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' ADMINISTRATIVE APPEAL OF WATER QUALITY IVESTIGATION ORDER NO. 29-2006-0044

NOVEMBER 30, 2006

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I.

INTRODUCTION

In the 1960s the County of San Diego (County) gave the City of San Marcos (City) land for the specific purpose of building a public park. The County had used the land as a landfill for about twenty years following World War II, but the landfill had since been "closed." The park was developed in phases: the first phase was the installation of ball fields in the 1970's. For the second phase, starting in the 1980s, the City wanted to expand the park to accommodate more ball fields, playing fields, and outdoor recreation activities, but to do this the City needed two things – assurance from the County that it would continue to be responsible for the landfill related aspects of the park, and money.

The City got money in the form of a development grant from the federal government, which required that the City get approvals of its plans from the County and also required that the City maintain ownership of the park. The City asked for and got assurance that the County would continue to meet its obligations to maintain the landfill. This was documented through a Joint Exercise of Powers Agreement (JPA), which was drafted by the County, reviewed by County Counsel, and submitted for approval and entry into the minute books of the Board of Supervisors in 1986. The JPA provided that the County would continue to be responsible for "landfill related incidents" or requirements – even if those requirements changed due to "any subsequent legislation." The City accepted responsibility for all the "park related incidents" that might stem from operation of the park. Construction of the park expansion followed, after receiving approval from the County for the new improvements.

From 1986 through 2005, the County lived up to its promises in the JPA. It monitored the landfill, undertook investigations when requested, and submitted regular reports of its activities to the San Diego Regional Water Quality Control Board (RWQCB). Then, in 2005, the County stopped living up to its obligations. The City believes this occurred because of a mistake on the part of the staff of the RWQCB. In 2000, the RWQCB informed the City that the landfill would be regulated under Order No. 97-11. The City was told that it would be named as the entity responsible for the landfill because it was the owner of the park. The City objected immediately, advising the RWQCB that the County should be added to the Order because of the JPA and their historic responsibility – but the RWQCB refused to do so on the grounds that an opinion in a recent and unpublished appellate case, the "Duck Pond" decision, prevented the requested action. It seemed that the RWQCB had interpreted the opinion as creating a regulatory "cloak of invisibility" for the County.

Although it was not named on Order 97-11, the County *still* faithfully performed its obligations under the JPA, maintaining the landfill as it had done since 1945. The City did not pursue an appeal of Order 97-11 as the reason to do so was moot. However, once the RWQCB began requesting more active investigation and testing of the landfill, the County started relying on its regulatory cloak. On April 17, 2006, the RWQCB issued a new order, Investigative Order No. 2006-44, issued pursuant to Cal. Water Code § 13267 (not § 13304, as was at issue in the "Duck Pond" case), which again did not name the County. The City turned to the County to respond to the new Order, but the County has refused to do so. The city filed a claim with the County to get their cooperation, and it

was denied. The City has therefore appealed Order No. 2006-44 and requests that the RWQCB amend it to add the County as a discharger. The law, facts, and public policy require that result.

II.

ISSUES ON APPEAL

This appeal presents three issues for the RWQCB's resolution:

1. *Proper Parties.* Cal. Water Code §13267 provides that "any person...who has discharged...waste within its region" shall furnish technical reports to the RWQCB. Should the County, which discharged the waste that triggered Order No. 2006-044, be considered a discharger under § 13267 and be added to that investigative order, as requested by the City?

2. *Joint Powers Agreement.* The County and City executed a written agreement establishing the County's responsibility for "testing and/or remedial activity" at the historic San Marcos landfill. Should this Agreement be disregarded by the RWQCB when issuing Orders and naming parties responsible for the testing and/or remediation of the landfill?

3. *Unpublished Case Authority.* Is it appropriate for the RWQCB staff to rely on an unpublished appellate court opinion as authority for not naming the County on Orders requiring monitoring, investigation and maintenance of the landfill?

