL ENFORCEMENT AGENCY HEARING PANEL DECISION ON KELLER CANYON LANDFILL, ISSUED MARCH 25, 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 August 10, 2015, I served the attached **DECISION** by placing it in a postpaid, envelope, addressed to the parties hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Sacramento, California.

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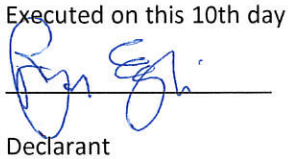
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 10th day of August, 2015, at Sacramento, California.



Declarant