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 COUNTY OF SAN DIEGO'S OPPOSITION TO THE CITY OF SAN MARCOS' ADMINISTRATIVE APPEAL OF WATER QUALITY INVESTIGATION ORDER NO. 29-2006-0044

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INTRODUCTION

Early in 2000, the California Regional Water Quality Control Board, San Diego Region ("RWQCB"), circulated draft Addendum No. 1 to General Order 97-11, "General Waste Discharge Requirements for Post-Closure Maintenance of Inactive Nonhazardous Waste Landfills Within the San Diego Region." Addendum No. 1 added the "Bradley Park Landfill" site in the City of San Marcos ("City") to Order 97-11, and named the City of San Marcos, the owner of the site, as the responsible party. The City objected to its designation on April 26, 2000, citing, among other reasons, a Joint Powers Agreement document with the County of San Diego ("County") dated August 12, 1986. On May 4, 2000, RWQCB Executive Director Robertus responded with an explanation of the basis for designating the City as operator and responsible party. On June 14, 2000 the RWQCB adopted Addendum No. 1 to General Order 97-11 and notified the City.

At this point, the City was entitled to pursue one course of action, or forfeit its opportunity to challenge the Robertus and RWQCB decision concerning the responsible party for regulatory response to the RWQCB for this site. That course of action would have been to file an appeal to the State Water Resources Control Board under Water Code § 13320. If unsatisfied with the result of that appeal, the City could then file an action seeking review in Superior Court pursuant to Water Code § 13330. The City did not pursue its statutory remedies in 2000. The City appeal brief incorrectly asserts that the City's "reason to do so [appeal] was moot."

That assertion is the City's effort to excuse its complacency, or to imply having been "lulled to sleep" by the County. The truth is that communications from the County to the City and RWQCB at the time clearly indicated that the County would not, and could not, accept responsibility for a site upon which the City's improvements and management practices made the discharges seen recently to be inevitable occurrences.

As will be explained and documented in this opposition, City documents recently obtained by the County corroborate the County's position.

The City would have the RWQCB believe that the County "partnered" in the creation and expansion of the park. The City would also have the RWQCB misunderstand the reason for the JPA document. The City would have the RWQCB be uninformed concerning the changed relationship and changed interpretation of the JPA by the parties as the park grew to unanticipated proportions over the years since 1986, such that the distinction between "park" and "landfill" essentially no longer exists. The "landfill" has become "the park."

Lastly, the City would have the RWQCB function as a *de facto* Superior Court, asking the Board to sit in judgment of the rights and responsibilities of two governmental entities, when it is clearly the City's intention to also seek the recourse it claims to be entitled to in Superior Court. It hopes to manipulate this Board into making a decision it does not need or have to make, thereby assisting the City in its impending litigation with the County over the site issues.

The County's position in this appeal is that Executive Director Robertus accurately assessed the issue of site responsibility in 2000, with a well-reasoned analogy to an unpublished Court of Appeal decision on a similar issue. The City now seeks, six years after failing to exercise its right to appeal that decision, to get a second chance to bite the apple it left on the table in 2000. There are no different factual circumstances to justify rescinding the 2000 decision. The argument that using an unpublished decision is improper is a red herring. Mr. Robertus' letter is not a legal submission to a California court; and nevertheless his reference to that decision is secondary to his fact and law analysis, which is the real basis for his decision.

This RWQCB has a reliable, appropriate responsible party, and the logical party to be responsive to RWQCB orders: the site owner. That site owner has engaged in the

practices that will be outlined below that undoubtedly have created the need for the actions directed by this agency.

II.

RELEVANT FACTS

A. The Transfer of the Site and Subsequent JPA Agreement

The County transferred the site by two deeds, one in 1964 and one in 1968. Both deeds restricted the property use to park purposes, for obvious reasons. Since no consideration was paid, the County did not want to give property away and have it be developed for a profit by the City. More importantly, because it was a former landfill, the County did not want development with buildings or residences that would subside or become dangerous as a result of the buried landfill material.

In 1985 the City planned to embark upon its first significant park development project, and learned from the RWQCB that post-closure requirements would be imposed. The City pressed the County to include this site in the County's county-wide test well program. The request, as well as the plan to significantly develop the park, set off a flurry of assessment activity within the County regarding the legal options for the County to monitor site conditions while permitting the park development to proceed. One option, mentioned by the City in its appeal, was for the County to take title back, so it would control the site, and lease it to the City. Exhibit 1 of the City's brief confirms that concern. It also confirms two other facts. First, that the County was concerned about irrigating the top deck of a former solid waste facility. Second, out of concern that Local Enforcement Agency requirements are complied with, which the County agreed to do *upon transfer of title.* Apparently the use of grant funds precluded that option.

