

Greenaction for Health and Environmental Justice
El Pueblo Para El Aire y Agua Limpio/People for Clean Air and Water

June 27, 2011

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California Regional Water Quality Control Board
Central Valley Region
1685 E Street, Suite 200
Fresno, CA 93706

RE: Chemical Waste Management, Inc. Tentative Special Order Modifying Waste Discharge Requirements Order No. R5-2006-0122

**OPPOSITION TO TENTATIVE SPECIAL ORDER MODIFYING WASTE
DISCHARGE REQUIREMENTS ORDER NO. R5-2006-0122 AND REQUEST FOR**

Greenaction for Health and Environmental Justice (“Greenaction”) and El Pueblo Para El Aire y Agua Limpio/People for Clean Air and Water (“El Pueblo”) submit the following comments regarding Tentative Special Order (TSO) that proposes to modify Waste Discharge Requirements Order No. R5-2006-0122 and request an extension to the commenting period.

I. Introduction

On May 26, 2011, the Central Valley Water Board (“Water Board”) issued the TSO. The Special Order would permit a second three-year period for the continued operation of the bioreactor portion of landfill B-19 (“Bioreactor”) at the Kettleman Hills Facility (“KHF”). Chemical Waste Management, Inc. (“CWMI”) owns and operates the Bioreactor and KHF. Order No. R5-2006-0122 prohibits the continued addition of liquids into the Bioreactor after three years from September 15, 2008, the date liquids were first introduced. The regulations

specify the Bioreactor can only be operated in renewable three-year periods, not to exceed a total of twelve years. Staff proposed to request the Water Board to consider the adoption of the Special Order despite well-documented and chronic violations at the CWMI KHF, despite serious health problems including infant deaths and birth defects plaguing Kettleman City, despite blatant racism and discrimination in the land use permits, and despite the fact that the issuance of new permits to allow the Bioreactor to operate would have a discriminatory and disproportionate impact on the low-income people of color residents of Kettleman City.

On May 26, 2011, the Water Board provided what was referred to as a “notice” of the Special Order and “notice” of a so-called “public hearing” concerning the Special Order, which is scheduled for “3/4/5 August 2011,” at 8:30 a.m. in Rancho Cordova, CA.

Greenaction and El Pueblo object to the proposed public hearing notice and location and to the entire permitting process for the Special Order because meaningful participation by Kettleman City and Avenal residents was effectively precluded.

Greenaction and El Pueblo urge the Water Board to reject the Special Order because of CWMI’s atrocious history of environmental violations and the administrative record is incomplete to justify a renewal of the permit.

Greenaction and El Pueblo request an extension to the comment period to submit additional testimony, evidence, and/or comments in writing because the notice was defective (as described below) and the administrative record regarding the Bioreactor is not publicly available short of a Public Records Act Request. Greenaction submitted a Public Records Act Request to the Water Board but will need time to review boxes of records to submit additional comments.

II. Invalid and Improper Permitting Process

Greenaction and El Pueblo protest the permitting process for the Special Order because meaningful participation was effectively precluded by defective, inadequate and improper notice, failure to provide Spanish translation of the TSO, unreasonable date, time, and location of the public hearing, and selection of the designated parties at the public hearing that did not represent the interests of Kettleman City and Avenal residents.

A. Defective, Inadequate and Improper Notice

In the notice for the public hearing, the links provided for information on meeting and hearing procedures did not exist: <http://waterboards.ca.gov/water_laws/>, <http://waterboards.ca.gov/centralvalley/board_meetings/mtgprocd.shtml/>. Therefore, the notice itself was defective due to the defective links. Meaningful public participation in a public hearing was hindered since access to information on meeting and hearing procedures was not available in the notice for the public hearing.

