CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

WATER QUALITY INVESTIGATION ORDER NO. R9-2006-0044

CITY OF SAN MARCOS
BRADLEY PARK/OLD LINDA VISTA LANDFILL
SAN DIEGO COUNTY

THE CITY OF SAN MARCOS' REPLY FOR THE ADMINISTRATIVE APPEAL OF WATER QUALITY IVESTIGATION ORDER NO. 29-2006-0044

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I.

INTRODUCTION

The County of San Diego's (County) opposition to the City of San Marcos' (City) appeal of Order 2006-044 requesting that the County be added as a discharger to the Order for Bradley Park/Old Linda Vista Landfill (the Site) boils down to three arguments:

1. The City's appeal of Order 2006-044 is time-barred;
2. The Joint Exercise of Powers Agreement executed between the City and the County in August 1986 doesn't mean what it says; and
3. Irrigation for the park is causing the waste discharge – *not the County's placement and burning of municipal waste for twenty-three years.*

These arguments don't survive scrutiny. The City's appeal of Order 2006-044 is neither precluded by the principles of collateral estoppel nor is it time-barred. The Joint Exercise of Powers Agreement (JPA) means what it says: the "County will retain liability for landfill-related incidents and responsibility for testing and/or remedial activity . . . ." Nothing indicates that the parties intended for the County's responsibility to change over time as the park was developed. After all, the purpose of granting the Site to the City was to develop it into a park, and the purpose of the JPA was to establish responsibilities between the two public entities prior to the second phase of park development.

Last, there is no evidence that the operational issues raised by the County are the cause of the groundwater contamination or exposed waste at the Site. Again, the County's own grant deed required the Site to be developed into a park. If the County was concerned that park irrigation would be problematic, the time and place to require

constraints on irrigation of the park or other operational issues was in the JPA.

Alternatively, the County could have withheld its approval during the development process. Instead, the County required park development with its deed restriction, affirmatively approved the park plans in 1987, and approved the City's applications for federal Community Development Block Grants. The handful of operational issues identified by the County are not the cause of all waste discharge at the Site. The waste discharge is a result of the County's use of the Site as landfill for decades. The County should be named as a discharger/responsible party on Order 2006-044.

II.

THE COUNTY SHOULD BE ADDED AS A DISCHARGER/ RESPONSIBLE PARTY TO ORDER R9-2006-044.

A. San Marcos' appeal of Order 2006-044 is not procedurally barred.

The County argues that the City's appeal of Order 2006-044 is barred under the principles of collateral estoppel. The doctrine of collateral estoppel bars a party from re-litigating issues that were previously decided by a tribunal, or in some cases, from re-litigating issues that could have been decided in an earlier proceeding. "[A] party is barred from raising an issue of fact or law *if the issue was actually litigated and determined by a valid and final judgment in a previous proceeding . . . .*" *George Arakelian Farms, Inc. v. Agricultural Labor Relations Board* (1989) 49 Cal.3d 1279, 1289-1290 (italics added). Here, issues relating to Order 2006-044 have not been fully presented, nor has the San Diego Regional Water Quality Control Board ("RWQCB") reached a final decision.

The County argues that San Marcos is barred from appealing Order 2006-044 because it did not pursue an appeal of a separate Order, Addendum No. 1 to Order 97-11 issued six years ago. This argument ignores the fact that there are two separate and distinct Orders, issued under different sections of the Water Code and requiring two different scopes of work. In fact, the RWQCB's cover letter for Order 2006-044 expressly provided that San Marcos could appeal the enclosed, new Order if it desired. In response, San Marcos submitted a timely appeal of Order 2006-044, and presentation of the case to the RWQCB has just begun.

The fact that the Orders involve separate sections of the Water Code is particularly important because the logic relied on by Mr. Robertus in rejecting the City's request in 2000 focused on interpretation of § 13304(f) (now subsection j) which is limited in application to that particular section of the Water Code. Order 2006-044 is not premised upon § 13304, but instead upon § 13267, which is not subject to the same arguments.

