

From: Wendy Wyels
To: Hold, Howard; Olson, Anne
Date: 2/15/2011 8:39 AM
Subject: Fwd: County of Stanislaus Comments and Evidence Re: Draft Cease and Desist Order
Attachments: Stanislaus-Geer Rd. Comments on Draft CDO.pdf

>>> "Newmark, Greg" <gnewmark@meyersnave.com> 2/14/2011 4:19 PM >>>
Dear Mr. Landau, Mr. Mayer, Mr. Coupe and Ms. Wyels,

I am submitting with this electronic mail message the County of Stanislaus' comments and supporting evidence for the draft Cease and Desist Order regarding the Geer Road Landfill, currently scheduled for the April 2011 Regional Board meeting. In compliance with the Hearing Procedures for this matter, this message shall serve as the submission of electronic copies of the County's comments and evidence. An electronic copy of the County's comment letter is attached hereto. Electronic copies of the supporting evidence can be accessed via the following ftp transfer information:


username: 
password: 

Also in compliance with the Hearing Procedures, hard copies of the County's comments and evidence will be delivered to your offices today.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Gregory J. Newmark
Attorney at Law
MEYERS NAVE
333 South Grand Avenue, Suite 1670
Los Angeles, California 90071
Phone: 213.626.2906
Fax: 213.626.0215
gnewmark@meyersnave.com
www.meyersnave.com <<http://www.meyersnave.com/>>
www.publiclawnews.com <<http://www.publiclawnews.com/>>

CONFIDENTIALITY NOTE:

This email may contain material that is confidential, privileged and/or attorney work product for the sole use of the intended recipient. Any review, reliance or distribution by others or forwarding without express permission is strictly prohibited. If you are not the intended recipient, please contact the sender and delete all copies.

IRS CIRCULAR 230 DISCLOSURE:

To comply with IRS regulations, we advise you that any discussion of Federal tax issues in this e-mail was not intended or written to be used, and cannot be used by you, (i) to avoid any penalties imposed under the Internal Revenue Code or (ii) to promote, market or recommend



555 12th Street, Suite 1500
Oakland, California 94607
tel 510.808.2000
fax 510.444.1108
www.meyersnave.com

Leah S. Goldberg
Attorney at Law
lgoldberg@meyersnave.com

February 14, 2011

Via Personal Delivery

Kenneth Landau, Assistant Executive
Officer
Regional Water Quality Control Board,
Central Valley Region
11020 Sun Center Dr, Suite 200
Rancho Cordova, CA 95670
Facsimile: (916) 464-4645

Re: ***Stanislaus County - Geer Road Landfill – Comments on Draft Cease and Desist Order***

Dear Mr. Landau:

I. **Introduction**

On behalf of Stanislaus County ("County"), Meyers Nave is pleased to submit the County's comments and recommendations regarding the Draft Cease and Desist Order Geer Road Landfill issued on November 22, 2010 ("Draft CDO"). The County's comments and recommendations are set forth in this letter and in the enclosed documents.

County representatives have met with the Regional Water Quality Control Board, Central Valley Region ("Regional Board") staff on several occasions to discuss the issues of concern in this Draft CDO. We appreciate the time staff has devoted to this issue, and we thank the staff members for their courtesy and professionalism.

Nevertheless, the County respectfully asserts that the Draft CDO cannot be adopted without significant modifications. The Draft CDO seeks to force a public entity, at significant cost, to implement an expensive and hasty remedial strategy that is more aggressive than necessary to protect water quality and that does not conform to State Water Resources Control Board policies mandating a phased and cost-effective approach. Instead of focusing primarily on removing the source of volatile organic compounds ("VOCs") in the groundwater by aggressively extracting and burning the landfill gas, the Draft CDO also mandates installation of a new and expensive

groundwater extraction and treatment system ("GWET System"). Not only is the mandated expanded GWET System the most expensive option for removing VOCs from the landfill, it is the least efficient method for removing VOCs. It would require pumping and treating 200 million gallons of groundwater annually to remove approximately 21.5 pounds of VOCs. (Declaration of Bryan Stirrat, hereinafter Stirrat Decl. ¶ 30.) Eliminating the contamination source (i.e. the landfill gas) will serve to protect the waters of the State in a much more cost effective manner.

The County retained an independent consultant, who developed a remedial strategy for the site that is not only cost-effective, but that is predicted to achieve compliance with applicable water quality regulations. To avoid a CDO with impossible requirements and to address the real concerns with the elevated levels of contaminants in the groundwater at the Geer Road Landfill ("Landfill"), the County is proposing to optimize and expand the existing landfill gas extraction system and to optimize the existing GWET System, followed by a phased characterization of the site. This proposal is aggressive and provides the Regional Board with assurances of progress while giving the County a realistic schedule.