In the notice for the public hearing, the date of the public hearing is listed as “3/4/5 August 2011.”¹ The date of the public hearing in the notice is ambiguous because it was not clear whether the public hearing begins on August 3, 2011, or can start on any one of those days, and also whether the hearing will only last one day or can last several days. Clay Rodgers, Assistant Executive Officer of the Water Board, clarified that the hearing will only last one day on one of the listed days, and the exact meeting date will be available two or three weeks before the public hearing.² Even a local newspaper, the Hanford Sentinel, interpreted the meeting date incorrectly when the newspaper reported that the “. . . [public hearing] is set for Aug. 3 at the Central Valley

¹ California Regional Water Quality Control Board Central Valley Region, Notice of Public Hearing Concerning Special Order for Chemical Waste Management, Inc. Kettleman Hills Facility, Kings County Modifying Waste Discharge Requirements Order No. R5-2006-0122, 26 May 2011, page 1.

² Clay Rodgers, Executive Assistant Officer of California Regional Water Quality Control Board Central Valley Region, Phone conversation with Alexander Martinez, Greenaction, 23 June 2011.

Water Quality Control Board headquarters in Rancho Cordova, near Sacramento. The meeting could last up to three days"³ How are Kettleman City and Avenal residents expected to be involved in the public hearing if a local newspaper cannot interpret the meeting date for the public hearing correctly? Meaningful public participation is effectively precluded because the meeting date is ambiguous and the notice was defective.

The notice for the TSO was also invalid and improper because the TSO will affect all Kettleman City and Avenal residents, yet only one Kettleman City resident, Maricela Mares Alatorre, was notified. Notifying one Kettleman City resident out of 1,500 and zero Avenal residents out of 15,000 is not proper or adequate notice. The Water Board must notify all Kettleman City and Avenal residents of the TSO and permitting process to ensure meaningful public participation.

B. Failure to Provide Spanish Translation of the TSO

The TSO is inadequate because the TSO was provided in English only. The TSO available for download at http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/ was only provided in English, which discriminates against monolingual Spanish-speaking Kettleman City and Avenal residents. Eighty-eight percent of Kettleman City residents are primarily Spanish-speaking, and 61 percent are monolingual Spanish-speaking. Meaningful public participation is effectively precluded by the absence of Spanish translation.

In California, Spanish translation of materials has been required for meaningful participation by the public. In 1988, Kings County approved CWMI's application to construct and operate a hazardous waste incinerator at KHF over vocal opposition by many Kettleman City

³ Eiji Yamashita. "Chem Waste Seeking Renewal of Bioreactor Permit." Hanford Sentinel, 4 June 2011. Last accessed 23 June 2011 <http://www.hanfordsentinel.com/news/local/article_2f8a7c86-8e50-11e0-ae00-001cc4c002e0.html>.

residents. The residents, many of whom were monolingual Spanish-speaking, expressed continuous and strong interest in participating in the review process. However, many materials in the review process were not provided in Spanish. A judge later overturned the approval in part on the grounds that Kings County's failure to provide Spanish translations of materials had effectively precluded residents from meaningful participation.⁴

C. Date, Time, and Location of the Public Hearing

The date, time, and location of the public hearing will effectively preclude the participation of Kettleman City and Avenal residents. The public hearing will be scheduled on a day between August 3, 2011, and August 5, 2011, at 8:30 a.m. in Rancho Cordova, California. For example, since the meeting starts at 8:30 a.m. a Kettleman City resident would need to leave Kettleman City at 4:00 a.m. to reach Rancho Cordova, which is approximately two hundred and thirty (230) miles from Kettleman City. The location and time of the public hearing is a further barrier to participation for Kettleman City and Avenal residents because the meeting date may not be available until ten days before the meeting.⁵ For example, a Kettleman City resident may not know the meeting date up until ten days before the meeting, making it difficult or impossible to take time off from work or find suitable childcare to attend the public hearing. The so-called public hearing effectively precludes Kettleman City and Avenal residents from participating because the hearing is far away, scheduled during working hours, and the meeting date may not be available until ten days before the hearing. Participation by the affected community would be possible if the public hearing was held during the evening in Kettleman City. The Water Board should do what the Cal EPA/Department of Toxic Substances Control and United States

⁴ *El Pueblo para el Aire y Agua Limpio v. County of Kings*, Civ. No. 366045, Ruling on Submitted Matter, 22 Env'tl. L Rep. 20357 (Sacramento Sup. Ct. Dec. 30, 1991).

