

REQUEST FOR COUNCIL ACTION CITY OF SAN DIEGO	CERTIFICATE NUMBER (FOR COMPTROLLER'S USE ONLY)
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TO: CITY COUNCIL	FROM (ORIGINATING DEPARTMENT): Development Services Department	DATE: 8/21/2015
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SUBJECT: Dissolution of the Local Enforcement Agency (LEA) Hearing Panel and Adoption of LEA Administrative Hearing Procedures Manual

PRIMARY CONTACT (NAME, PHONE): William Prinz, 619-533-3696	SECONDARY CONTACT (NAME, PHONE): Lonnie Eads, 619-533-3692
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COMPLETE FOR ACCOUNTING PURPOSES

FUND	200226				
FUNCTIONAL AREA	OTHR-00000000-SH				
COST CENTER	1611110011				
GENERAL LEDGER ACCT					
WBS OR INTERNAL ORDER					
CAPITAL PROJECT No.					
AMOUNT	0.00	0.00	0.00	0.00	0.00

FUND					
FUNCTIONAL AREA					
COST CENTER					
GENERAL LEDGER ACCT					
WBS OR INTERNAL ORDER					
CAPITAL PROJECT No.					
AMOUNT	0.00	0.00	0.00	0.00	0.00

COST SUMMARY (IF APPLICABLE): None

ROUTING AND APPROVALS

CONTRIBUTORS/REVIEWERS:	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED
Environmental Analysis	ORIG DEPT.	Vacchi, Robert	08/24/2015
Liaison Office	CFO		
	DEPUTY CHIEF	Graham, David	09/30/2015
	COO		
	CITY ATTORNEY	Dugard, Prescilla	
	COUNCIL PRESIDENTS OFFICE		

PREPARATION OF: RESOLUTIONS ORDINANCE(S) AGREEMENT(S) DEED(S)

1. Disband the LEA independent hearing panel established pursuant to San Diego Resolution R-290036.
2. Adopt the solid waste enforcement agency Administrative Hearing Officer Procedures Manual (Manual) to authorize the Development Services Director, or designee, to appoint independent hearing officers as provided in Public Resources Code section 44308(d). The manual addresses the qualifications and procedures for LEA hearings as required by the Public Resources Code.

STAFF RECOMMENDATIONS: Approve requested actions.	
SPECIAL CONDITIONS (REFER TO A.R. 3.20 FOR INFORMATION ON COMPLETING THIS SECTION)	
COUNCIL DISTRICT(S):	All
COMMUNITY AREA(S):	All
ENVIRONMENTAL IMPACT:	The activity proposed is not a “project” as defined by CEQA Section §15378(b)(2) and is therefore not subject to CEQA pursuant to State CEQA Guidelines Section §15060(c)(3).
CITY CLERK INSTRUCTIONS:	Please file the Solid Waste Local Enforcement Agency (LEA) Administrative Hearing Procedures Manual upon adoption by the City Council and Mayor.

COUNCIL ACTION
EXECUTIVE SUMMARY SHEET
CITY OF SAN DIEGO

DATE: 8/21/2015

ORIGINATING DEPARTMENT: Development Services Department

SUBJECT: Dissolution of the Local Enforcement Agency (LEA) Hearing Panel and Adoption of LEA Administrative Hearing Procedures Manual

COUNCIL DISTRICT(S): All

CONTACT/PHONE NUMBER: William Prinz/619-533-3696

DESCRIPTIVE SUMMARY OF ITEM:

This item is to disband the LEA Independent Hearing Panel established by City Council on May 4, 1998 under Resolution R 290036 and approve City of San Diego Solid Waste Local Enforcement Agency Administrative Hearing Procedures, providing for independent hearing officers for LEA administrative hearings as authorized by the California Public Resources Code. California Public Resources Code section 44308 alternatively authorizes the City to provide for independent hearing officers for LEA administrative hearings.

STAFF RECOMMENDATION:

Approve requested actions.

EXECUTIVE SUMMARY OF ITEM BACKGROUND:

The City of San Diego designated the Development Services Department as its own solid waste Local Enforcement Agency (LEA) on July 29, 1997. The California Integrated Waste Management Board (CIWMB) concurred on November 19, 1997. LEA duties were previously conducted by the County of San Diego Department of Environmental Health prior to that time.