It is impossible for the County to comply with the remedial schedule or to pay for the multifaceted approach proposed in the Draft CDO. The Draft CDO would thus set the County on a course for failure. It is not possible for the County to install a new GWET System, conduct an extensive investigation into the lateral and vertical extent of contamination and optimize the existing landfill gas system all at the same time. Not only does the remedial schedule require the County to violate its legal obligation to publicly solicit bids for major public works projects, but the County's staff cannot possibly manage a simultaneous three pronged approach. In a County that has had significant layoffs, the staff support is simply not available. And the same is true with the financial resources required to comply with the Draft CDO.

In addition to the technical flaws, the Draft CDO is also legally flawed. The Draft CDO violates Water Code section 13360 by impermissibly specifying the manner of compliance. It also violates the Controllable Factors Policy in the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins ("Basin Plan") and Water Code section 13267.

In addition to these major issues, the Draft CDO contains numerous inaccuracies. In the attached revised Draft CDO, the County offered corrections.

The County is committed to the protection of water quality. As a public agency concerned with the health and welfare of its citizens and the environment, the County has made every effort to ameliorate the impacts of the Landfill. The Draft CDO ignores the tenacious efforts by the County to address the legacy of this closed Landfill. Since the mid-1980's when the County first learned that the Landfill may be impacting the groundwater, the County has been responsive and even proactive in its efforts to address environmental concerns. Looking at the data for the past 20 years, the

County's actions have removed roughly ninety percent (90%) of VOCs at the Landfill. (Engineering Feasibility Study Geer Road Landfill, February 13, 2009, p. vii, hereinafter "Feasibility Study.")

Due to the limited amount of time given to provide comments on the Draft CDO, the County reserves the right to submit additional comments and evidence.

II. Factual Background

The County is one of the owners of the Landfill and it operated the Landfill from 1970 to 1990. (SCS Engineering Feasibility Study, Geer Road Landfill p. 4.) This 168 acre Landfill is located eight miles east of Modesto adjacent to the Tuolumne River. (*Ibid.*) This Class III Landfill accepted residential, commercial, industrial, cannery, construction, and demolition wastes. The Landfill accepted approximately 4.5 million tons of waste during its operation. (*Ibid.*) Waste was deposited using a trench and fill method. In the final years of operation, wastes were deposited using the area fill method in order to bring the top of the Landfill to the required slopes for closure. (*Ibid.*)

The Landfill consisted of a single unlined landfill unit. It does not have a leachate collection and removal system ("LCRS") because the Landfill predated the regulatory requirements for both a base liner or a LCRS. (*Ibid.*) The Landfill ceased accepting waste in 1990 and closure was approved in 1996. (*Ibid.*) The Landfill is currently capped with a geomembrane and vegetative soil cover on the top and compacted clay and vegetative soil on the side slopes. (*Ibid.*)

Groundwater was first tested in 1976, and the groundwater has been routinely monitored since 1987. (*Ibid.*) The Landfill groundwater monitoring network currently consists of twenty-two (22) groundwater monitoring wells in the shallow groundwater zone and twelve (12) groundwater monitoring wells in the deeper zone. (*Ibid.*)

Elevated levels of VOCs and some metals and inorganic compounds have been identified in groundwater. The County installed a GWET System in 1993. It consists of twelve (12) groundwater extraction wells that pump water to the treatment plant. The treatment system includes two types of pre-filters, plus two 10,000 pound granular activated charcoal vessels to remove the VOCs. (*Ibid.*)

Landfill gas is generated as part of the natural degradation of the waste in the Landfill. (*Ibid.* at p. 5.) Landfill gas is monitored at 73 landfill gas probe locations in and around the Landfill. To control the landfill gas, a network of 83 landfill gas extraction wells are located throughout the Landfill. In 1992, a flare was installed in the northern portion of the site to burn off the landfill gas extracted from the landfill gas extraction wells and this flare operated from 1992 to 2006. In 1995, a second flare was installed in the southern portion of the Landfill. But in 2006, the northern flare was taken off-line after it was severely vandalized. Currently, all eighty-three (83) extraction wells are connected to the southern flare. (*Ibid.*)

Over the years, the Landfill has been regulated by Waste Discharge Requirements ("WDRs"). The most recent WDRs (Order R5-2009-0051) were issued in April 2009.

The County has worked diligently to meet all deadlines in the closure, postclosure, and corrective action programs and in the WDRs. Furthermore, the County has implemented many corrective measures before being mandated to do so by the Regional Board. The County's corrective action measures to date have reduced the constituents of concern, and VOC levels in particular, in the Landfill by roughly 90%. (Feasibility Study, p. vii.)