Second, the County assumes that acceptance of one administrative order, premised on particular circumstances, forever forecloses arguments on separate, future Orders, premised on different circumstances. San Marcos could not have appealed matters not yet identified by the RWQCB.[1]

Last, the County argues that San Marcos' letter to Mr. John Robertus, the Executive Director of the RWQCB, requesting that the County should be named as a

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[1] The two cases cited by the County for the proposition that parties may not raise issues that could have been previously litigated are cases where courts applied collateral estoppel after the parties litigated their matters *in court*. Contrary to the County's assertion that its cited language in *Sutphin v. Speak* applies to "various scenarios, including one such as this," there is no indication that the *Sutphin* Court in 1940 contemplated application of this principle to administrative proceedings.

responsible party under Addendum No. 1 to Order 97-11, constitutes the "full and fair hearing" required by the law to invoke the doctrine of collateral estoppel. Mr. Robertus' letter back to San Marcos stated that he would not recommend to the Board that the County be added as a responsible party. (See Exhibit 5 to the City's Opening Brief.) Since this issue was not fully presented (if presented at all) and considered by the Board in making its decision, there was no "adjudicatory proceeding" on this issue. An administrative decision is not res judicata when the agency is not acting in a quasi-judicial capacity and the decision is not the result of an adjudicatory proceeding. *Penn-Co. v. Board of Supervisors* (1984) 158 Cal.App.3d 1072, 1077, 1080. *See also Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 794. The doctrine of collateral estoppel simply does not bar the City's appeal of Order 2006-044.

Perhaps what the County really means is that since San Marcos didn't pursue an appeal of Addendum No. 1 to Order 97-11, it is time-barred in pursing an appeal of Order 2006-044. Again, such an argument ignores the separate existence of the two Orders. More importantly, it ignores the ability of the RWQCB to revisit its own Orders (*see* Cal. Water Code § 13320(a)). The procedural bars raised by the County simply do not prevent the RWQCB from considering San Marcos' appeal.

B. The Joint Exercise of Powers Agreement means what it says.

The County complains that the impact of the park improvement projects has "changed the site, and changed the relationship between City and County. It also requires the JPA to be interpreted through the filter of the changed circumstances and character of the site." (Opposition Brief, p. 4.) Written agreements are not so easily abandoned.

The deed transferring title from the County to the City *required* that the Site be converted into a park. The City submitted plans for its second phase of park development to the County, who approved those plans as "consistent with the goals for beneficially utilizing closed landfills." (See Exhibit 4 to City's Opening Brief.) The County also approved plans for the City's applications for Community Development Block Grants.

There is simply no way the County can argue that it did not or could not anticipate that the Site would be turned into a park, that light fixtures would be installed, and that irrigation would be required. If the County had concerns about these items, the place to resolve those concerns should have been in the JPA. The County could have required specific approval of any park developments. It didn't. Instead, it agreed to "retain liability for landfill-related incidents and responsibility for testing and/or remedial activity required . . . ." The purpose of the JPA is not just to provide the County with access to the Site; it is to clarify that the County is responsible for investigation and remedial activity associated with the landfill.

These responsibilities did not change with the City's adoption of a Negative Declaration in 1997 which stated the City would "maintain the cover to ensure proper drainage, prevent erosion and will fill subsided areas and cracks to prevent intrusion of water and surface gas emissions. The County will monitor for groundwater and landfill gas migration." This is consistent with the JPA. The City handles surface cover issues - i.e., maintenance of park improvements - and the County is responsible for landfill-related matters – i.e., subsurface conditions and requirements – a responsibility it continued to perform after 1997 by conducting monitoring in compliance with Order 97-11.

The JPA means what it says: The County is responsible for landfill-related incidents including testing and remedial activity. No agreements over the past twenty years since execution of the JPA changed the County's responsibility. The RWQCB does consider contracts that assign responsibility when amending its Orders. In this case, the RWQCB should amend Order 2006-044 to add the County as a responsible party.