The LEA is responsible for enforcement of State (Cal Recycle, formerly known as the CIWMB) solid waste statutes and regulations within the City of San Diego. The LEA also issues solid waste facility permits in accordance with State statutes and regulations. The LEA's certification with the Cal Recycle requires the establishment and maintenance of an Independent Hearing Panel (IHP) or Independent Hearing Officer (IHO) to hear appeals of LEA actions.

On May 4, 1998, the San Diego City Council adopted San Diego Resolution R 290036, authorizing the establishment of the LEA and the LEA Independent Hearing Panel.

Since 1998 the LEA has maintained a three (3) member IHP composed of one member with professional experience in solid waste management, one member with a legal background and the third member as a representative of the public at large. These seats were appointed by the Council President for no more than two consecutive four-year terms.

The California Public Resources Code (Public Resources Code) section 44308 alternatively authorizes the City to provide for an IHO for LEA administrative hearings if it adopts procedures and qualifications for a hearing officer appointment. Due to difficulties the LEA has had in maintaining an established and qualified IHP, the Development Services Director recommends that the City Council adopt the permissible alternative and use the IHO model for LEA hearings.

The adoption of the attached LEA Administrative Hearing Procedures Manual (Manual) will establish the process for appointment of hearing officers related to LEA proceedings. Cal Recycle has concurred with the proposed Manual.

Under the IHO option the LEA would be able to utilize either a contract hearing officer available to City Departments through the Purchasing and Contracts Division or an Administrative Law judge available through the state of California meeting the qualifications described in the attached Manual.

The Manual provides guidance to the Development Services Director, or his/her designee to appoint an IHO in accordance with California statutes and regulations, to fairly and equitably adjudicate enforcement, to resolve permitting issues and to address public concerns involving LEA actions.

CITY STRATEGIC PLAN GOAL(S)/OBJECTIVE(S):

Goal #2: Work in partnership with all of our communities to achieve safe and livable neighborhoods;

Objective #1: Protect lives, property, and the environment through timely and effective response in all communities

FISCAL CONSIDERATIONS: None

EQUAL OPPORTUNITY CONTRACTING INFORMATION (IF APPLICABLE): None

PREVIOUS COUNCIL and/or COMMITTEE ACTION (describe any changes made to the item from what was presented at committee):

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS: None

KEY STAKEHOLDERS AND PROJECTED IMPACTS:

Stakeholders: owners and operators of public and private solid waste facilities, business enterprises and disposal sites that may appeal an LEA enforcement action. Also members of the public alleging that the LEA has failed to act in accordance with applicable laws and regulations.

Impact: Appellants would have their matters heard before an Independent Hearing Officer rather than a panel of three persons appointed by the City Council.

Vacchi, Robert
Originating Department

Graham, David
Deputy Chief/Chief Operating Officer

City of San Diego
Solid Waste Local Enforcement Agency
ADMINISTRATIVE HEARING PROCEDURES

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INTRODUCTION

Assembly Bill 939 (AB 939) was signed into law on September 29, 1989. This law created statewide changes in the management of solid waste. It was passed with the intention of promoting source reduction, recycling, and composting activities to extend solid waste landfill capacity.

AB 939 requires that all cities and counties have Integrated Waste Management Plans. Some of the elements addressed in these plans include: waste characterization, recycling, source reduction, household hazardous waste, etc.

AB 939 also created the California Integrated Waste Management Board (CIWMB), requiring the dissolution of the Solid Waste Management Board existing at that time.

Another change included the need for local agencies to apply for designation and re-certification as the local enforcement agency (LEA) within their jurisdiction. This required the local agency to submit to the CIWMB, for approval, a Designation Information Package and an Enforcement Program Plan. These documents outlined what solid waste regulatory activities are being performed, and how they are accomplished at the local level.

According to the California Public Resources Code (PRC), the Designation Information Package requires the LEA to have in place an Independent Hearing Panel (IHP) or an Independent Hearing Officer (IHO) to act as the local appeals body for solid waste permitting and enforcement issues. The City of San Diego LEA has chosen to provide for an IHO under PRC section 44308(d).