III. **The Appropriate Remedial Strategy is to Prioritize the Landfill Gas to Eliminate the Primary Source of Contamination**

A. **Remedial and Regulatory Objectives**

In developing a remedial strategy for the Geer Road Landfill, the County and the Regional Board are both guided by the same water quality and regulatory objectives. The primary water quality goal of the remedial effort is to develop a corrective action that will comply with all applicable laws and regulations. California Code of Regulations, title 27, section 20430, subdivision (c), essentially requires the discharger to implement corrective action that will ensure all constituents of concern achieve water quality protection standards at the point of compliance. Another relevant authority is State Water Resources Control Board Resolution 92-49, which sets forth the Water Board's policy on investigation and cleanup of contaminated sites. Among other things, Resolution 92-49 mandates that dischargers be allowed to pursue a phased approach to investigation and remediation, and that they must be allowed to select cost-effective remedial methods. The County's proposed remedial strategy achieves these water quality goals and complies with these regulations. The Draft CDO, unfortunately, is more aggressive than necessary to achieve water quality goals, and fails to comply with the policies in Resolution 92-49.

B. **The County's Remedial Strategy will Reduce Constituents of Concern Below Water Quality Protection Standards at the Point of Compliance**

In order to assure the County as well as the Regional Board that an effective, and cost-effective, remedial strategy is developed for the Landfill, the County consulted an independent consultant who has not worked on this site before to propose a strategy. To that end, the County relied on Bryan A. Stirrat & Associates. Mr. Stirrat and his team of highly-qualified experts evaluated the site and the Draft CDO. Mr. Stirrat, who has worked on approximately 150 to 200 landfills during his career, has developed a remedial strategy, which is explained in the attached declaration (Declaration of Bryan Stirrat). Mr. Stirrat predicts that an optimized and expanded landfill gas system, coupled with a targeted groundwater corrective action in the area of MW-4S, will achieve compliance with water quality protection standards at the point of compliance

for all constituents of concern. (Stirrat Decl. ¶¶ 8, 43.) According to Mr. Stirrat, the current decreasing trend in VOCs levels in groundwater beneath the Landfill is primarily a result of the current landfill gas system. (Stirrat Decl. ¶ 36.) Optimizing and expanding the landfill gas system to improve vacuum coverage of the waste prism will significantly improve landfill gas collection efficiency across the entire site and prevent VOCs from coming into direct contact with the surrounding formation and the underlying groundwater. (Stirrat Decl. ¶¶ 30, 32.) As to the vinyl chloride and c-1, 2-DCE levels in the area of MW-4S, Mr. Stirrat believes that these levels are likely localized and therefore could be addressed with a more intensive landfill gas extraction effort and a focused groundwater corrective action in the area of MW-4S. (Stirrat Decl. ¶ 36.) The optimized and expanded landfill gas system, together with a more focused groundwater corrective action and potentially a more intensive landfill gas extraction effort in the area of MW-4S, will provide a "comprehensive VOC strategy for the site." (Stirrat Decl. ¶ 36.) Mr. Stirrat also believes that the inorganic constituents of concern will be adequately addressed by the County's proposed remedial approach. (Stirrat Decl. ¶¶ 37.)

The appropriate primary remedial strategy for reducing VOC contamination at the Landfill is to maximize the recovery of landfill gas by optimizing the current landfill gas system. (Stirrat Decl. ¶ 30.) Optimization and expansion of the landfill gas system involves six key components. First, after appropriate engineering analysis, the number of landfill gas extraction wells would be increased. (Stirrat Decl. ¶ 32.) Second, a comprehensive assessment of the current landfill gas production trends would be conducted so that the vacuum to the currently installed wells and the newly installed wells can be properly tuned. (*Ibid.*) Third, the existing landfill gas and "vadose zone" wells would be surveyed for water level to determine whether the base of the Landfill is partially immersed in groundwater, and if so, to what extent. (*Ibid.*) Fourth, the information gathered through the water level survey would be used along with historical information regarding the waste prism to create a three dimensional conceptual model of the Landfill, which would provide a better understanding of the landfill gas conditions on the site and of the nature of the groundwater impacts. (*Ibid.*) Fifth, a speciated VOC survey of the landfill gas wells in the vicinity of groundwater monitoring well MW-4S would be performed to help define the conditions adjacent to that well where vinyl chloride has been a persistent contaminant of concern. (*Ibid.*) Sixth, the results of the VOC survey would be used along with the three dimensional model to determine whether a more intensive landfill gas system and a focused groundwater corrective action is needed for the area immediately adjacent to groundwater monitoring well MW-4S. (*Ibid.*)

The County's proposed remedy is superior to the expanded GWET System required by the Draft CDO. Not only are landfill gas systems more effective at removing VOCs than GWET Systems, they are also more cost-effective. In addition, unlike GWET Systems, which treat the groundwater after it is already contaminated, landfill gas systems remove the source of the contamination and prevent the groundwater from becoming contaminated in the first place. Furthermore, the County's expert consultant believes

that an optimized landfill gas system, coupled with a targeted groundwater remedy, will be effective in achieving compliance with water quality protection standards.

The County and its consultants believe it is critical to allow the remedial strategy to follow the results of further investigations and analyses. The recommended remedy should not be prescribed beforehand. That is a key failing of the Draft CDO approach: it prescribes remedial actions without allowing for a determination of whether those actions are necessary, appropriate or cost-effective.