Since title did not transfer, the County became concerned about its right to enter and liability for entering a site that it did not own to perform any testing or maintenance that might be required of the County. The document intended to protect the County's right of access for those purposes was the JPA Agreement.

B. The City's Extensive Development of the Site For Park Purposes

At that point in time (1985), the site was mostly unimproved land, was arguably predominantly "landfill", and therefore under the JPA principally the responsibility of the County Department of Public Works. Those circumstances drastically changed in the succeeding 20 years. Over that time, the City has permitted or completed the following projects at the site:

1. 1989 original Major Park expansion (approx. $1.1M) consisting of athletic fields, lighting, parking lots, concession stand, playground equipment, caretaker's residence and "latchkey" (day care) building and landscaping on upper mesa area, over the landfilled area.

2. 1990 Indoor Soccer Arena project (approx. $400K) creating "indoor" soccer facility on the lower mesa area.

3. 1990 easement granted to County Water Authority for 1991 pipeline project that installed a major underground pipeline through the center of the site.

4. 1992 Restroom Improvement Project.

5. 1998-2000 Turf, Parking Lot, and Picnic Improvement Project that added lighted sports fields, turf play area, restrooms and picnic improvements. (approx. $400-500K).

6. 2002 Repair of Caretaker residence project, which was the result of differential settlement and methane infiltration concerns. (approx. $110K).

7. 2003 Sports Field Lighting/Electrical Improvement project. (approx. $140K).

The County has seen documents indicating that the City plans in the near future to further expand/develop the small remaining undeveloped area of the park, which would essentially make the entire site devoted to "park purposes."

The impact of all of these improvement projects 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. As will be discussed below in some detail, in 1997, in preparation for the significant expansion in 1999-2000, the City circulated a negative declaration under CEQA, in which it acknowledged that the

City is responsible for all site maintenance, and the County's participation is limited to monitoring groundwater and landfill gas issues.

Lastly, as will be clearly documented in this submission, the current maintenance and discharge issues leading the RWQCB to take the recent regulatory actions are the product of park improvements construction, irrigation, and maintenance practices by the City.

III.

THE CITY'S PARK PROJECTS HAVE CREATED THE ISSUES

A. The Site Was Turned Over With Adequate Cover

In 1986, in preparation for the park development, Southern California Soil and Testing, Inc. prepared a limited soil investigation report. The firm excavated 26 trenches on the site, and noted an average cover depth of 3' to 4', with a range of cover from 1.5' to 7'. The summary describes the trash as "well preserved" and notes only encountering watery conditions at one out of twenty-six locations. However, the report warns that the decomposition of deleterious materials will be accelerated by the introduction of water from landscape irrigation, once the park is developed. This report is submitted as County Exhibit A. In addition, in preparation for the expansion in 1989, the City gave a variety of contractors permission to dump clean fill at the site and during that process added at least 5000 cubic yards of imported material to bring the ball fields to their elevation levels, which enhanced the cover. (See County Exhibit B regarding added fill). So, contrary to the implications of City submissions, inadequacy of cover is not a valid basis to assert that issues are "landfill related."

The significance of this point is the "but for" scenario that must be analyzed in addressing this appeal. **But for** the City aggressively developing this site, irrigating the cover at 8 athletic fields on a daily basis, and engaging in the activities described below, this site would have been a benign closed solid waste facility, with an easily maintained,

non-irrigated cover. It would violate all equitable principles to hold the County responsible when **but for** these activities, the site cover that was functioning properly would be adequate to protect the site from recent discharges.

B. "Lowlights" of the City's Improvement Activities

1. Light Poles in the Trash

Starting with the first major improvement project in 1989-1990, the City demonstrated its lack of recognition of the impacts of drilling into landfill cover and trash and installing appurtenances that enhance water infiltration opportunities. It is obvious that large light stanchions used for the many athletic fields are installed and supported by large support foundations installed through the cover material and into the trash layer (or below) thereby creating infiltration conduits for surface and irrigation water to enter the landfill. In 1989 the contractor for the initial improvement project wrote to the City seeking to disclaim liability for the stability of the light poles, since construction specifications called for installation of the light foundations on top of landfill material. (See County Exhibit C). The City response acknowledges that design and, a rejection of the recommended alternative design due to cost concerns. (See County Exhibit D).

