

SOLID WASTE INDEPENDENT HEARING PANEL
COUNTY OF SOLANO

JEPSON PRAIRIE ORGANICS,
Petitioner/Permittee

vs.

SOLANO COUNTY LEA,
Respondent,

Case No. LEA-2011-01

DECISION ON SUBMITTED MATTER

On January 18, 2011, in Conference Room A of the Solano County Events Center, the Solano County Solid Waste Independent Hearing Panel ("Hearing Panel")¹ heard this matter pursuant to Section 44307 of the Public Resources Code.²

Petitioner/Permittee Jepson Prairie Organics, a wholly owned subsidiary of Recology ("JPO"), was represented by Brian S. Haughton and Kathryn L. Oehlschlager of Barg Coffin Lewis & Trapp, LLP. Respondent Solano County Department of Resource Management, the local enforcement agency (the "LEA") under the California Integrated Waste Management Act of 1989 (Division 30), was represented by Deputy County Counsel Lori Mazzella. Various members of the public also appeared, including Larry Nixon, Rosie Enriquez, and Carol Maciel.

Evidence was received and the hearing was closed. Both parties agreed to an extension of the decision period from 5 days to 15 days. (§ 44310(c).)³

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¹ This Hearing Panel has been established by the Solano County Board of Supervisors in accordance with Section 44308 and is comprised of Solano County Supervisor Linda Seifert (the chairperson), Bruce DuClair and Christopher Fong.

² All further statutory references shall be to the Public Resources Code, unless otherwise indicated.

³ JPO and the LEA both briefed the matter and provided supporting materials. Together with the prepared recording and transcript of the hearing, these documents comprise the administrative record in this proceeding.

BACKGROUND

The following facts are not in dispute.

JPO operates a composting facility at 6426 Hay Road in Vacaville, Solano County, California ("Facility"). The Facility is operated under Compostable Materials Handling Facility Permit No. 48-AA-0083, issued by the LEA.

Odor impacts on nearby properties of the Facility have been an issue for JPO in the past. JPO has recently invested in new technology designed to reduce odors generated by its Facility. In response to odor complaints during early 2010, the LEA and JPO entered into a Stipulated Corrective Action Order ("Stipulated Order") dated March 27, 2010, pursuant to section 45020(b)(3). The basis of the Stipulated Order was the LEA's contention that the Facility was in violation of the state minimum standards for odor impacts, provided at 14 Cal. Code Regs. § 17867(a)(2).⁴

The Stipulated Order sets out short- and long-term actions to address odor and certain remedies should there be "Odor Exceedances." An "Odor Exceedance," for the purposes of the Stipulated Order, is defined as two "Verified Odor Events" within a 30 day period of time. A "Verified Odor Event" occurs when (1) the LEA receives one or more complaints from one or more residents during one day, and (2) the LEA determines that the odor reported by the resident(s) originates from JPO and is in violation of 14 Cal. Code Regs. § 17867(a)(2).

On November 17, 2010, the LEA received complaints of odor from two residents, one at 6156 Circle C Lane and the other at 6107 Clark Road, approximately three miles north/northwest of the Facility. The first complaint (from Circle C Lane) was received at 5:37 p.m., and the second was received at 5:41 p.m. At that time the wind was from the southeast at around 1 mile-per-hour and the temperature was on or about 58 degrees.

⁴ This subsection states in full: "All handling activities shall be conducted in a manner that minimizes vectors, odor impacts, litter, hazards, nuisances, and noise impacts; and minimizes human contact with, inhalation, ingestion, and transportation of dust, particulates, and pathogenic organisms."

1 Ricardo M. Serrano, Environmental Health Supervisor for the LEA, investigated the
2 complaints shortly after receiving them. After his investigation, Serrano completed a
3 “Compostable Materials Handling Operation and Facility Inspection Report” in which he
4 attributed the odor to the Facility and found a violation of 14 Cal. Code Regs. § 17867(a)(2).
5 Based on Serrano’s report, on November 19, 2010, the LEA issued a letter to JPO, with the
6 attached report by Serrano, stating that a “Verified Odor Event” occurred on November 17, 2010
7 (“Violation Report”).

8 On November 29, 2010, JPO appealed the LEA’s issuance of the Violation Report.
9 Specifically, JPO appealed:

- 10 1. “[I]ssuance of the November 19 violation report”; and
- 11 2. “[A]rbitrary and capricious application of [14 Cal. Code Regs. § 17867(a)(2)]”;
- 12 and
- 13 3. “[F]ailure to use an objective standard in measuring odor.”