The City requests that the RWQCB find that the County is a responsible party for landfill-related matters under Cal. Water Code § 13267 and the Joint Powers Agreement, and recognize that the County's responsibility is not limited by the unpublished appellate

decision in the "Duck Pond" matter. Alternatively, the City requests that the RWQCB find that the items identified as landfill-related in Section 5 of the Evaluation Monitoring Program Workplan submitted by the City to the RWQCB on November 2, 2006 are landfill-related impacts, not park-related impacts.

III.

FACTUAL BACKGROUND

A. Creation of the Park: a gift with strings.

After operating the historic San Marcos landfill for 20 years, the County issued two Quit Claim Deeds to the City for a portion of the landfill (the "Site"). The deeds contained express conditions that "the real property . . . shall be used and maintained for public park purposes and for no other purposes." If the Site was ever used for any purpose other than a public park, it would revert back to the County. San Marcos passed resolutions accepting the deeds and restrictions imposed by the County.

Planning for the expansion of the park began in the 1980's, but construction did not commence until after the parties agreed on continuing responsibility for the Site. The County originally proposed that ownership of the Site be returned to it, and the County would then lease the land back to the City for the park.[1] The proposed lease provided that the County would continue to be responsible for all landfill requirements. However, the lease concept was rejected because of grant conditions that required City ownership, and instead the City requested assurances from the County that it would remain

[1] Exhibit 1 (attached) is a true copy of a letter from the County, dated April 7, 1986, proposing a lease agreement with the City of San Marcos.

responsible for landfill-related matters. On August 12, 1986 the parties documented the County's obligations for the Site and executed a "Joint Exercise Of Powers Agreement Between The City Of San Marcos And The County of San Diego." The JPA[2] contains the following provisions:

(1) County will continue to retain liability for landfill-related incidents and responsibility for testing and/or remedial activity required pursuant to existing law, and any other subsequent legislation. County will defend and indemnify City and its employees against landfill-related incidents.

(2) County will retain right of entry to install, monitor and maintain monitoring and methane gas control systems as required for Closed Landfills.

(3) The City will assume liability and maintenance responsibility for park-related incidents and improvements and will defend and indemnify County and its employees against such incidents/improvements.

B. The County's compliance with the JPA.

On March 16, 1987 the RWQCB notified the City that the Site was subject to California Administrative Code, Title 23, Chapter 3, Subchapter 15 *Discharge of Waste to Land.* The City responded to the RWQCB in a letter dated April 1, 1987 with a copy of the JPA and an explanation that the County was responsible for landfill matters.[3] The County subsequently assumed those responsibilities, consistent with the JPA.

On April 14, 1987 the County reviewed and approved San Marcos' plan for redevelopment of the Site into a public park ("Bradley Park"), stating the plan was

[2] Exhibit 2 (attached) is a true copy of the Joint Powers Agreement dated August 12, 1986.

[3] Exhibit 3 (attached) is a true copy of a letter to the RWQCB from the City dated December 23, 1986 informing the RWQCB of the JPA.

"consistent with the goals for beneficially utilizing closed landfills."[4] Throughout development, the City has sought and received input and approval from the County for many of the Park's improvements. In fact, much of Bradley Park's development was funded through the U.S. Department of Housing and Urban Development Community Development Block Grant ("CDBG") program, which requires detailed applications and County approval before authorization to proceed or funds are released.

On September 26, 1991, consistent with its requirements under the JPA, the County submitted a comprehensive SWAT Report for the landfill to the RWQCB. The SWAT investigation identified five volatile organic compounds (including vinyl chloride), as well as arsenic, manganese, iron, total dissolved solids, chloride, and sulfate, all in excess of drinking water standards beneath the site. Elevated concentrations of arsenic and acetone were detected in vadose zone soil samples. The SWAT report attributed landfill gas migration and dissolution into groundwater as the likely source of vinyl chloride in groundwater and recommended continued groundwater monitoring at the Site. It is apparent that groundwater beneath the Site was impacted by landfill contaminants prior to 1991, before the major development of park facilities by the City.