Senate Bill 63 was signed into law by the Governor on July 28, 2009, which resulted in the abolishment of the CIWMB and moved the programs and responsibilities of the Board to the Department of Resources Recycling and Recovery (Cal Recycle). Cal Recycle shall be administered under the control of an executive officer known as the Director of Resources Recycling and Recovery (CalRecycle Director). Any reference in any law or regulation to the State Solid Waste Management Board, the California Waste Management Board, or the California Integrated Waste Management Board shall hereafter apply to the Department of Resources Recycling and Recovery. The CalRecycle Director shall hear and decide appeals of decisions by the IHO made pursuant to statute and regulation.

I. THE SOLID WASTE LEA

A. Introduction

The LEA acts on behalf of the State for the enforcement of State solid waste laws and regulations.

The LEA can promptly respond to illegal activities, and complaints or situations requiring correction, and can perform thorough follow-up activities because of their familiarity with specific conditions and issues and also the City programs, policies, procedures and protocol.

Solid Waste LEA Administrative Hearing Procedures

The LEA enforces the following laws and regulations:

1. 40 Code of Federal Regulations (CFR), Part 258.1;
2. PRC, Divisions 30 and 31;
3. Title 14 of the California Code of Regulations (CCR), Division 7; and
4. Title 27 of the California Code of Regulations (CCR), Division 2.

Typical LEA duties include:

1. Solid waste facility inspections;
2. Permitting of solid waste facilities;
3. Closure/post-closure activities for solid waste landfills;
4. Investigation, remediation oversight, and inspection of closed, illegal, and abandoned disposal sites (including burn dump sites);
5. Five-year permit reviews and review of solid waste Reports of Facility Information;
6. Investigation and abatement of illegal dumping complaints;
7. Response to complaints against solid waste haulers and solid waste facilities;
8. File maintenance; and
9. Public relations.

B. The LEA and the Independent Hearing Officer

The LEA issues, denies, revokes, suspends, and modifies Solid Waste Facilities Permits (SWFP). According to PRC section 40194, a “Solid, Waste Facility” includes a solid waste transfer or processing station, a composting facility, a transformation facility, and a disposal facility. The LEA regulates solid waste facilities by performing periodic compliance inspections. Each solid waste facility must comply with the requirements in the laws and regulations, and any conditions or requirements of any SWFP issued by the LEA for a given solid waste facility. Compliance is usually obtained by the LEA via inspection reports and compliance schedules. As long as the affected party shows a good faith effort toward correction, the LEA will work with the party involved. If a solid waste facility operator fails to meet the requirements as provided in the laws and regulations, then the LEA will issue a written Enforcement Order (Stipulated Order, Notice and Order, or Cease and Desist Order). Noncompliance with the enforcement order could result in the LEA initiating the required procedures to revoke, suspend, or modify the SWFP, or in assessing administrative civil penalties or civil penalties.

Upon request by the appropriate person or party, pursuant to PRC section 44310, the IHO must be convened in order to deny, suspend, or revoke a SWFP, and to hear appeals regarding enforcement actions, permit conditions, and/or contest administrative civil penalties issued by the LEA. The IHO will have the authority to adjudicate issues brought before the IHO. The IHO will review the LEA’s actions based on the facts and applicable laws and regulations as they apply to each specific case brought before them.

C. The Director of Resources Recycling and Recovery

The CalRecycle Director retains authority as the final appeal process in those cases where the aggrieved party is still dissatisfied with the actions taken or the decision rendered by the IHO.

II. INDEPENDENT HEARING OFFICER

A. Introduction

The PRC requires that the procedures for designation and qualifications for the IHO be adopted by the governing body of the LEA. The San Diego City Council (Council), by San Diego Resolution [REDACTED], has authorized the Development Services Director or his or her designee to appoint an IHO for LEA proceedings as provided in these LEA Administrative Hearing Procedures (Procedures).

The City of San Diego LEA IHO shall meet one of the following qualifications:

1. The individual shall be an attorney in good standing with the California State Bar, and shall have been licensed a minimum of five years.
2. The individual shall be an attorney or administrative law judge in good standing, and who is employed or contracted by the California Office of Administrative Hearings.

B. Selection of an Independent Hearing Officer

The Development Services Director or designee shall appoint the IHO.