C. Landfill Gas Extraction is the Most Effective Means of Reducing VOC Groundwater Contamination

Landfill gas extraction is more effective at addressing VOC contamination than a GWET System because VOCs have a stronger affinity for the vapor phase than the dissolved phase, and it is easier and cheaper to move and process gas than water. (Stirrat Decl. ¶ 30.) Indeed, the County's consultant estimates that the current landfill gas system removes approximately 1,800 pounds of VOCs per year. (*Ibid.*) In contrast, an expanded GWET System would only remove approximately 21.5 pounds of VOCs per year and would require pumping over 200 million gallons of water per year to do so. (*Ibid.*)—This data demonstrates that an optimized landfill gas system would be far more effective in addressing VOC contamination than the expanded GWET System required by the Draft CDO.

D. Landfill Gas Extraction is the Most Cost-Efficient Way to Reduce VOC Groundwater Contamination

The Regional Board is required under Section III of Resolution 92-49 to provide the County with the opportunity to select the most cost-effective method for cleaning up the Landfill. ("The Regional Board shall implement the following procedures to ensure that dischargers shall have the opportunity to select cost-effective methods for detecting discharges or threatened discharges and methods for cleaning up or abating the affects thereof.") The data available to the County clearly indicates that landfill gas extraction is far more cost-efficient than the expanded GWET System required by the Draft CDO. The County's consultant estimates that it would cost approximately \$26,000 to remove one pound of VOCs using the expanded GWET System described in the 2010 corrective action plan, while it costs significantly less to remove one pound of VOCs using a landfill gas system. (September 15, 2010 letter from County to Regional Board.)

E. Regional Board has No Technical Basis for Disputing the Effectiveness of the County's Proposed Remedial Approach

The Regional Board has no reasonable technical basis for disputing that an optimized and expanded landfill gas system would be an efficient way to prevent VOC impacts in groundwater at the Landfill. During the deposition of Wendy Wyels, Ms. Wyels agreed that a landfill gas extraction system in theory was an efficient way to prevent VOC

impacts in groundwater but that based on her understanding from the County's consultant, SCS Engineers, all of the landfill gas cannot be captured. (Deposition of Wendy Wyels, hereinafter Wyels Depo. p. 18, Ins. 11-15.) SCS Engineers, however, never made such a statement. (Sullivan Decl. ¶ 13.) Rather, SCS Engineers believes that landfill gas recovery is an effective remedy for this site, and recommend that remedial strategy. (Sullivan Decl. ¶ 15.) During her deposition, Ms. Wyels did not identify any basis for her belief that landfill gas extraction would not be an appropriate primary remedy for VOCs other than statements and reports from SCS Engineers. Because SCS Engineers has made it clear its statements and reports support a remedy focused on landfill gas, the Regional Board has no basis for its contention that an optimized and expanded landfill gas system could not effectively prevent VOC impacts in groundwater.

IV. The Remedial Schedule in the Proposed Cease and Desist Order Cannot Be Achieved

The Draft CDO requires the County to submit both a Landfill Gas Optimization Plan and a GWET Expansion Plan by March 30, 2011. Even if this date is extended by a month or two months, it would still not be feasible. Requiring two plans that require evaluation of two separate systems on the same date is a significant burden. One month later, by April 30, 2011, the Draft CDO requires a Supplemental Groundwater Investigation Work Plan. By July 31, 2011, the County must provide the first 2011 Semi-annual Groundwater Monitoring Report. By September 30, 2011, the County must conduct a facility inspection, completing any needed repairs within 30 days. By October 30, 2011, the Draft CDO requires a Groundwater Investigation Report. And by December 30, 2011, the Draft CDO requires implementation of the Landfill Gas Optimization Plan or an Expanded Landfill Gas System Construction Report and the Startup Testing and Construction Report for the Expanded GWET System. In summary, the Draft CDO requires eight separate deliverables in the period of eight months. It requires the County to simultaneously optimize the landfill gas system, install a new GWET System and conduct a thorough investigation into the lateral and vertical extent of the contamination, both on and off site. This schedule is infeasible.

A. The County Does Not Have the Financial Resources to Comply With the Aggressive Schedule Contemplated in the Draft CDO

The schedule in the Draft CDO requires the County to prepare and implement the Landfill Gas Optimization Plan, the GWET System Expansion Plan and the Phase I Groundwater Investigation Workplan by the end of 2011. Although it is difficult to estimate these costs, the County estimates that the Landfill Gas Optimization Plan

would cost approximately \$685,000 to prepare and implement¹, that the GWET System Expansion Plan would cost approximately \$1,600,000 to prepare and implement, that the Phase I Groundwater Investigation Workplan would cost approximately \$435,000 to prepare and implement, and that the annual operation, monitoring and maintenance costs would cost approximately \$583,000.² (Aggers Decl. ¶¶ 21-24.) In total, the Draft CDO would require the County to spend \$3,303,000 in 2011 alone.