Consistent with the JPA, the County has historically performed all work to monitor landfill gases and leachate and to maintain the landfill cap, while the City has maintained landscaping and Park-related improvements. Since 1994 the County has followed the SWAT Report recommendations and has provided semiannual and annual monitoring reports to the RWQCB. The County continued to perform these obligations following the

[4] Exhibit 4 (attached) is a true copy of a letter from the County to the City dated April 14, 1987.

adoption of Order No. 97-11, after the addition of the Site to Order No. 97-11 in 2000, and even after the issuance of Order No. 2006-44 earlier this year.

C. The RWQCB issues Addendum No. 1 to Order 97-11.

On April 20, 2000 the RWQCB notified the City that Bradley Park was to be added as a site regulated by Order No. 97-11, General Waste Discharge Requirements for Post-Closure Maintenance of Inactive Nonhazardous Waste Landfills within the San Diego Region. The notice stated that the City, as the Site owner, would be responsible for compliance with Order No. 97-11. On April 26, 2000 San Marcos objected to being named as the party responsible for landfill-related incidents and requested that the County be responsible for those landfill issues pursuant to the JPA.

Mr. John Robertus, Executive Director of the RWQCB, responded in a letter dated May 4, 2000, in which he indicated that he would not recommend to the Board that it add the County as a responsible party, citing as authority the unpublished opinion of the California Court of Appeal, 4th Dist., *City of National City v. State Water Resources Control Board* (Mar. 10, 2000) D031660 (the "Duck Pond" decision).[5] However, since the County continued to fulfill its obligations under the JPA, the City did not take further action to add the County to Addendum No. 1 to Order No. 97-11. Notably, San Marcos has been unable to find any evidence in either its files or those of the RWQCB that it received formal notice of Addendum No. 1's adoption on June 14, 2000.

[5] Exhibit 5 (attached) is a true copy of the letter from Mr. Robertus to the City dated May 4, 2000.

D. The County continues to comply with the JPA.

Despite not being named in Addendum No. 1 to Order No. 97-11, the County continued to fulfill its obligations under the JPA and, after noticing landfill-related groundwater impacts during its monitoring efforts, in August 2004 the County submitted a Landfill Evaluation Program Work Plan ("LEP") and Preliminary Site Conceptual Model to the RWQCB. The purpose of the LEP was to further evaluate ***"measurably significant" landfill-related groundwater impacts*** detected in upgradient and off-site downgradient groundwater monitoring wells. The County of San Diego Solid Waste Local Enforcement Agency submitted comments on the LEP in September 2004, but the RWQCB never formally commented on the plan. Years passed while no investigation was undertaken – even though the County had volunteered to do it.

E. The City responds to park-related issues; the County stops cooperating.

During compliance inspections in 2005, RWQCB staff observed exposed solid wastes in a drainage ditch and discharges of liquids from the toe of slope ("a seep") into the drainage ditch. The RWQCB issued Notices of Violation ("NOV") R9-2005-0172 and R9-2005-0046 to the City for the exposed wastes and discharges in February and May 2005. The City responded by taking action and submitting monthly reports, followed by a workplan to the County LEA in October 2005 to address the "seep" and exposed waste. The City met its responsibilities under the JPA by addressing the "seep" as it was related to park improvements, but the County refused to respond to any of the "landfill-related incidents" (such as the exposed solid waste in the drainage channel).

F. The 2006 Investigative Order and the following Appeal.

On April 17, 2006, the RWQCB issued Water Quality Investigation Order No. R9 2006-0044 ("the Order") to the City. The Order requires the City to initiate an Evaluation Monitoring Program to investigate the extent and impacts from discharges of waste constituents to groundwater, surface waters and as soil vapors from the Bradley Park/Linda Vista Landfill. The work plan requested of the City pursuant to this Order appears to be almost identical to the work plan provided by the County in August 2004, to which the RWQCB never responded.