C. Duties of the Independent Hearing Officer

The IHO shall:

1. Schedule the hearings in accordance with PRC section 44310 and these LEA Procedures;
2. Accept petitions and file them for review;
3. Send out Notice of Hearings;
4. Conduct hearings in accordance with these Procedures;
5. Prepare written findings of IHO decisions; and
6. Provide for a record of the hearing (audio or court reporter).

III. TYPES OF CASES

A. Introduction

Upon request by the appropriate person or party, pursuant to PRC section 44310, the IHO shall schedule hearings to deny, suspend, or revoke a SWFP, and to hear appeals regarding enforcement actions and permit conditions issued by the LEA. The IHO will have the authority to adjudicate issues brought before the IHO. The IHO will review the LEA actions based on the facts and applicable laws and regulations as they apply to each specific case brought before him or her. There are eight types of cases which may require the IHO to hold a hearing:

1. Permit Denial – PRC § 44300
2. Suspension of a Solid Waste Facilities Permit – PRC § 44305
3. Revocation of a Solid Waste Facilities Permit – PRC § 44306
4. Change of Solid Waste Facilities' Design or Operation – PRC § 44004
5. Permit Condition by LEA Contested by Applicant – PRC § 44307
6. Enforcement Actions by LEA Contested by Owner or Operator – PRC § 44307
7. Petition Alleging LEA Failure to Act as Required by Law – PRC § 44307

B. Permit Denial

Permit denial is outlined in PRC section 44300, which states if a permit is to be denied, the LEA may, after holding a public hearing before the IHO, deny a solid waste facility permit. The IHO shall hear the reasons and decide if the permit denial is warranted. There are five conditions for denying a permit:

- a. Incomplete Application;
- b. Permit does not comply with CEQA;
- c. Proposed facility will not meet minimum standards for operating a solid waste facility;
- d. False and misleading application;
- e. The applicant has, in the last three years, been determined to be in violation of, or has been issued a final order for, violations of Title 14, Title 27, the PRC, or violations of the terms and conditions of a SWFP. The violations must be recurring and remain uncorrected.

The IHO shall conduct the hearing, determine the facts, and issue a decision. A copy of the decision will be sent to the CalRecycle Director. Further appeals must be submitted to the CalRecycle Director and/or Superior Court.

C. Suspension of a Solid Waste Facilities Permit

The criteria and procedure for the suspension of a SWFP are outlined in PRC sections 44305-44310. A SWFP can be suspended by the LEA based on a significant threat to public health, safety, and the environment, or an imminent and substantial threat to public health, safety, and the environment. If the threat is significant, but less than imminent and substantial, the LEA must notify the operator of their intent to suspend the permit. The operator then has 15 days to request a hearing on the matter. If the operator does not request a hearing within 15 days, the LEA may suspend the permit, or they may continue with the hearing before the IHO on their own initiative.

In the case of an imminent and substantial threat, the permit may be suspended or revoked prior to holding a hearing. The IHO must hold a hearing within three days of the LEA's suspension of the SWFP, or the first day thereafter requested by an aggrieved party. The IHO must render his or her decision the same day the hearing concludes if the permit was suspended due to imminent and substantial threat.

D. Revocation of a Solid Waste Facilities Permit

The procedure for the revocation of a SWFP is outlined in PRC section 44306. A SWFP may be revoked if the application for a SWFP misrepresented the facts or failed to disclose relevant factual information, or if the operator has been determined to be in violation of, or has been issued a final order for, violations of Title 14, Title 27, the PRC, or violations of the terms and conditions of a SWFP. As with the criteria for Permit Denial, the violations must be recurring and not corrected.

E. Change of Solid Waste Facility Design

PRC section 44004 outlines the requirements of all parties when a change to a solid waste facility is proposed. The IHO may hold a hearing by request of an operator who disagrees with a decision made by the LEA to disallow a change at a solid waste facility, or require a SWFP revision. In such cases, the operator may request the IHO to hear the facts of the case and render a decision regarding the LEA's actions.

F. LEA Permit Conditions Contested by Applicant

An applicant for a Solid Waste Facility Permit may contend that conditions in the SWFP issued by the LEA are inappropriate pursuant to PRC section 44307. In this case, the applicant has 15 days from the issuance of the permit to send the LEA a written request for a hearing on the matter.