2. Dewatering Wells Left Open or "Lost" for Two Years

In 1990, for financial compensation, the City granted an easement to the County Water Authority (CWA), through the middle of this site, for a pipeline. (See County Exhibit E). Thereafter the CWA contracted to install the pipeline. This process involved significant excavation into the landfill (in the area which is now a problem), where water was encountered, leading to the installation of dewatering wells.

In 1991 the County LEA stopped the project due to health and safety concerns over the six trench wells driven approximately 20 feet into the landfill. The LEA observed those wells pumping 15-20 gallons of water per minute and saw large amounts of exposed refuse where the work was being performed. (See County Exhibit F).

It appears from the collective records marked as County Exhibit G that it took approximately two years to have the 7 wells and 5 exploratory borings from that project *possibly* properly rectified. Note the LEA letter of May 25, 1993 indicating that some of the borings were apparently "lost", causing concern that groundwater would be impacted and reminding the City of its responsibility for such impacts.

Many of the recent issues requiring regulatory action are focused in the area where this pipeline was installed. For instance, the City states in its submission (p.10) that erosive forces have created problems in the drainage channel bisecting the site. It asserts that this is "landfill-related" and therefore the County's problem. That is incorrect. That channel is the very location of this mismanaged pipeline project, and it obviously was never restored to appropriate condition. The City has been observed denuding that channel of vegetation, from time to time, and wouldn't it be just as likely that the erosion events occur at one of the "lost" boring locations referred to in Exhibit G?

3. <u>The Turf Field and Facilities Expansion in 1999-2000</u>

This project, completed in 2000, added another irrigated turf recreation field, parking lot, gazebo and picnic area, and related improvements. As the project was being planned and designed, the RWQCB expressed concern about the plan to further irrigate the additional field, since it is generally considered an incompatible activity to regularly irrigate the top deck of a former landfill. In fact, on January 29th and June 30th 1999 Executive Director Robertus wrote to the City to express reservation about the design, even after the City added a proposed infiltration barrier to the design in response to concerns expressed by the RWQCB earlier in 1998 and 1999. (See County Exhibit H)

It is precisely in the area of the discharge pipe from that barrier system that a seep was observed and reported by the County to the RWQCB. While the City has challenged the RWQCB staff conclusion that the seep relates to water mixing with refuse in that area, the County postulates that either the mitigation system has broken down, or in the installation of the field and barrier, waste was excavated and mixed into the layer above

the barrier, creating the contaminated seep condition. The controversy created by the City's analysis of the cause for the discharge has at least in part prompted the issuance of Investigative Order R9-2006-0044.

4. 2003 Sports Field Lighting Improvement Project

This project was described as, "the installation of sports field lighting and electrical system improvements, including trenching, conduit, wiring, lighting installation and appurtenant work." The work was completed in September 2003, and involved two significant events associated with the installation.

The first, two years earlier in 2001, involved geological testing performed at the behest of the City by Western Soil and Foundation Engineering, Inc. (See County Exhibit I). The testing involved drilling borings into the soil at the site. Five borings were drilled. Two encountered landfill material. One boring was terminated early due to entanglement of landfill refuse in the boring auger. One boring with landfill material noted perched water at the 5' level. The report recommends that, "If deep foundations are used to penetrate the landfill, then appropriate procedures should be followed as provided by an environmental consultant." There appears to be no evidence of use of such a consultant by the City when later installing the 50' poles more than 12 feet into the soil in 2003.

A report of the drilling to actually install the pole foundations in 2003 is even more alarming. Reports from Western Soils on June 2 and 3, 2003 (County Exhibit J) indicate drilling through water saturated trash, and caving of soil borings. It is clear from the reports that the City continued to install lights by drilling through trash to foundational soils when a significant groundwater presence was noted. Although the report recommends "dewatering according to environmental standards" no evidence of such activity has been provided to the County. The County believes that this negligent activity violates environmental regulations, and is typical of bad management practices at

the site. It also stands as evidence that probably every light pole at the site is a conduit for water infiltration into the trash layer.

5. Trenches and Fireworks

In 1996 the County learned of a practice engaged in by the City for an unknown number of years for its Fourth of July celebration at the park. That is, trenching into the top deck to place mortars to detonate fireworks. This commits two sins: intentionally disturbing the integrity of the cover; and introducing the possibility, however remote, of detonating methane landfill gas, should it be released, in the vicinity of human presence. Letters documenting the County discovery are submitted as County Exhibit K.