⁵ Notice of Public Hearing, page 2.

Environmental Protection Agency do – hold their hearings regarding the Chem Waste landfill in Kettleman City so the community can participate.

D. Designated Parties

The interests of Kettleman City and Avenal residents will not be represented at the hearing because the only designated parties are the Staff of the Water Board and CWMI. A designated party has the right to call an examine witnesses; to cross-examine opposing witnesses; to impeach any witness; and to rebut the evidence against him or her. Kettleman City and Avenal residents live directly adjacent to the Bioreactor and will be directly affected by the continued operation of the Bioreactor. Therefore, Kettleman City and Avenal residents should be represented at the hearing by designated parties because the TSO will affect Kettleman City and Avenal residents and the interests of these residents should be represented. Greenaction and the Kettleman City community group have submitted a written request to the Water Board to become designated parties.

III. Invalid Land Use Permit

Kings County has a well-documented pattern and practice of excluding Kettleman City residents from permit decisions that affect their community and lives. As the local land use agency, Kings County issued the Conditional Use Permit (CUP) for the landfill where the Bioreactor is used and its operation is proposed to be continued. As the Bioreactor's operation requires a CUP for the facility, the Water Board should not issue a new Bioreactor permit to be operated at a facility whose CUP was based on racial discrimination. Kings County defiantly refuses to translate permit documents into Spanish and they refuse to have public hearings in the community. As the Water Board and California EPA are mandated to uphold environmental

justice and comply with non-discrimination statutes, your agency cannot issue a permit for a technology at a facility that is permitted based on a racially discriminatory permit process.

IV. Water Board Should Consider Cumulative Impacts of the Bioreactor Along With the Many Other Pollution Sources in and near Kettleman City, and Should Consider the Birth Defects and Infant Deaths that Plague Kettleman City

The Bioreactor does not operate in a vacuum, but is located at a facility with many emissions sources and in an area with multiple pollution sources including pesticides, contaminated water, old oilfield pollution and massive diesel pollution. The Water Board's permit decision and environmental review process must consider the cumulative impacts of the Bioreactor when considered in combination of the other pollution sources in the area. It should also be evaluated with future proposed polluting industries including the proposed Avenal Energy Project, a 600 megawatt fossil fuel plant that has been approved by regional, state and federal agencies despite the existing poor air quality in the area.

V. History of Violations at Chemical Waste Management, Inc.'s Kettleman Hills Facility

CWMI has an atrocious history of serious and chronic environmental violations. CWMI's violations at KHF span over two decades that resulted in millions of dollars in fines and settlements. The Special Order should be rejected because CWMI has a poor track record of environmental compliance and stewardship, and these violations are chronic and serious.

These violations include toxic spills, illegal disposal, failure to conduct required monitoring and problems with the CWMI laboratory results.

In July 1984, EPA proposed a \$108,400 fine against CWMI for failure to monitor groundwater, failure to have a partial facility closure plan, and other violations.⁶ In October 1984, EPA banned the use of KHF for Superfund waste disposal because of RCRA violations.⁷ These violations include the absence of a groundwater monitoring system and disposal of PCBs in landfills not approved for PCB disposal.⁸

During 1984, EPA fined CWMI \$2.5 million for a total of 130 violations at KHF.⁹ Among other incidents, EPA charged that CWMI had allowed leaks from the landfill to contaminate local water supplies.¹⁰

During 1985, EPA fined CWMI ". . . \$7 million for improper groundwater monitoring, dumping incompatible wastes into ponds, keeping inadequate records, and more than 1,500 incidents of over-filling ponds. [CWMI] settled by agreeing to pay EPA \$2.1 million and DHS \$1.1 million."¹¹

In May 1986, the Central Valley Water Quality Control Board's ". . . groundwater monitoring review of [CWMI]'s 41 operating and observation wells found volatile compounds in 18 wells, including chlorobenzene, phenols, cyanides, and alpha and beta radioactivity."¹²

In March 1988, there was a landslide at KHF that tore out part of the liner system and displaced toxic waste deposited at the site.¹³ "[T]he EPA . . . ordered [CWMI] to suspend operations, excavate more than one million cubic yards of waste, and repair the liner system

⁶ Greenpeace, *Waste Management Inc.: An Encyclopedia of Environmental Crimes & Other Misdeeds*, 1991, page 45.