The County does not have sufficient financial resources available to support these costs. Funds for post-closure activities at the Landfill come from the Geer Road Operating Account and the Post-Closure Maintenance Account, which receives \$450,000 in tipping fees each year from the Fink Road Landfill. (Aggers Decl. ¶¶ 15-19.) At the end of the 2010 fiscal year, the total funds set aside for the Landfill in both the Geer Road Operating Fund and the Geer Road Post-Closure Maintenance Account was only \$3,423,162. (Aggers Decl. ¶ 20.)

Other than the Post-Closure Maintenance Account and the Geer Road Operating Fund, the County has no other funds available for its Landfill obligations. (Aggers Decl. ¶ 27.) The County's General Fund is facing a current revenue shortfall of \$15.6 million, and therefore cannot be looked to as a potential source of funding. (Aggers Decl. ¶ 25.) Moreover, while the County Board of Supervisors has identified tipping fees at the Fink Road Landfill as the source of corrective action financial assurances, the amount of that financial assurance has not been approved by the Regional Board nor has it been allocated by the Board of Supervisors.

Under Section IV.C. of Resolution 92-49, the Regional Board is required to consider the financial resources available to the discharger in determining the schedule for investigation and cleanup and abatement. However, it is clear from Ms. Wyels deposition that the Regional Board failed to do so. When Ms. Wyels was asked whether the Regional Board considered the financial resources available to the County in issuing the Draft CDO other than the financial assurances requirement in Title 27 of the California Code of Regulations, Ms. Wyels replied "no." (Wyels Dep. p. 86, lns. 14-23.) Accordingly, the remedial schedule in the Draft CDO violates Resolution 92-49.

¹ If the number of landfill gas wells is nearly doubled, however, the actual cost may be much higher.

² Regional Board staff has opined that these costs may not be accurate because the existing GWET System will most likely be taken off-line. However, the costs of operating the new or "interim" GWET System proposed in the October 29, 2010 Corrective Action Plan significantly exceed the operational costs of the existing system. This is because the interim GWET System requires significantly more electricity to operate the pumps and the air stripper than the current system, which uses relatively little electricity.

A. The County Does Not Have the Technical Resources To Comply With The Aggressive Schedule Contemplated In The Draft CDO

The schedule in the Draft CDO will require the County and its consultant to work at break-neck speed to meet the deadlines. The County, like many public agencies, is facing huge budget shortfalls. And like many public agencies, the County has had to lay off employees and is facing additional lay offs this year. (Aggers Decl. ¶ 30.) As a result, the remaining County employees handle multiple job duties that were previously handled by two or more individual employees. (Aggers Decl. ¶¶ 31-32.) To add insult to injury, the County has had to impose a two year, five percent work furlough which began on July 1, 2010. (Aggers Decl. ¶ 33.) This furlough reduces each full-time employee's hours by 104 hours each year. (*ibid.*) In other words, County employees are required to do more work in less time.

In addition to the pending layoffs, the County currently has a County-wide hiring freeze which has impacted the ability to fill two key positions in the Solid Waste Management and Landfill Divisions: the Landfill Manager III and a Solid Waste Project Manager I/II. Consequently, the Landfill Division is operating with only a Manager I position filled. (Aggers Decl. ¶ 31.)

The Department of Public Works, which is responsible for overseeing all public works projects, is also currently functioning at minimum staffing levels. (Aggers Decl. ¶ 34.) Three separate elements of the Draft CDO have the potential to be public works projects requiring coordination and oversight by the County's Public Works Department: 1) a full expansion of the landfill gas system, 2) the groundwater investigation work (because of the number of wells being drilled), and 3) the new GWET System. (Aggers Decl. ¶ 35.) Accordingly, the Public Works Department would not be able to oversee multiple projects taking place on a parallel track, and the Department of Environmental Resources does not have ample contracting staff to pick up the workload. (Aggers Decl. ¶ 36.)

The Regional Board was required to consider the technical resources available to the County in determining the remedial schedule in the CDO. (See Resolution 92-49 Section IV.C.) It is clear from the tight schedule in the CDO and Ms. Wyels' deposition, however, that the Regional Board failed to do so. (Wyels Dep. p. 88, Ins. 3-13.)

B. The Timeline does not Allow the County to Comply with its Legal Obligations

The County, as a public agency, is required to comply with the public bidding requirements in the California Public Contract Code sections 22030-22045. As such, it is required to publicly bid any "public project", defined as "construction, reconstruction, erection, alteration, renovation, improvement, demolition, and repair work involving any publically (sic) owned, leased, or operated facility." (Cal. Public Contract Code § 22002

(c)(1.) The County's Procurement Process requires an informal bidding process for commodities or services of up to \$25,000 in value. For commodities and services \$25,000 or greater, the County must solicit formal bids. (Aggers Decl., Exhibit 6, p. 20.) The contract for the commodities or services may be awarded to the lowest responsible bidder without approval by the Board of Supervisors. (*Ibid.*) "Public works projects exceeding \$100,000 shall be referred to the Director of Public Works and must be approved by the Board of Supervisors." (*Ibid.* at page 39 of 73, ¶ 11.)