On May 16, 2006, San Marcos submitted to the RWQCB a request for an administrative appeal and review of the Order on the grounds that 1) as the former landfill operator, the County, should be named the discharger under Cal. Water Code § 13267; and 2) pursuant to terms of the JPA, the County is the party responsible for landfill-related matters.

On May 30, 2006, the County sent a letter to the RWQCB denying responsibility for any regulatory enforcement actions for the Site. Somewhere between the County's willingness to submit its Landfill Evaluation Program Work Plan in 2004 and the RWQCB's decision to ignore it and instead demand a similar plan from the City, the County determined that it had a regulatory cloak of invisibility and if it never does another thing at the landfill, the RWQCB will not care.

G. The current regulatory status of the Site.

On July 17, 2006, the City submitted a Workplan in response to Order 2006-44. The Workplan addressed those items which are the responsibility of the City – the park

related items, such as the ball field liner sub-drain discharges that manifested themselves as seeps. The RWQCB rejected the Workplan as they desired a complete assessment of all the characteristics of the landfill, not just the park-related issues. At this time, the City was unaware that the County had already submitted a plan to investigate the Site.

On October 10, 2006, representatives and counsel from the City, County and the RWQCB met to discuss the scheduling of a hearing and to a process for determining the outcome of the City's administrative appeal of the Order. At this meeting, the County still refused to take responsibility for the Order, and never informed the City of the existence of the prior Landfill Evaluation Program Work Plan submitted to the RWQCB. The City only learned of the Plan's existence when it completed a records review in late October 2006.

The RWQCB agreed to defer the investigation required by the Order until the issue of responsibility is resolved under the following conditions:

1. San Marcos was to provide a Revised Work Plan that meets the requirements of the Order for performance of a comprehensive investigation of the entire landfill; and
2. San Marcos must mitigate exposed trash as necessary to protect human health and the environment.

In accordance with the above conditions, the City submitted an Evaluation Monitoring Program Workplan dated November 2, 2006 (the "EMP"), and will mitigate the exposed trash as necessary to protect human health and the environment (as discussed in the EMP). However, nothing related to the exposure of this misplaced solid waste in a drainage ditch (that pre-dated the park development) can be attributed to park-related improvements. The waste, which should not have been buried in the drainage channel,

was exposed by the scouring of the covering soils during the heavy rains the Site experienced in the 2004-2005 wet season. This clearly is a "landfill-related incident" for which the County is responsible. There is no reason, neither regulatory nor legal, why responsibility at this Site should now be changed, twenty years after the City constructed Bradley Park in reliance on the County's promises in the JPA.

If the RWQCB continues to take the position that it is administratively barred from identifying the County as a discharger on the Order, then this appeal requests that the RWQCB adopt findings of fact confirming that of the various tasks required by Order 2006-44, only the investigation of the "seep" is directly related to park improvements, and the other requirements relate to impacts to groundwater from the landfill unit, not the improvements installed above it.

IV.

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

A. San Marcos has the right to appeal Order No. R9-2006-044.

1. San Marcos submitted its request to appeal in a timely manner.

On April 17, 2006, the RWQCB issued Order No. R9-2006-044 pursuant to Cal. Water Code § 13267[6] identifying San Marcos as a responsible party and discharger. The Order did not name the County as a discharger, and directed only San Marcos to investigate the Site. In accordance with the thirty day timeline provided in the RWQCB's

[6] All references to statutes are references to the Cal. Water Code unless otherwise specified.

cover letter transmitting the Order, the City Marcos submitted a timely request for review of the Order, followed by a public hearing, if necessary.