14 After the LEA provided notice under Section 44310, a hearing was conducted in
15 accordance with Section 44307 and the Hearing Panel’s Procedures Manual.

16 DISCUSSION

17 1. Jurisdiction of the Hearing Panel

18 The Hearing Panel must first address the question of whether the Violation Report is
19 subject to this appeal process. The LEA contends in its pleadings that the hearing should not
20 proceed on the merits because the issuance of the Violation Report pursuant to section 44307
21 was not an “enforcement action pursuant to [Section 45000 *et seq.*]” Furthermore, the LEA
22 contends that JPO is unallowably “trying to...circumvent the enforcement process to which JPO
23 ostensibly already consented.” (LEA Brief at p.3.)

24 The Hearing Panel disagrees with the LEA. Although the LEA is correct that the
25 Violation Notice was “[s]imply marking a violation on an inspection form [and] does not have

1 the legal impact of a formal Notice and Order” (LEA's Brief at p.4), that statement ignores three
2 important facts. First, the Violation Notice was formally issued pursuant to the Stipulated Order,
3 which directly resulted from the LEA taking administrative enforcement action. (See LEA's
4 Brief at p.2; section 45020(b)(3).) Even though the parties entered a stipulation, the Stipulated
5 Order is nevertheless a “corrective action order” issued pursuant to section 45000 *et seq.* A
6 second fact ignored by the LEA is that the Violation Report does have a “formal” impact on JPO,
7 in that it subjects it to a certain monitoring plan and could lead, upon a second “Verified Odor
8 Event,” to a reduction in food scraps and, possibly, “additional enforcement action of any kind.”
9 (LEA's Brief at pp.3-6; 8.) A third fact ignored by the LEA is that, under its interpretation, JPO
10 could hypothetically be noticed for a Verified Odor Event once every thirty days and have no
11 recourse to question the LEA’s findings, which raises due process concerns.

12 Considering these three important facts, the Hearing Panel determines that the Violation
13 Report is effectively an “enforcement action” under section 45000 *et seq.*, which in turn may be
14 appealed to the Hearing Panel by JPO. (Section 44307.)⁵

15 **2. Findings of Fact**

16 Based on the evidence presented at the hearing, the Hearing Panel makes the
17 following findings of fact:

18 a. Two separate complainants, Larry Nixon on Circle C Lane and Rosie Enriquez on
19 Clark Road, detected a rancid and putrid odor on November 17, 2010. The odor was akin to
20 rotting flesh or dirty diapers.

21 b. The complainants were strongly and negatively impacted by the odor.

22 c. Approximately 15 minutes after receiving the first complaint, Ricardo M.
23 Serrano, a trained employee of the LEA, confirmed the presence of the same odor on Circle C
24 Lane.

25 ⁵ It should also be noted that at the hearing the LEA’s counsel appeared to waive this issue in the interest of economizing the parties’ and the Hearing Panel’s time.

1 d. Serrano detected the same odor in driving from Circle C Lane to the Facility and
2 at the Facility itself, in an attempt to trace the odor back to its source.

3 e. The odor matched the odor being generated by the composting activities at the
4 Facility, and not odors emanating from other possible sources in the vicinity, such as the Dixon
5 storm water pond, two wastewater treatment ponds, a slaughterhouse, manure, and compost
6 material used as fertilizer on surrounding agricultural land.

7 f. Odor can travel in “pockets” and may not remain at one location continuously.

8 g. JPO personnel detected a slight odor shortly after receiving the complaints, which
9 were relayed to JPO by the LEA, at the corner of Hawkins and Clark roads.

10 h. Many factors affect the detection of odor, including when the odor is measured,
11 whether the odor is intermittent, wind speed, temperature, and the senses of the person detecting
12 the odor.

13 i. The Nasal Ranger is not mandated by the California Department of Resources
14 Recycling and Recovery (“CalRecycle”) and its use is not required in the agreed upon Stipulated
15 Order.

16 j. The Nasal Ranger is dependent on a human user making the ultimate
17 determination as to an odor’s characteristics, most notably its type.