6. Year Round Irrigation of Sports Fields/Evidence of Overwatering

The site as improved houses 8 irrigated sports fields. While the City would argue that adequate precautions and fail-safe systems prevent over-watering or accidental leakage from the systems, even regulated watering is likely to, over time, create infiltration into the trash layer. Only one of the fields has any mitigation design, and it appears likely that this field is exhibiting evidence of discharge of subsurface water contaminated by landfill waste. We see, in the reports from soil testing, a progression from "well-preserved" trash (translation: dry) in 1986 to later soils reports reflecting ever increasing encounters with groundwater mixed with trash, clearly the progressive infiltration of park-related irrigation water into the refuse layer.

A classic example of the impact of irrigation of the sports fields is documented in correspondence with the City, County and RWQCB in the summer of 2000, shown on attached County Exhibit L. The County reported overwatering and inadequate drainage at the new ball field to the RWQCB, and copied the City. In spite of the source of water being the irrigation system at the City's park facility, we see a note from City officials planning their "we're not responsible" strategy.

It is important to note that on July 17, 2000, Executive Director Robertus issued a directive for information to the City under Water Code § 13267, because the field final

design and construction apparently did not comport with the engineering report plan submitted to the Regional Board. To the County's knowledge, from a review of records of the RWQCB and City, there was never a final "as built" set of drawings submitted for this field.

IV.

THE MEANING AND IMPACT OF THE 1986 JPA AGREEMENT

A. The JPA Was Prepared To Grant the County A Right To Enter The Site

In the 1970s and 1980s, this site was mostly unimproved, therefore properly categorized "landfill" more so than "park". In the time frame of the mid-eighties, two things were happening with the site. First, the state established its Solid Waste Assessment and Testing (SWAT) program list, and this site appeared on the list. Secondly, the City embarked upon the first of its significant park expansion/modification programs (outlined above), which were destined to transform the site from mostly "landfill" to predominantly "park." The County acknowledged testing/monitoring responsibility as former owner of what was at the time still a landfill site. Proposals were floated back and forth about the possibility of the County re-taking title and leasing to the City. The County was concerned about its authority to enter the site to test and monitor. It is likely, though not clear, that the City did not want to lose its control over a site for which it had very large plans. The resolution is the 1986 JPA.

B. In 1997 the City of San Marcos Acknowledged Liability For Site Maintenance

By 1997 the park had significantly expanded. In preparation for a further significant expansion that would make most of the site occupied by park improvements, the City circulated a CEQA "Notice of Determination and Negative Declaration." A copy is submitted as County Exhibit M.

The negative declaration identified mitigation measures, including the following, at page two, with regard to the responsibility of the County vs. the City:

> "The County of San Diego will continue to monitor the site with migration probes measuring levels of methane gas. The City of San Marcos will be responsible for maintaining *all the property, including the slope areas, as part of the developed park area and monitoring the park area surface."* (Emphasis added)

And the following, at page three:

> "The City will 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 Department of Public Works will monitor for groundwater and landfill gas migration."

Those specific provisions were added or modified by the City from a draft negative declaration circulated to, among others, the County. A letter dated July 22, 1997 from Joseph Minner at the County to the City specifically requested the confirmations that were incorporated into the final draft. (See County Exhibit L)

These documents demonstrate the City's acknowledgment that, because the park use is now at least 75-80% of the site, which incorporates the top deck of nearly all areas of buried waste, the City is the principal entity responsible for the site. While the City's submission attempts to spin a tale of complete County responsibility suddenly being withdrawn overnight, in fact, there was a progressive shifting of responsibility commensurate with the ever-expanding park development.

The City submission overstates the County involvement with the site after 1997 and the significant additional improvements. The County perceived its role after that time, consistent with the San Marcos declaration to the world, to be to conduct inspections and tests, and report the results to regulators. As the potential consequence of irrigation, poor maintenance practices, and dominant park activity became clear, by 2000 the County clearly indicated it could not take regulatory liability for a site with this level of development and potential problems from irrigation and structures intruding the cap.

C. "Landfill-related" versus "Park-related"

The City illogically argues that any discharge or seep event is, by definition, "landfill-related." The fallacy of that argument should be clear. A mountain of evidence indicates that the mixing of trash and water is caused by one or more of the following:

1. Irrigation water from sports fields percolating and accumulating in trash.

2. Breaches in landfill cover by light poles, unclosed dewatering wells, fences, building structures, or trenches in the cover permitting surface water infiltration.