The following outlines the administrative tasks required for public works projects, and which will likely be required for the capital improvements for the remedial actions at the Landfill:

- (i) Prepare, review and finalize a Scope of Work with the environmental consultant;
- (ii) Develop a Project Authorization for the work to be done. If the work is not already budgeted, the Board of Supervisors must appropriate the necessary funds at a Board meeting;
- (iii) Prepare and review the contract and obtain necessary signatures;
- (iv) Develop an MOU with Public Works. This requires a planning meeting to discuss what is needed, submittal of a work outline, and contract preparations;
- (v) Finalize the engineered stamped drawings;
- (vi) Review the drawings (Public Works);
- (vii) Prepare the bid documents (Public Works);
- (viii) Prepare a staff report for the Board of Supervisors jointly with Public Works;
- (ix) Coordinate with the Clerk of the Board for setting the bid solicitation opening for a date/time that is available on the Board of Supervisor's calendar;
- (x) Prepare and submit Staff reports to the CEO's office a minimum of 11 days before the scheduled Board meeting;
- (xi) Post the bid solicitation for a minimum of 30 days;
- (xii) Hold a pre-bid conference and/or walk through of the site mid-way through the bid period;

(xiii) Review the bid submissions to document that all required elements have been provided and everything is in order and determine the lowest responsible and responsive bidders. Public Works then consults with the Department of Environmental Resources regarding the results of the bid solicitation;

(xiv) Prepare and submit a staff report in coordination with the Public Works staff recommending approval of the contractor to the CEO's office a minimum of 11 days prior to the scheduled Board of Supervisor's meeting;

(xv) Prepare the Notice of Intent to Award letter and letters to the contractors who were not selected;

(xvi) Wait five business days for the bid protest period to expire;

(xvii) Address any bid protests. Bid protests can take between two weeks and several months to resolve depending upon how high up the complaining contractor appeals. Of course, if the contractor sues on the bid award, the matter could take a year or more to resolve;

(xviii) Prepare the contract documents and mail them to the successful contractor;

(xix) Once the agreement is received from the contractor, Public Works sends the contract to Risk Management for verification that the insurance documents comply with County requirements;

(xx) Public Works and the Department of Environmental Resources hold a preconstruction meeting with the contractor; and

(xxi) Public Works issues the notice to proceed.

(Declaration of Jami Aggers, hereinafter Aggers Decl. ¶ 40.)

In the best of circumstances, the public works process outlined above takes on average six months from the date the Regional Board approves a workplan. Aggers Decl. ¶ 39.) This time frame assumes that there is only one request for bids out at a time. If there are multiple bids occurring at the same time, more time may be required.

The Draft CDO provides the County with only ten and one-half months to submit the completion reports for the landfill gas improvements and the new GWET System and obtain Regional Board approval. This means that after an assumed 60-day staff approval of the Landfill Gas and GWET system Plans and complying with the public

bidding requirements, the County would only have two and one-half months to install, develop and test the systems. This is simply not feasible. Thus, the only way the County could possibly comply with the deadlines in the Draft CDO would be to not comply with the public bidding requirements.

C. The Remedial Schedule in the Draft CDO Improperly Assumes that the Regional Board Will Timely Respond to Submittals

The remedial schedule in the Draft CDO is also infeasible because the Regional Board has not historically responded to the County's submittals in a timely fashion. For example, the County submitted an Evaluation Report of Impacted Groundwater in the North Area on October 30, 2009, and the only written comments the County received were in the Draft CDO issued on November 22, 2010. (Aggers Decl. ¶ 10.) Likewise, the County submitted a Financial Assurance Cost Estimate to the Regional Board on June 19, 2009, but did not receive a written response from Regional Board staff until October 27, 2009. (Aggers Decl. ¶ 8.) The County submitted the additional information requested in the Regional Board's October 27, 2009 letter on December 1, 2009. To date, the Regional Board has not responded to the County's December 1, 2009 submittal. Unfortunately, even if the Regional Board wanted to comment on each of the County's submittals, the remedial schedule in the Draft CDO does not allow any time for the Regional Board to respond and approve or conditionally approve work plans. And if any of the work plans were conditionally approved, there would be no opportunity to modify the work plans prior to implementation.