G. LEA Enforcement Actions Contested by Operator

The LEA shall hold a hearing, before the IHO, upon a petition to the LEA after the taking of any enforcement action, including the assessment of a civil penalty, by the person subject to the action pursuant to PRC section 44307.

H. Petition Alleging LEA Failure to Act as Required by Law or Regulation

PRC section 44307 states "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 law or regulation. An operator, permit applicant, or a member of the public, may request convening hearing under the procedures of PRC section 44310 if the LEA has failed to act as required by law or regulation.

I. Civil Penalties

The Council must be notified of the LEA's intent to issue an administrative civil penalty for a violation of solid waste laws and regulations pursuant to PRC section 45011. The IHO shall hold a hearing to review the civil penalty to be assessed, if requested by the local governing body or the operator, as stated earlier under the section on contesting LEA enforcement actions.

IV. PUBLIC NATURE OF HEARINGS

All administrative hearings are considered public. Tapes of the proceedings, if available, may be obtained upon request.

Notwithstanding the above, at the request of either or both parties, the IHO may conduct all or part of a hearing by telephone, closed-circuit TV, or other electronic means. To the extent that a hearing is conducted by telephone, closed-circuit TV, or other electronic means, the availability of public observation is satisfied by giving members of the public an opportunity, at reasonable times, to hear or inspect the LEA's records, and to inspect any transcript obtained by the LEA.

The IHO is responsible for recording the hearing by audio tape at the LEA's expense. The LEA is not required to prepare a transcript. Any party, at their expense, may hire a licensed reporter to prepare a transcript from the audio tape recording, or cause additional recordings to be made during the hearing if the making of the additional recordings does not cause distraction or disruption.

V. PROCEDURES FOR HEARINGS

A. Parties

An IHO hearing involves certain and distinct persons, or "parties," who appear, participate in the proceeding, and give testimony and/or legal arguments. Parties may be called "applicants for a permit," "permittees," or "respondents." Applicants, permittees, and respondents are parties who are ordered to attend or have requested the hearing before the IHO. Parties may include the following:

1. LEAs – staff of the Development Services Department.
2. A person or organization seeking relief from the actions taken by the LEA (e.g., a permit revocation, suspension, modification, etc.).
3. A person or organization against whom enforcement is sought (e.g., the respondent in an action by the LEA for a permit denial or a Notice and Order).
4. A person or organization who alleges the failure of the LEA to act.

B. Initiation of Proceedings

A proceeding before the IHO may be initiated due to statutory requirement, upon request of any party authorized by law, or by order of the governing body. The person subject to an action by the LEA is notified in writing of the LEA's action or intent to act. The operator then has 15 days to request the IHO to review the facts of the case and render a decision regarding the LEA's actions to be taken. If the operator does not request a hearing by the IHO within 15 days, the LEA may initiate the intended action or proceed in presenting the facts of the case before the IHO if required by statute or regulation. The action is implemented if the IHO agrees with the

intended action based on the facts of the case. However, if the IHO does not agree with the intended action, based on the facts presented, the action intended is not implemented.

After initiation of a proceeding in which an applicant for a permit or a permittee is entitled to a hearing, the party, upon written request made to any other party no later than 72 hours prior to the hearing, is entitled to both of the following:

1. The names and addresses of witnesses to the extent known to the other party, including, but not limited to those intended to be called to testify at the hearing.
2. Inspect and make a copy of any relevant documents in the possession or custody or under the control of the other party, including statements made by any person pertaining to the subject matter of the proceeding, all writings pertaining to the subject matter of the proceeding.

Inspection or copying is not authorized by the PRC of any writing or item which is privileged from disclosure by law or otherwise made confidential or protected as an attorney's work product.

Any party may request information from any other party. If a party fails to forward the information, then the party requesting the information may serve and file a verified petition to force the information from the other party in the Superior Court for the county in which the hearing will be held, naming as the respondent the party refusing. The petition shall be served upon the respondent and filed within 15 days.

C. Notice of Hearings

At least 15 days prior to a hearing, except for suspensions, notice shall be sent to the applicant or permittee and the LEA. The notice of hearing shall be served by any of the methods of service listed in San Diego Municipal Code (Municipal Code) section 12.0406.