3. Faulty maintenance permitting erosion and exposure of waste, or

4. Public entity projects (County Water Authority) providing temporary or permanent conduits for infiltration.

None of these items are "landfill-related" or County controlled or sponsored. The County's position is that if regulatory agencies expect the County to be responsible for this site principally as a landfill, which it no longer is, all park uses and improvements should be removed and the cover restored to open, unimproved space in order that maintenance and groundwater protection can be achieved.

D. The Drainage Ditch/Waste Issue

The City brief asserts that the County "misplaced solid waste in a drainage ditch" without any factual corroboration to support that assertion. The location of the "seep" and the exposed waste in 2005 and 2006 is precisely in an area impacted by one or more City sponsored activities in the history of this site. The "seep" event was at the end of the discharge pipe installed by the City in conjunction with their allegedly lined turf field installed in 1999-2000. The drainage channel was torn open (and apparently to some extent, left open for several years during the County Water Authority pipeline project in the early 1990s. That project clearly disrupted both cover and buried trash, likely leaving trash in or near the drainage channel area. This area was maintained by the City; and on more than one occasion, County DPW officials noticed that the City had denuded the vegetation along the channel slopes, hastening erosive forces.

The City argues that the erosion from rain, as opposed to irrigation, makes the drainage ditch issue a "historic landfill" issue. That argument ignores two salient facts. First, the City and County Water Authority (not a San Diego County department) significantly altered this channel. Secondly, the channel accepts all drainage from the surrounding park improvements, and is of course significantly impacted by that irrigation

and improvements. In short, the argument is specious. The same principles that make the seeps City issues make the channel a City issue.

V.

THERE IS NO LEGAL BASIS FOR ADDING THE COUNTY AS RESPONSIBLE PARTY FOR THIS SITE

A. The Appeal Is Barred Under Collateral Estoppel Principles

1. Responsibility For the Site Has Been Determined

The City argues that, because this is a new order, separate and distinct from Addendum 1 to General Order No. 97-11, issued in 2000, it is not barred from appealing the County not being named as responsible party on the order. The County believes that this argument is faulty for the following reasons.

Issue-preclusion, or collateral estoppel, bars a party to a proceeding from re-litigating issues that were previously decided by a tribunal, or that could have been litigated and decided in the earlier proceeding. The principles of collateral estoppel can apply to administrative proceedings such as this matter before the RWQCB. *George Arakelian Farms v. Agric. Labor Rels. Bd.* (1989) 49 Cal.3d 1279.

The rule can apply not only to issues actually litigated in the prior proceeding, but to issues that could have been litigated in that proceeding. *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464. In *Sutphin v. Speak* (1940) 15 Cal.2d 195 the California Supreme Court discussed the application of res judicata principles in various scenarios, including one such as this, stating:

> "Next is the question, under what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable. In *Price* v. *Sixth District*, 201 Cal. 502, 511 [258 Pac. 387], this court said: "But an issue may not be thus

> split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result . . . This principle also operates to demand of a defendant that all of its defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them." (See, also, *Elm* v. *Suburban Fruit Lands Co.*, 217 Cal. 223 [17 Pac. (2d) 1003]; *Andrews* v. *Reidy*, 7 Cal. (2d) 366, 370 [60 Pac. (2d) 832]; *Minnich* v. *Minnich*, 127 Cal. App. 1 [15 Pac. (2d) 804].)"

Sutphin v. Speak 15 Cal.2d at 202.

The issue, raised by the City of San Marcos and decided by the Regional Board's adoption and issuance of Addendum 1 to General Order 97-11 on June 14, 2000, was who is the responsible party or parties for this site? That issue was clearly raised by the City to the Regional Board, as evidenced in the April 26, 2000 letter from Mr. Malone to Executive Director Robertus, and the responding letter from Mr. Robertus to the City on May 4, 2000. (See City Exhibit 5[1]). Upon issuance of Addendum No. 1, the Regional Board decided that issue contrary to the position of the City. The City had every right to litigate that determination, first by appealing to the SWRCB under the Water Code, and then to Superior Court and above, if it chose to do so. The City decided not to appeal that determination. It cannot 6 years later seek to re-litigate an issue it raised, had determined, and now wants to pursue.