D. The Remedial Schedule in the Draft CDO is Inconsistent with Resolution No. 92-49

Resolution No. 92-49 mandates the Regional Board to "require the discharger to conduct investigation, and cleanup and abatement, in a progressive sequence." (Resolution 92-49, § II.A.1.) Resolution 92-49 also requires that the Regional Board evaluate alternatives based on effectiveness and cost for site investigation and remediation. (Resolution 92-49, § III.C.) The schedule included in the Draft CDO requires the County to conduct investigation and install or upgrade two separate remedial systems at once. This is the antithesis of a phased approach. Nor does the Draft CDO allow any time for evaluation of alternatives based on the effectiveness of the landfill gas system or the information derived from the site investigation.

The Draft CDO obligates the County to install an "interim" GWET System by the end of 2011. Then, 16 months later, the Draft CDO requires the County to submit a design report for a new GWET System, and requires the County to have the new GWET System up and running nine months later. This remedial schedule does not allow time for Regional Board review of the new GWET System Design Report, nor does it allow time for the public works project to go through the public bidding process. More importantly, however, the Draft CDO requires the County to install two new GWET systems within 25 months. Regional Board staff stated that it does not believe the interim GWET System will capture enough of the plume. Therefore, a new system will

be required at a later date. (Deposition of Howard Hold, hereinafter Hold Dep. p. 93.) The phased approach identified in Resolution 92-49 does not mean installing one GWET System after another. Conversely, Resolution 92-49 contemplates a cost effective remedial approach. (Resolution 92-49 § III.)

E. The Timeline in the Draft CDO Does not Account for Potential Delays Due to Permitting or Weather

The County's ability to complete construction of necessary improvements could be delayed as a result of inclement weather. (Aggers Decl. ¶ 42.) Additionally, some of the remedial improvements may require permits from the San Joaquin Valley Air Pollution Control District ("SJVAPCD"), which could create further delays. While the County can request that the SJVAPCD employ an expedited process, the County has no control over the permit process the SJVAPCD ultimately employs. The remedial schedule in the Draft CDO is infeasible because it fails to account for delays that could result from these additional constraints.

V. The Draft CDO Impermissibly Specifies the Manner of Compliance in Violation of Water Code Section 13360

Water Code Section 13360 prohibits the Regional Water Board from specifying the manner in which a permittee achieves compliance with waste discharge requirements and explicitly authorizes a permittee to comply in any lawful manner. The Draft CDO violates Section 13360 by specifying that the County must achieve compliance with the WDRs by constructing and implementing the expanded GWET System described in the County's October 2010 Corrective Action Workplan. The Draft CDO must therefore be revised to permit the County to comply with the WDRs in any lawful manner, including by implementing an optimized landfill gas system and a targeted groundwater extraction system as proposed by the County's experts.

VI. The Regional Board is Estopped From Enforcing The Requirements in Provisions G.1.G and G.1.H of the WDRs

The Regional Board is estopped from taking enforcement action against the County for alleged failure to submit the corrective action and well installation plans required by Provisions G.1.g and G.1.h of the WDRs because the Regional Board failed to notify the County that it disagreed with the conclusions in the County's *Evaluation of Impacted Groundwater in North Area* report ("Evaluation Report"). Estoppel may be asserted against the government "where justice and right require it." (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 399 (citations omitted).) Estoppel applies in administrative proceedings when the following four elements are present: "(1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (*Spray, Gould & Bowers v. Associated Internat. Insurance Co.* (1999) 71, Cal.App.4th 1260, 1268; see also *In the Matter of the Petition*

of *William G. Kengel*, Order No. WQ 89-20 (Cal. St. Wat. Res. Bd. 1989).) While estoppel generally arises from words or conduct, estoppel may also arise from silence where there is a duty to speak, and the party upon whom such duty rests has an opportunity to speak but remains silent. (*Spray, Gould & Bowers v. Associated Internat. Insurance Co.* (1999) 71, Cal.App.4th 1260, 1268.) A duty to speak need not rest upon any legal obligation. (*Ibid.*) Rather, the duty may arise from "principles of natural justice." (*Ibid.*)

All of the elements of estoppel are present in this case. First, the Regional Board was aware that the County had submitted its Evaluation Report to the Regional Board on October 30, 2009; that the Evaluation Report concluded that "[s]ince LFG is already being mitigated in the northern area of the site, and there is evidence of a positive effect on groundwater, no additional corrective action measures are recommended other than continuing plans for enhanced groundwater extraction and treatment" (*Evaluation of Impacted Groundwater in North Area*, p. 23.); and that the Regional Board disagreed with the Evaluation Report's conclusion that no corrective action measures were needed.

Second, the Regional Board had a duty to inform the County if the Evaluation Report did not comply with the requirements of Provision G.1.f because compliance with the requirements in G.1.g and G.1.h of the WDRs were dependent upon the conclusions in the Evaluation Report. However, the Regional Board did not inform the County that it disagreed with the conclusions in the Evaluation Report or otherwise indicate that the Evaluation Report did not satisfy the requirements of Provision G.1.f. until it issued the CDO more than one year after the County submitted its Evaluation Report. The Regional Board knew that the County would interpret its silence to mean that the Regional Board concurred with the conclusions in the Evaluation Report since common Regional Board practice is to provide a written response to technical reports, and if necessary, request revisions to reports that the Regional Board believes do not comply with the Regional Board's requirements.