D. Disqualification of IHO

Any person designated to serve as an IHO is subject to disqualification for bias, prejudice, interest, or for any other reason for which a judge may be disqualified in a court of law. Applicable rules and procedures for the disqualification of an IHO shall be those promulgated by the City Manager for City Code Enforcement Hearing Officers pursuant to Municipal Code section 11.0301.

E. Subpoenas

Before the hearing has commenced, the IHO may issue subpoenas *duces impersona* (persons) and subpoenas *duces tecum* (records), if necessary, at the request of any party for attendance of witnesses or production of documents at the hearing. Compliance with section 1985 of the California Code of Civil Procedure shall be condition precedent to the issuance of a subpoena *duces tecum*.

The subpoena process shall be extended to all parts of the State and shall be served in accordance with sections 1987 and 1988 of the Code of Civil Procedure. No witness shall be obliged to attend at a place out of the county in which he or she resides, unless the distance is less than 150 miles from his or her place of residence. However, the IHO, upon affidavit of any party showing that the testimony of that witness is material and necessary, may endorse on the subpoenas an order requiring the attendance of that witness.

All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the enforcement agency, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties, shall receive mileage, in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court.

F. Evidence

Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Evidence is defined in California by Evidence Code section 140, which provides:

Evidence means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.

Whenever an IHO takes judicial notice of a matter, it shall be noted in the record and all parties shall be informed. Any party shall be given a reasonable opportunity to refute the judicially noticed matters.

Evidence may be presented which is either direct or indirect. *Indirect evidence* is commonly called circumstantial evidence. *Direct evidence* means “evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.” Cal. Evid. Code § 410.

Direct evidence includes:

1. Testimony by a witness who actually experienced or perceived the facts about which he or she is testifying (e.g., an inspector who testifies about taking a gas level measurement).
2. Opinion testimony by a witness qualified as an expert in the field in which he or she is testifying (e.g., an inspector who testifies about inspections findings).
3. A writing bearing on the issues of the hearing (e.g., a laboratory report showing that a water sample taken contained volatile organic compounds in excess of those allowed by law).

Circumstantial evidence does not directly prove a fact, but is evidence of facts or circumstances from which inferences may be drawn about the existence or nonexistence of facts at issue.

Hearsay evidence may be used solely for the purpose of supplementing or explaining other evidence; it is not sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

In order for evidence to be considered in determining the existence or nonexistence of a fact, it must be admissible. Certain factors affect the admissibility of evidence:

1. It should be relevant, i.e., any evidence having a tendency to prove or disprove any disputed fact that is of consequence to the determination of that action.
2. The witness must be competent to testify to the evidence adduced.
3. A foundation must be laid for documentary evidence to be admissible, i.e., that the document the person is offering as evidence is what they say it is. This is usually accomplished by testimony of a witness who has personal knowledge of the exhibit or document.

G. Hearsay Evidence

There are some instances where evidence, meeting all other requirements, is deemed inadmissible because of other rules or policies affecting it. Otherwise relevant evidence may be excluded because its probative value is substantially outweighed by the time it takes to present it, or by the probability that it will create undue prejudice, or because it is inadmissible hearsay or privileged. Hearsay evidence is defined by Evidence Code section 1200 as:

Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

Evidence of any other statement, which is offered to prove the truth of the statement, is hearsay.

The following are examples that are *not* hearsay evidence:

1. A statement made by a witness while testifying at a hearing in a particular case, is not hearsay in that case.
2. Any statement which is not offered to prove the truth of the statement.
3. When there is a controversy over whether certain things were said or done, not whether those things are true or false, evidence of those statements or facts is not hearsay. For example, a witness testifies that an inspector told him that he did not have to apply for a permit. His testimony is not hearsay if it is offered to show that his action in not applying was reasonable in light of what the inspector told him (regardless of the accuracy of the inspector's statement).

In the event that a party attempts to introduce evidence which is inadmissible for some reason, the opposing party may object to the introduction. Failure to object waives the party's right to

have the evidence excluded. An objection must be made on specific grounds. The IHO will rule on the objection, either sustaining it or overruling it. If it is sustained, the evidence is not admitted, and it may not be considered in making the decision. If the objection is overruled, the evidence is admitted.