⁷ *Id.*

⁸ *Id.*

⁹ Edwin L. Miller, Jr., San Diego District Attorney, *Final Report: Waste Management, Inc.*, 1992, page 11.

¹⁰ *Id.*

¹¹ California Assembly Office of Research, *Today's Toxic Dump Sites: Tomorrow's Toxic Cleanup Sites*, 1986, pages 19, 24.

¹² Greenpeace, page 46.

¹³ *Id.* at 47.

before operations [could] resume.”¹⁴ Also in 1988, CWMI was fined \$80,000 for a fire at KHF landfill.¹⁵

In April 1989, DHS fined CWMI for \$363,000 for eleven administrative and operational violations discovered during a routine inspection in late 1988.¹⁶ These “[v]iolations include failure to report a fire, having inoperable fire control equipment on site, ‘discrepancies’ on written tracking records for weight and volume of wastes, and inadequate management of windblown material.”¹⁷

From March 2000 to November 2003, CWMI failed to perform monthly monitoring of the lysimeters at KHF’s landfill B-16 (“B-16”) for the presence of fluids, in violation of the Operation Plan for B-16 and section 15 of TSCA, 15 U.S.C. § 2614.¹⁸ CWMI was fined a civil penalty of \$10,000 and agreed to spend at least \$37,500 on air quality and other environmental monitoring equipment to be donated to Kings County Environmental Health Services.¹⁹

In November 2010, EPA fined CWMI \$302,100 for failure to properly manage PCBs at its KHF Hazardous Waste landfill.²⁰ These violations include: spill of toxic PCBs, a PCB drum exceeding the regulatory threshold of 50 ppm, a PCB drum not marked with the removal from service date, manifests that did not include the removal from service date or the PCB waste weight in kilograms, the release of PCBs below the drain valve cap of CWMI's 10,082 gallon

¹⁴ Miller, page 11.

¹⁵ *Id.*

¹⁶ Greepeace, page 47. *See also* Miller, page 11.

¹⁷ Greepeace, page 47.

¹⁸ U.S. EPA, Region IX, TSCA Consent Agreement and Final Order, 3 May 2005, pages 3-4. Available online at <<http://www.epa.gov/region9/kettleman/docs/kettleman-TSCA-CAFO-3May2005.pdf>>. Last accessed 23 June 2011.

¹⁹ *Id.* at 4,7.

²⁰ U.S. EPA, Region IX, TSCA Consent Agreement and Final Order, 29 Nov. 2010. Available online at <<http://www.epa.gov/region9/kettleman/docs/CAFO-ChemicalWasteManagement.pdf>>. Last accessed 23 June 2011.

PCB tank with PCB concentrations that exceeded the regulatory threshold, and improper PCB disposal.²¹

In February 2011, EPA released a RCRA inspection report documenting serious potential violations by CWMI at KHF.²² These potential violations include: failure to determine whether hazardous waste met treatment standards prior to disposal, disposal of prohibited wastes (wastes generated onsite and customers' wastes) that did not meet treatment standards, problems with CWMI laboratory's analytical equipment and calibration verification, open containers and improperly marked containers of hazardous waste, and failure to properly maintain and operate the facility relating to risks of fires, explosions or releases which could threaten human health or the environment.²³ An area of concern was the possibility of improper diluting of hazardous waste by CWMI to meet treatment standards.²⁴

In May 2011, the California Department of Toxic Substances Control fined CWMI for \$46,000 in penalties for failure to report releases of hazardous waste at KHF.²⁵

It is thus obvious that CWMI has a poor track record of environmental compliance and stewardship. The previously listed violations are only a partial account of CWMI's environmental violations at KHF. Please see the submitted evidence for further violations by CWMI at KHF. The Special Order should be rejected because CWMI has a poor track record of environmental compliance and stewardship, these violations are chronic and serious, these

²¹ *Id.* at 4-9.