2. San Marcos' right to review of the Order is not barred by prior actions.

San Marcos' right to review of this Order is not preempted by previous decisions of the RWQCB. The County has previously argued that the RWQCB may not consider San Marcos' appeal of this Order on the basis that the issues raised by the City (i.e., whether the County should be added as a responsible party) were previously adjudicated when the RWQCB added San Marcos as a responsible party under Addendum No. 1 to Order No. 97-11, but did not name the County. However, Order No. 2006-44 is separate and distinct from Order No. 97-11, and any decisions made (or not made) regarding Order No. 97-11 do not bar decisions associated with Order No. 2006-44. Order No. 97-11 was issued pursuant to § 13263, while Order No. 2006-44 was issued pursuant to §13267. The two Orders were issued pursuant to different statutory authority.

Second, the scope of each Order is dramatically different. Order No. 97-11 calls for a monitoring and reporting program of existing conditions, while Order No. 2006-44 requires a comprehensive and active new investigation program, including the development of a conceptual site model, the implementation of interim remedial actions, the performance of a feasibility study and a recommended corrective action program. The scope of the 2006 Order is on an entirely different scale, and costs for its implementation will be likewise greater than that of the 97-11 monitoring program – a program historically assumed by the County at the Site. The County itself has underscored the difference between these two Orders by its willingness to perform the requirements of

Order No. 97-11 on the one hand, and its flat refusal to perform any action directed by Order No. 2006-44 on the other. It's clear that these two Orders are two different actions, each creating its own right for review.

Section 13320(a) provides that, "The state board may, on its own motion, *at any time*, review the regional board's action or failure to act . . . ." (Italics added.) The Regional Board is governed by the same law, and may act similarly with respect to the hearings proceeding before it. Given the facts here where (1) the parties have a contractual agreement for the County to perform certain activities associated with the Site, (2) the County has performed such responsibilities until the issuance of Order No. 2006-44 (and continues to perform certain tasks at its selection), and (3) there is uncertainty in the record about when and whether the City received notice of the adoption of Addendum No. 1 to Order No. 97-11, it is appropriate for the RWQCB to review its identification of responsible parties under Order No. 2006-44 and add the County as a discharger under Order No. 2006-44. Furthermore, the RWQCB has the discretion to review the responsible parties named under Order No. 97-11 on its own motion if it believes it is appropriate to do so for this case.

B. The County of San Diego is an appropriate discharger/responsible party under Order R9-2006-044.

1. <u>The County of San Diego is a discharger/responsible party pursuant to Cal. Water Code § 13267.</u>

The RWQCB issued Order No. 2006-44 under § 13267 which provides in part:

> (b)(1) . . . [T]he regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging . . . waste within its region . . . that could affect the quality of waters within its region shall furnish, under penalty or

> perjury, technical or monitoring program reports which the regional board requires.

The language of § 13267 is broad in coverage. As discussed by the SWRCB in its review of the "Duck Pond" Order (Order No. WQ 96-2, February 22, 1996; 1996 Cal. ENV LEXIS 3), § 13267 is intended to apply to both current and past discharges, and clearly applies to uncontrolled, intentional, or negligent releases. This section was last amended in 2001 to provide the SWRCB and the RWQCBs even broader power to require a technical or monitoring report from any person who is suspected of having discharged waste. Here, the County, through its operation and inadequate closure of the Site, discharged waste that could affect the quality of waters within this region. Also, while the City disagrees that § 13304(j) limits the County's potential liability under § 13304, no such limitation exists in § 13267 (and since Order No. 2006-44 was not issued under § 13304, the parties need not address the application of subsection (j) at this time). Under the plain language of § 13267, the County should be named as a discharger and responsible party in Order No. 2006-044.