H. Oral Evidence

Oral evidence shall be taken only on oath or affirmation. The oath or affirmation will be administered by the IHO. Each party may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in the direct examination, impeach any witness regardless of which party first called the witness to testify, and rebut the evidence against him or her. If the permittee does not testify in his or her own behalf, the permittee may be called and examined as if under cross-examination.

I. Absence of Applicant/Permittee

The hearing will proceed as normal whether the applicant or the permittee is present or not. An applicant's or permittee's failure to appear at the hearing will forfeit their opportunity to present information to the IHO. The burden of proof is on the permittee to establish that he or she is entitled to the action sought of the enforcement agency. The IHO may act without taking further evidence. Nothing in this deprives the permittee of the right to make any showing by way of mitigation.

J. Conduct of the Hearing

Whenever possible and agreeable to all parties, IHO hearings may proceed in an informal manner. This is the more preferable method to achieve compliance allowing stakeholders to raise all the important facts and issues to achieve a desired outcome being timely and voluntary compliance. A Stipulated Notice and Order may be utilized to record the agreed upon compliance methods and time schedule. However, all enforcement cases may not warrant this model especially if significant issues create a threat to public health and safety. In such cases, more formal proceedings may be necessary.

When the less formal option is not agreed upon by all parties, hearings may resemble courtroom trials, but with less formality and should proceed more quickly. They usually involve the active participation of the IHO in questioning witnesses. Facts are proved through the introduction of evidence. The hearing does not need to be conducted according to the technical rules relating to evidence and witnesses. All parties should have a fair opportunity to present information, and the hearing should flow in an orderly fashion. The IHO will preside over one issue at a time.

The following structure follows more formalized rules, and may be used as a guideline by the IHO on the flow of an individual case. In most cases, the party seeking relief which requested the hearing (normally the operator or other aggrieved party) will present first, followed by the LEA. In some cases, the LEA may need to go first to present clarifying information.

1. To begin each pending case, the party requesting the hearing (the “operator,” in this example) will present the facts of its case, presenting its testimony and documents.
2. Each witness must swear or affirm, to the IHO, to tell the truth. Witnesses testify to facts or lay a foundation for the introduction of evidence, or the opinions of an expert witness. The process by which the operator elicits this testimony is called direct examination. It takes the form of questions to, and answers from, each witness.
3. After each witness has been questioned on direct examination, the opposing party (the LEA, in this example) is permitted to question the witness regarding statements or answers given during direct examination; this process is called cross-examination.
4. After cross-examination of a witness, the IHO may ask questions of the witness.
5. In some instances, the operator may ask the witness additional questions relating to the questions asked during cross-examination; this is called redirect examination. The LEA may ask additional questions relating to the answers given to the redirect examination; this is known as re-cross examination.
6. The process may continue in this manner until there are no more questions or until the IHO curtails the questioning as repetitious or unproductive.
7. After the operator has presented all of its witnesses and exhibits, it will rest its case. Then the LEA follows the same procedures in presenting its case.
8. The operator requesting relief may wish to end with a closing statement that highlights the important facts and testimony of the case.
9. The LEA will then be allowed to present a closing statement.
10. The matter is then considered closed and submitted for decision; the IHO then makes a decision.

The party requesting relief, the applicant, permittee, or operator has the burden of proof. That party must provide a preponderance of the evidence for every fact necessary to support the claim for relief, not simply providing the larger quantity of witnesses. It is a measure of the quality of witnesses, documents, exhibits, etc., and the focus should be on which is more credible and convincing. The IHO may hear the testimony from the applicant and take action without hearing further evidence.

K. Findings and Decisions

A decision may be reached immediately following submission of the matter, or may require consideration by the IHO before a decision can be reached. A decision must be issued within 5 days after the case is submitted for decision, or as allowed by the PRC. The IHO shall issue a

decision in writing and shall include findings of fact, a determination of the issues presented, and the penalty, if any. Copies of the decision shall be sent to all parties and to the CalRecycle Director.

Before a case is submitted to the IHO for a decision, any party may request the IHO to take official notice of any generally accepted technical or scientific matter pertaining to solid waste management, or any fact which may be judicially noticed by the courts of the State.