C. The County is a discharger/responsible party under Cal. Water Code § 13267.

In addition to being a responsible party by contract, the County is a responsible party under Water Code § 13267. The County dismisses the City's argument that § 13267 is broad in scope as lacking legal authority. To the contrary, it was the SWRCB itself in its review of the "Duck Pond" Order (Order No. WQ 96-2, February 22, 1996; 1996 Cal. ENV LEXIS 3) that discussed the broad coverage of § 13267, which is intended to apply to both current and past discharges. The County, through its operation and inadequate closure of the Site, discharged waste that could affect water quality.

Furthermore, it is not illogical (as argued by the County) for § 13267 to apply to a broader set of dischargers than those identified under § 13304. While the two statutes are similar, they are in fact different, and the difference makes sense. Section 13267 was specifically amended in 2001 to allow the RWQCB to name entities the RWQCB *suspects* of having discharged waste. Section 13304 does not include this same language. The amendment to § 13267 provides the RWQCB with broad enforcement authority for investigations. Upon learning information from an investigation, the RWQCB can then be more precise when naming dischargers under § 13304.

This enforcement scheme is reasonable and fits this case: the RWQCB has more than enough reason to suspect the County of having discharged waste at the Site. Since the County meets the definition of a discharger under § 13267, the RWQCB should add the County to Order 2006-044 so it participates in the Site investigation. After learning more about the Site from the investigation, the RWQCB can then decide if it should proceed under § 13304, and if so, who should be a responsible party and contribute to any necessary remediation. While the City disagrees that § 13304(j) limits the County's potential liability under § 13304, no such limitation exists in § 13267 and the parties need not reach the issue of the County's liability under § 13304 at this time. However, if the legislature had wanted the same potential protections provided under § 13304 to apply to § 13267, it would have added the same language to § 13267. The legislature didn't add such language, and such potential limitations do not apply here.

D. The County's list of operational issues do not eliminate its liability.

The County provides a list of six operational issues related to park activities that the County asserts are the true cause of any waste discharge. Some of these arguments underscore the County's responsibility, others are circumstances the County accepted under the JPA, and some are just irrelevant. However, even if the RWQCB assumes that each of these issues contribute to the discharge of waste into the groundwater (a fact that the City doesn't concede), the County's use of the Site as landfill and the results of the SWAT Investigation are sufficient basis for the RWQCB to conclude that the County's actions have resulted in the discharge of waste, and the County should be named to Order 2006-044 pursuant to § 13267.

First, the County complains about the installation of light poles. However there is no evidence that the installation of the light poles (which for the most part are dry installations), nor any minimal digging that potentially occurred for fireworks, materially affected or substantially altered the landfill containment system. Further, the County knew that lights would be installed as part of the park development. The County agreed to maintain its responsibility for subsurface conditions in light of this knowledge.

Second, the County asserts that six borings installed by the County Water Authority (CWA) in the drainage swale were left open resulting in exposed refused. However, the CWA selected this location for a regional water pipeline specifically because the County asserted it had not deposited trash in the drainage swale. But the CWA did encounter trash in the drainage ditch, demonstrating that the County improperly deposited waste in this area. As a result, the CWA was forced to abandon its project and the pipeline was never installed.

Furthermore, the County's correspondence to the CWA shows that the County, the regulatory authority for the landfill, approved these well permit applications and the plan to destroy the wells. (Ex. G to County's Opposition.) As the entity that: 1) deposited the waste in the drainage swale; 2) is responsible for landfill-related matters; and 3) the regulatory agency providing oversight for the boring installation and abandonment/ destruction process, the County was in a much better position than San Marcos to monitor and ensure proper abandonment of the borings. The County placed trash in the drainage swale, and as heavy rainfall causes the soil to erode in an area where trash wasn't supposed to exist, it should be the County that remediates the exposure of that waste.

The County also complains that irrigation of the park is the true cause of the waste discharge. Again however, the County forgets that *it required the Site to become a park.* The City developed mitigation measures to control excess irrigation and runoff, and submitted such measures to the RWQCB in 2000. As reported to the RWQCB, during normal irrigation cycles the flow from the drainage pipe was measured to be less than .0004 CFS – an extremely minimal flow.