Last, it was and is inappropriate for the RWQCB to rely on the unpublished "Duck Pond" decision. Cal. Rule of Court 977(a) provides that opinions of a California Court of Appeal not certified for publication must not be cited or relied on by a court or a party in any other action. If the City were to challenge the Order through a writ of mandamus (after exhaustion of administrative remedies), the unpublished "Duck Pond" decision could not be cited to the Court in support of any argument that the County should not be added to the Order. Cal. Rule of Court 976(c) states the standards for certification of an appellate court decision, and includes that those decisions which establish a new rule of

law may be certified for publication. The "Duck Pond" decision has not been so certified, and therefore should not be viewed as establishing a new rule of law.[7]

2. The County of San Diego is responsible for the discharges pursuant to the Joint Powers Agreement between the parties.

The JPA executed in 1986 specifies that the County has liability for "landfill-related incidents" including "responsibility for testing and/or remedial activity required pursuant to existing law." Therefore, any legal requirements associated with the testing and remediation of the landfill are to be performed by the County. The City assumed liability and maintenance responsibility for park-related incidents and improvements. The City also indemnified the County against any incidents/ improvements. Accordingly, the City's responsibility is to maintain the park's improvements and retain liability should anyone suffer injury at the park.

The obligations assumed by the County and the City under the terms of the JPA are supported by each of the parties' past conduct. The County has performed all legal requirements for the landfill, and continues to perform such requirements (i.e., submissions of semiannual and annual monitoring reports), with the exception of those tasks identified in Order No. 2006-44.[8] After noticing significant groundwater impacts, in 2004 the County submitted a Landfill Evaluation Program Work Plan ("LEP") to the

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[7] See *Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 710-711 (Cal. Rules of Court establish comprehensive standards for determining publication of Court of Appeal cases, particularly specifying that an opinion announcing a new rule of law or modifying an existing rule be published).

[8] A list of the reports prepared and submitted by the County is provided in Table 1 of the Evaluation Monitoring Program Workplan submitted by San Marcos dated November 2, 2006. The City incorporates the Evaluation Monitoring Workplan into the record for this appeal by this reference.

RWQCB, and presumably would have performed the tasks identified in the LEP if the RWQCB had reviewed and approved the document following its receipt. It is only with the tasks raised in 2005, and further specified in Order 2006-44, that the County is now refusing to fulfill its legal obligations under the JPA (and under § 13267) for the landfill. The City believes the RWQCB has the discretion to replace one responsible party with another when it receives evidence of a settlement or contractual agreement between parties demonstrating that one party is responsible for a site or release in place of another.[9] This case is no different: the contract between the parties identifies the County as responsible for landfill-related matters. The next section provides further detail as to what issues are "landfill-related" and what issues are associated with the Park and its improvements. The City requests that Order No. 2006-44 be modified to name the County as a discharger and responsible party for those "landfill-related" matters.

C. The investigation of the landfill goes beyond issues caused by the Site's use as a Park or the Park's improvements.

As discussed in the Evaluation Monitoring Program Workplan prepared and submitted by San Marcos to the RWQCB on November 2, 2006 (the "EMP"), there are several tasks that are solely associated with the landfill, and a few tasks that are associated with the Park and its improvements. First and foremost, it seems clear that those tasks identified in the County's own August 2004 Landfill Evaluation Program Work Plan ("LEP") address "landfill-related incidents" and are not the result of the park

[9] For example, the RWQCB removed the Centre City Development Corporation ("CCDC") from the Orders associated with the remediation of the Marina area plume (the so-called "blob") when CCDC submitted evidence that Chevron Corporation had assumed responsibility for the release for which CCDC had been named.

and its improvements. Considering the County's requirements under the JPA to handle landfill-related incidents, and its historic practice in doing so, it seems clear that the County itself believed that those tasks identified in its August 2004 LEP were items resulting from the landfill, not items caused by the Park and its improvements.

A specific example of this is the exposure of solid waste in the bottom of the drainage ditch that bisects the Park. The unlined drainage ditch pre-dated construction of the landfill and the park, and the County rebuilt it over shallow debris when it closed the landfill; the City had no involvement in that action. Historical records did not indicate that solid waste existed in this area, but the scouring of the ditch caused by the record rainfall events of the 2004-2005 wet season, *not regular irrigation for the Park*, exposed this refuse. This issue is associated with the historic landfill, not the result of the Park and its improvements, and the County is responsible for any investigation and remedial activity required to address this issue.