The City ignores the prejudicial effect to the County of seeking to "appeal" that determination 6 years later. Had the issue been litigated and determined as the City hoped, and had the County been named on Addendum No. 1 to General Order 97-11, the County had possible rights and remedies to assert concerning the management of this site, for example, the intrusions into trash, and excessive irrigation in the intervening 6 years, among others. The Regional Board fairly and correctly decided that, with the magnitude of park improvements, and the ownership and control firmly in the City's hands, the City should be the responsible party for the site. The County has relied upon that

[1] The Robertus letter refers to the April 26, 2000 Malone letter. The City has not produced that letter to the County or to this tribunal, for reasons unknown to the County.

determination in scaling back its involvement with a site that it conceptually cannot agree is properly developed and managed in a way that will not cause impacts to the environment.

Although the City attempts to pretend that until 2004 the County took full responsibility for a variety of activities at the site, the County made the City fully aware after 2000 that it could not be actively involved in site maintenance because of its concerns about the City's improvements and maintenance issues. Attached as County Exhibit O are examples of the County position. To the extent that work was done, as can be seen, it was done under protest and to avoid further regulatory enforcement, but not because the County had not indicated that the JPA meaning had changed with site changes.

2. Issuance of the Investigative Order Under WC §13267 Does Not Change the Result

The City cites no authority for the proposition that the decision articulated by Executive Director Robertus is irrelevant because the Investigative Order was issued pursuant to Water Code § 13267 instead of Water Code § 13304. The City argues that because the prohibition of Water Code § 13304, sub. (j) is not repeated in § 13267, Robertus' prior decision is not binding. It also tries to paint § 13267 as broader in scope, and therefore providing a basis to add the County.

In addition to lacking legal authority, the argument lacks logic. As a matter of statutory interpretation, the two statutes use essentially the same language to describe potentially responsible parties. Water Code § 13304 (a) uses, "any person who has discharged or discharges waste....". Water Code § 13267 uses, "any person who has discharged, discharges, or is suspected of having discharged.....". As an enforcement tool for the Regional Board, it would be illogical to not have the statutes apply to the same people or entities, since investigation runs parallel with regulation and enforcement. Therefore, the argument that the Regional Board should be issuing investigative orders to

someone it has determined it should not name as a responsible party lacks legal or practical logic.

B. The Robertus Analysis in 2000 Is Correct

The City objects to Executive Director Robertus' citation to an unpublished Court of Appeal decision. That argument is based upon the principle that attorneys are not permitted to cite to unpublished authority in a court of law. This venue is not a court of law, and regardless, the citation is ancillary to the analysis, which remains the basis of Robertus declining to add the County as a responsible party on proposed Addendum No. 1. The legal reasoning, without citing to the objected authority, is that because the County transferred title to this site in 1968, and it presumably complied with then-existing statutes, under the specific statutory direction of Water Code § 13304 (f),[2] the County could not be the responsible party in the absence of evidence of pre-1981 discharges. Not only is there no argument that effectively refutes that analysis, but once again, it stands essentially as the "law of the site."

C. Whether the City Has Indemnity Rights Under the JPA Is Not A RWQCB Issue

The City has on a number of occasions asserted that the JPA required the RWQCB to name the County as a responsible party for this site, and the Regional Board has declined. The arguments concerning the purpose, meaning, and impact of transmutation of the site from predominantly "landfill" to predominantly "park" are mentioned in the parties' submission. It is respectfully submitted that the litigation and resolution of that dispute is beyond the scope of authority for the RWQCB to decide. Issues of contribution for past expenses and apportionment of costs of future expenses under a poorly defined legal agreement are appropriately to be resolved in a court of law after permitting the judicial process to proceed. The City clearly intends to pursue its perceived remedies, having filed a notice of claim with the County, as a prelude to

[2] Then Water Code § 13304 (f) is now Water Code § 13304, sub. (j), per Stats 2003 Ch 614. § 2 (SB 1004).

litigation. An interpretation by the RWQCB would only complicate that process, not resolve it. Since the RWQCB has named and has jurisdiction over a responsible municipal entity with adequate resources to comply with its orders, there is no need to cross into the judicial domain of contract interpretation, as requested by the City.

CONCLUSION

The City of San Marcos appeal of Investigative Order R9-2006-0044 should be denied. The City could have, and should have, appealed the decision concerning responsible parties made by Executive Director Robertus and ratified by the RWQCB in issuing Addendum No. 1 to General Order 97-11 in 2000. The City cites no new facts or compelling law in support of its request for the RWQCB to modify that determination, and to do so would be improper and prejudicial to the County.

In fact, the circumstances at the site justify continuing to direct the City to respond to regulatory directives. The site is predominantly developed park land, and the missteps cited above dictate that the City should be responsible for compliance.

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Respectfully Submitted,

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