Even if the RWQCB assumes that the six issues identified by the County contributed to the discharge of waste to groundwater, there is no evidence that *only these activities* caused the waste discharge at the Site. These items don't outweigh the evidence that the County's disposal of waste at the Site for twenty-three years also could contribute to the waste discharge at the Site. The results of the SWAT Investigation and the discovery of waste in the drainage swale is sufficient evidence for the RWQCB to at least *suspect* the County has discharged waste and is a responsible party under § 13267.

III.

THE RWQCB SHOULD IDENTIFY THE TASKS THAT ARE LANDFILL-RELATED MATTERS

Despite the RWQCB's invitation to San Marcos on the cover letter for Order 2006-044 to appeal the Order if it found necessary, the County argues that the RWQCB is barred from revising the Order and adding the County as a responsible party. As discussed in its Opening Brief and this Reply, San Marcos disagrees with this argument. However, it the RWQCB believes it is somehow procedurally barred from adding the County as a responsible party to the Order, then San Marcos requests that the RWQCB

identify the tasks in the Evaluation Monitoring Program Workplan submitted by San Marcos to the RWQCB on November 2, 2006 (the "EMP") that are, for investigation purposes, landfill-related matters. The RWQCB, the agency with the technical expertise in this area, should be well suited to make such determinations.

As discussed in the EMP, San Marcos admits there are some tasks that are related to the park and its improvements, and San Marcos has indicated a willingness to address such matters. For example, the "seeps" from the ballfield drainage systems are likely caused by the installation of the park and its improvements. As described in Section 4.2 of the EMP, the City has twice responded to these "seeps" and has located the points of discharge and remediated them. To the extent further work is required to address these "seeps" or discharges, San Marcos will address these matters.

However, the evidence supports that, at least for investigation purposes, many of the other tasks are primarily landfill-related matters. An indicator of which tasks the County believed to be landfill-related are those tasks identified in the County's own August 2004 Landfill Evaluation Program Work Plan ("LEP"). Additionally, the results of the County's 1991 SWAT Investigation attributed landfill gas migration and eventual dissolution into groundwater as the likely source of vinyl chloride and other chemicals dissolved in the groundwater. Thus, groundwater beneath the Site was clearly impacted by landfill contaminants as early as 1991, prior to major development of recreation facilities by San Marcos.

Also, monitoring wells upgradient of the landfill show concentrations of landfill contaminants. (See EMP, Figure 2 - MW SM-2; see also Ex. 6 to City's Opening Brief.)

These findings are evidence that the groundwater problems at the Site were not generated solely by the Park or its improvements. Accordingly, San Marcos requests that the RWQCB concur with the allocations detailed in Section 5.0 of the EMP regarding which tasks are landfill-related matters and which tasks are caused by the park improvements.

IV.

CONCLUSION

The County operated a landfill at the Site for twenty-three years. When it stopped using the landfill it required that the Site be used only as park. To ensure this use the County agreed to be responsible for any investigation and remediation required because of the landfill. There is sufficient technical evidence for the RWQCB to at least suspect that waste discharges at the Site are a result of the County's disposal of waste during its operation of the landfill, and the County should be added as a discharger/responsible party to Order No. 2006-44 pursuant Cal. Water Code § 13267. Alternatively, if the RWQCB believes that it is procedurally barred from adding the County to Order No. 2006-44, the City requests that the RWQCB concur with the allocation of tasks in Section 5.0 of the EMP between landfill-related matters and park-related matters.

Respectfully submitted,

DATE: Jan 8, 2007

OPPER & VARCO, LLP

By:
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ATTORNEYS FOR PETITIONER, THE CITY OF SAN MARCOS

Administrative Appeal Of INVESTIGATIVE ORDER R9-2006-44

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to this action; my business address is 225 Broadway, Suite 1900, San Diego, California 92101. On **January 8, 2007**, I served the document entitled: **THE CITY OF SAN MARCOS' REPLY FOR THE ADMINISTRATIVE APPEAL OF WATER QUALITY IVESTIGATION ORDER NO. 29-2006-0044** by serving a true copy of the above-described document in the following manner:

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Mr. James R. O'Day
Office of County Counsel
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Dated: January 8, 2007

Linda C. Beresford