On the other hand, the "seeps" from the drainage systems are likely caused by the installation of the Park and its improvements. The "seeps" appeared to be discharges from a functioning sub-drain system with an impermeable liner designed to specifically prevent rain water and irrigation waters from penetrating into the landfill unit. 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 remaining issues are not the result of the Park and its improvements. As stated in the County's 1991 SWAT Report, five volatile organic compounds

(including vinyl chloride), as well as arsenic, manganese, iron, total dissolved solids, chloride, and sulfate exist in excess of drinking water standards beneath the Site. The SWAT also reported that elevated concentrations of arsenic and acetone were detected in vadose zone soil samples. The SWAT report attributed landfill gas migration and eventual dissolution into groundwater as the likely source of vinyl chloride in groundwater and recommended continued groundwater monitoring at the Site. 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.

Furthermore, monitoring wells upgradient of the landfill show concentrations of landfill contaminants.[10] These technical findings are evidence that the groundwater problems are a result of the historic landfill, and are not caused by the Park or its improvements. Accordingly, as detailed in Section 5.0 of the EMP, the majority of the investigation tasks requested by the RWQCB are "landfill-related incidents" that are not associated with the Park and its improvements, and therefore should be the responsibility of the County pursuant to the JPA and § 13267.

V.

CONCLUSION

For the reasons above, the City requests that the RWQCB add the County to Order No. 2006-44 as a discharger/responsible party for the Site. If the RWQCB believes that it

[10] See EMP, Monitoring Well SM-2 shown in Figure 2. See also the August 21, 2006 letter from the RWQCB to Mr. Mike Mercereau of the City of San Marcos, a true copy of which is attached as Exhibit 6. The last paragraph on page 1 notes that monitoring well SM-1 contains detectable concentrations of waste constituents and is no longer viable for use as a background monitoring well.

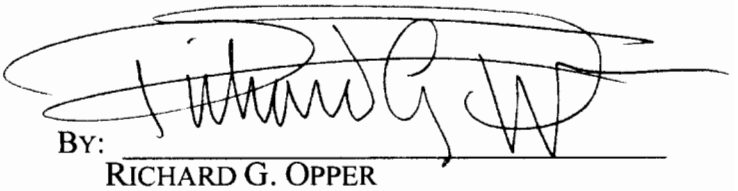
is administratively barred from adding the County to Order No. 2006-44, the City requests a finding by the RWQCB that the "landfill-related" tasks identified in Section 5.0 of the EMP are landfill-related incidents distinguishable from issues related to the operation of the Park and its improvements.

It is unfortunate that the County's original proposal to undertake this work was not reviewed and accepted when it was submitted in 2004; more would now be known about any inadequate closure actions possibly taken by the County, and remedies could be ready for proposal and review. Despite this regulatory hiatus, the right response by the RWQCB should be to name the County as a result of its historic role at this Site. The State of California should take advantage of the County's institutional memory and technical capacity as they promised, to address the problems the County created and historically accepted. The County should be added to the Order.

Respectfully submitted,

DATE: Nov 30, 2006

OPPER & VARCO, LLP



BY: _____
RICHARD G. OPPER
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 **November 30, 2006**, I served the document entitled: **Appellant's Opening Brief** by serving a true copy of the above-described document in the following manner:

BY U.S. MAIL

I am readily familiar with Opper & Varco LLP's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, documents are deposited with the Opper & Varco LLP personnel responsible for depositing documents with the United States postal service; such documents are delivered to the United States Postal Service on that same day in the ordinary course of business, with postage thereon fully prepaid. I deposited in Opper & Varco LLP's interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Opper & Varco LLP for collecting and processing documents for mailing with the United States Postal Service:

Mr. James R. O'Day
Office of County Counsel
County Administration Center
1600 Pacific Highway, Room 355
San Diego, California 92101-2469

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

Dated: November 30, 2006

Janene L. Kallen