In making a decision, the IHO must consider only the evidence and public comment received during the proceeding. Statements of the parties or their attorneys not made under oath are not evidence. Exhibits not entered into evidence are also not evidence. The IHO may not conduct his or her own experiments or go on a fact-finding mission without affording all parties the right to accompany them and rebut or impeach the evidence adduced. Similarly, the IHO may not engage in off-the-record private communications with parties or witnesses regarding the matter under consideration. The IHO decision becomes effective immediately after it is served upon the applicant. If an appeal to the CalRecycle Director is filed, the decision of the IHO is stayed pending determination by the CalRecycle Director. (Note: The appeal must be filed within 10 days of service of the IHO written decision.)

L. Reinstatement or Reduction of Penalty

A person whose permit has been revoked or suspended may petition the enforcement agency for reinstatement or reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition. If the LEA declines to take the action requested, the petitioner, if he or she so requests, shall be granted a hearing pursuant to the PRC Division 30, Part 4, Chapter 4, Article 2.

VI. APPEALS OF INDEPENDENT HEARING OFFICER DECISIONS

A. Introduction

PRC sections 45030-45042 outline the appeal process. Appeals may be made initial to the CalRecycle Director. The CalRecycle Director's decision may be appealed to the superior court.

Any person aggrieved by action on request for a hearing before the IHO may appeal to the CalRecycle Director to:

1. Review the written decision of the IHO.
2. Review the petitioner's request if the IHO failed to render a decision.
3. Review a decision by the governing body not to direct the IHO to hold a public hearing.
4. Review the IHO's decision not to hold a hearing.

Appeal Request Deadlines:

1. Within 10 days from the date of a written decision by an IHO.

2. Within 45 days from the date a request for hearing was received by the LEA on the failure of the IHO to render a decision or consider a petitioner's request.

B. PRC section 45031 CalRecycle Director Actions Regarding Appeals

After receiving a request for appeal by an aggrieved operator, within 30 days, the CalRecycle Director may do any of the following:

1. Decide not to hear the appeal if the applicant does not raise substantial issues.
2. Decide not to hear the appeal if the appellant did not participate in the IHO public hearing. The CalRecycle Director shall hear an appeal if the CalRecycle Director determines the appellant has a good reason for not attending.
3. Accept the appeal, and decide the matter based upon a review of the record of the LEA's IHO and any written material submitted by the aggrieved party.
4. Accept the appeal and hold a public hearing. The hearing must be held within 60 days unless all parties agree to a delay. At the hearing, the evidence before the board shall include:
 - i. The record before the IHO;
 - ii. Relevant facts as to any actions or inactions not subject to review by the IHO;
 - iii. The record before the LEA;
 - iv. Written and oral arguments submitted by the parties;
 - v. Any other relevant evidence the CalRecycle Director determines should be considered consistent with PRC Division 30.

C. PRC section 45032 Additional CalRecycle Director Actions Regarding Appeals

The CalRecycle Director may take the following actions regarding appeals:

1. The CalRecycle Director may only overturn an enforcement action by the LEA if it finds that the action was inconsistent with PRC Division 30, Title 14 and Title 27. This restriction reiterates the difficulty the CalRecycle Director would encounter overturning a LEA action that is correctly based on statutory or regulatory authority.

D. PRC section 45040 Appeals to Superior Court

Within 30 days after service of a copy of the decision from the CalRecycle Director, any aggrieved party may file with the Superior Court a petition for a writ of mandate for review thereof. The court will examine the records and other relevant evidence in making its review, and their proceedings shall be governed by California Code of Civil Procedure section 1094.5.

LEGAL REFERENCES

40 Code of Federal Regulations
Parts 258.1

California Code of Regulations
Title 14
Title 14, Division 7
Title 27
Title 27, Division 2

California Code of Civil Procedure
Section 1985
Section 1987
Section 1988
Section 1094.5(e)-(f)

California Evidence Code
Section 140
Section 1200

California Public Resources Code
Divisions 30 and 31
Division 30, Part 4, Chapter 4, Article 2
Section 40194
Section 44004
Section 44300
Section 44305
Sections 44305-44310
Section 44306
Section 44307
Section 44308(d)
Section 44310
Section 45011
Sections 45030-45042
Section 45032
Section 45040

Assembly Bill 939
Senate Bill 63

San Diego Resolution R- (DATE of Final Passage)