Third, the County was not aware that the Regional Board disagreed with the conclusions in its Evaluation Report. Indeed, the County never received any written comments or communications from the Regional Board in response to the Evaluation Report until it received the Draft CDO.

Lastly, the County relied on the Regional Board's silence to its detriment. The County reasonably assumed that the Regional Board concurred with the conclusion in the Evaluation Report that further corrective action in the northern area of the site was not required and therefore did not submit a corrective action plan or a well installation plan for the north area. The test for estoppel has been clearly met in this case, and the Regional Board is thus estopped from citing the County in the Draft CDO for failing to comply with the requirements of Provisions G.1.g or G.1.h of the WDRs.

VII. The Remedy Proposed by the Regional Board in the Draft CDO violates the Controllable Factors Policy in the Basin Plan

The Regional Board's ability to regulate water quality is limited by the Controllable Factors Policy in the Basin Plan. That policy provides that the Regional Board may only apply water quality objectives to controllable water quality factors. (See Basin Plan, III-1.00, IV-15.00 (emphasis added).) "Controllable water quality factors" are defined as "those actions, conditions, or circumstances resulting from human activities that may influence the quality of the waters of the State, that are subject to the authority of the State Water Board or the Regional Water Board, *and that may be reasonably controlled.*" (Basin Plan, III-1.00, IV-15.00 (emphasis added).)

The Draft CDO violates the Controllable Factors Policy by requiring the County to obtain hydraulic control of all impacted groundwater coming from the Landfill using an expanded GWET System. Hydraulic control of the plume with extraction and treatment of groundwater is not a controllable water quality factor because the volume of groundwater flowing beneath the Landfill is so large that it cannot be reasonably controlled. (Stirrat Decl. ¶ 38.) Moreover, even if the groundwater could be controlled it would be impracticable to treat and dispose of such a large quantity of water. (*Ibid.*)

VIII. The Burdens, Including Cost, of the Investigation and Reporting Provisions of the Draft CDO Do not Bear a Reasonable Relationship to the Benefit, in Violation of Water Code Section 13267

When ordering a discharger to conduct an investigation and prepare technical reports, under Water Code section 13267, the Regional Board must insure that the burden, including cost, of the reports bears a reasonable relationship to the benefits provided. The Draft CDO imposes numerous investigation and technical report obligations on the County. However, the Regional Board made no effort to conduct the analysis required by section 13267. The Regional Board did not consider whether the burden of the investigation and reports are reasonable in relationship to the benefits, and in fact there is no such reasonable relationship.

IX. County's Proposed Draft CDO

As noted above, the County, as a public entity serving the residents of Stanislaus County, desires to address the environmental concerns from the Landfill. This mission, however, must be tempered by the financial and technical constraints the County faces. As noted elsewhere in these comments, the best approach—i.e. most cost effective and expedient approach, with the greatest chance of success—is to optimize and if necessary expand the existing landfill gas system. Those corrective actions, coupled with targeted groundwater extraction and treatment, will, the County believes, achieve compliance with all applicable water quality laws and regulations.

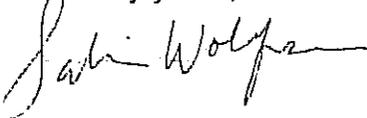
Nonetheless, to address the Regional Board's concerns about deficiencies in information related to the extent of contamination downgradient from the Landfill and in deeper groundwater zones, the County proposes to conduct a phased investigation into the extent of the contamination.

Attached hereto as Exhibit F, the County submits a revised Draft Cease and Desist Order. This revised Draft CDO corrects some of the findings as they relate to the WDRs and clarifies that the County did request concentration limits above backgrounds as confirmed by Harold Hold during his deposition. (Hold Dep., p. 112, lns. 15-20.) In addition it proposes the above mentioned corrective actions and site investigation approach with a remedial schedule for compliance. However, the County is continuing to work with its consultants and the Regional Board, and reserves right to submit further suggested revisions.

X. Conclusion

The County appreciates the time and attention you have taken to review this matter and the County's concerns related to the Draft CDO. The County is committed to remediating environmental concerns from the Landfill and believes that its proposed remedial approach is the most effective and cost-efficient way to do so.

Sincerely yours,



SSW for Leah S. Goldberg

- c: Kenneth Landau, Assistant Executive Officer
- David Coupe, Esq. (without exhibits)
- Wendy Wyels
- Anne Olson (without exhibits)
- Howard Hold (without exhibits)
- Patrick Pulupa, Esq.
- Thomas Boze, Esq. (without exhibits)
- Jami Aggers (without exhibits)
- Stan Risen (without exhibits)
- Sonya Harrigfeld (without exhibits)
- Gregory Newmark, Esq. (without exhibits)

LSG:kw

1589795.3