18 **3. Determination of the Issues**

19 **a. JPO’s violation of 14 Cal. Code Regs. § 17867(a)(2)**

20 As established in Findings of Fact (a),(c),(d), and (e), on November 17, 2010, odor
21 produced by JPO’s Facility impacted multiple local residents. This was independently
22 confirmed by a trained person at the LEA a short time later, as established in Findings of Fact
23 (c),(d), and (e). Even JPO detected an odor, as established in Finding of Fact (g). Although JPO
24 contends that such odor was slight and did not necessarily come from the Facility, as established
25 in Finding of Fact (f) the fact that odor travels in “pockets” means that the fact that odor was not

1 evident to JPO personnel did not mean that the odor was not present at the scene. Indeed, the
2 Hearing Panel recognizes the challenges inherent in measuring odor, as established by Findings
3 of Fact (f) and (h); however, JPO has not been able to overcome the compelling evidence
4 presented by the LEA that the odor emanated from the Facility.

5 Furthermore, the odor was strongly objectionable, as established by Findings of Fact (a)
6 and (b). It was so strong, in fact, that it could be detected three miles away approximately 15
7 minutes after being detected, as established in Findings of Fact (c) and (d).

8 As such, the LEA justifiably determined that JPO's handling activities at the Facility
9 were not "conducted in a manner that minimizes...odor impacts [and] nuisances." (14 Cal. Code
10 Regs. § 17867(a)(2).) It is true, as JPO contends, that the state minimum standard regulation
11 calls for the minimization – but not the elimination – of odor impacts. However, JPO has not
12 been able to overcome the compelling evidence presented by the LEA that the odor was by no
13 means minimal.

14 In the final analysis on this issue, JPO has not been able to show by a preponderance of
15 the evidence that the LEA failed to act properly in issuing its Violation Report.

16 **b. Arbitrary and capricious application of 14 Cal. Code Regs. § 17867(a)(2)**

17 JPO contends that the LEA failed to apply "predictable standards" to measure the source
18 of the odor and the degree to which the odor was objectionable, rendering its current detection
19 method arbitrary and capricious. (JPO Brief p.5.) As a way to provide such predictability, JPO
20 suggests that the LEA "establish objective standards for the strength and duration of odors" and
21 specifically suggests the use of the Nasal Ranger. (Id.)

22 However, JPO has not shown by a preponderance of the evidence that the LEA's
23 practices, including its actions in issuing the Violation Notice, are insufficient. Four factors
24 weigh against JPO. First, as established in Finding of Fact (i), the Nasal Ranger is not mandated
25 by CalRecycle, nor is it mandated by the Stipulated Order. Second, the detection of odor

1 fundamentally involves the need for a human being to smell it with their nose, so there is always
2 a degree of subjectivity in the measurement. In fact, as established in Finding of Fact (j), the
3 Nasal Ranger itself is dependent on a human user making the ultimate determination as to an
4 odor's characteristics. Third, there is a strong argument to be made that the unaided human nose
5 is the best measurement to use in this situation, as 14 Cal. Code Regs. § 17867(a)(2) would
6 appear to be aimed at protecting residents who do not use field olfactometers in everyday life.
7 Lastly, the LEA's actions in this instance – receiving complaints of odor, independently
8 confirming the existence of such odor by a trained LEA representative, and using expertise to
9 determine the source and strength of the odor – constitute actions that the Hearing Panel finds to
10 be fair and reasonable.

11 For these reasons, JPO did not present sufficient evidence to sway the Hearing Panel on
12 this issue.

13 **c. Failure to use an objective standard in measuring odor**

14 For similar reasons as those noted in Section 3(b), the Hearing Panel rules against JPO on
15 this issue. As noted above, the Nasal Ranger is not mandated by CalRecycle or the Stipulated
16 Order. If the parties intended that an objective standard be used, it would have been placed in
17 the Stipulated Order, which JPO signed. Moreover, measuring odor is inherently subjective,
18 even when a purportedly objective device like the Nasal Ranger is used. In addition to these
19 points, JPO did not counter the LEA's assertion in its Brief, based on the caselaw, that
20 "numerical standards are [not] necessary to confirm the presence of excessive odors or the
21 maintenance of a public nuisance." (LEA Brief p.9.)

22 For these reasons, on this issue JPO has not been able to show by a preponderance of the
23 evidence that an objective standard must be used in measuring odor.

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1 **DISPOSITION**

2 For the reasons above, the Hearing Panel rules that JPO has not shown by a
3 preponderance of the evidence that the LEA acted improperly in issuing the Violation Report to
4 JPO. This decision shall take effect immediately upon service, as provided in Section 45017.

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6 DATED: 1/31, 2011

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10 Supervisor Linda Seifert (Chair)


Bruce DuClair


Christopher Fong