²² U.S. EPA, Region IX, 2010 RCRA Investigation Report, 24 Feb. 2011. Available online at <<http://www.epa.gov/region9/kettleman/docs/CwmRcraReportWebFinal.pdf>>. Last accessed 23 June 2011.

²³ *Id.* at 71-76.

²⁴ *Id.* at 79.

²⁵ C.A. EPA, Department of Toxic Substances Control, Enforcement Order Docket HWCA 20102948, 20 May 2011. Available online at <http://www.dtsc.ca.gov/HazardousWaste/Projects/upload/CWM_EO_2011.pdf>. Last accessed 23 June 2011.

violations include years of monitoring violations – and therefore the claims that the Bioreactor can be operated safely and legally are questionable and impossible to verify.

VI. Incomplete Administrative Record

The Special Order should be rejected until a complete administrative record regarding the Bioreactor is made available to the public and there is a justification for the permit renewal.

While landfill B-19 is no longer allowed to accept hazardous waste, the Bioreactor overlays the closed hazardous waste phases of landfill B-19.²⁶ The 2010 RCRA Investigation Report by EPA contains a troubling footnote about the Bioreactor:

According to facility representative, the leachate from [the Bioreactor] was not considered to be a hazardous waste. This leachate, generated from the Class II/III landfill that overlays the closed Class I hazardous waste landfill, *was not assumed to migrate through the hazardous waste portion of the landfill* (emphasis added).²⁷

There should no assumptions regarding leachate from a research, development, and demonstration Bioreactor sitting on top of hazardous waste. It should be confirmed, tested, and monitored that leachate from the Bioreactor is not migrating through the hazardous waste portion of the landfill before the renewal permit for the should even be Bioreactor considered.

The notice for the Special Order states “Staff proposes to request the [Water Board] to consider adoption of the Special Order”²⁸ Staff and the Water Board have not yet provided any memoranda or supporting documents or statements for such a recommendation. The Bioreactor permit renewal should be rejected until a justification is provided for the continued operation of the Bioreactor, which is allegedly a research, development, and demonstration project.

²⁶ U.S. EPA, Region IX, 2010 RCRA Investigation Report, 24 Feb. 2011, pages 37-38, 55.

²⁷ 2010 RCRA Investigation Report, page 55, footnote d.

²⁸ California Regional Water Quality Control Board Central Valley Region, Notice of Special Order for Chemical Waste Management, Inc. Kettleman Hills Facility, Kings County Modifying Waste Discharge Requirements Order No. R5-2006-0122, 26 May 2011, page 1.

VII. Violation of Civil Rights of Low-Income, Latino and Spanish-speaking Kettleman City residents:

As a state agency that receives federal funds and is subject to non-discrimination regulations including Title VI of the United States Civil Rights Act of 1964, the Water Board/Cal EPA cannot take actions such as permit decisions that would have a discriminatory and disproportionate impact on protected populations. Greenaction and El Pueblo also urge the Water Board to reject the Bioreactor permit due to the discriminatory and disproportionate impact the Bioreactor's operation would have on the low-income, people of color and Spanish-speaking residents.

In addition, as described above, the "notice" and "public hearing" location, time and dates are problematic and would effectively and systematically deny residents their lawful right to participate in this permit process. Such systematic exclusion from meaningful participation in the permit process violated the Water Board's environmental justice and civil rights mandates. Unless corrected, the Water Board/Cal EPA will be in violation of federal civil rights statutes and their mandate to uphold environmental justice.

VIII. Summary

Greenaction and El Pueblo challenge the "notice" and challenge the "public hearing" and the entire permitting process for the Special Order because meaningful participation by Kettleman City and Avenal residents was effectively precluded. Kettleman City and Avenal residents cannot be expected to participate in the permitting process as the notice for the public hearing has an ambiguous meeting date; the links for the meeting and hearing procedures are non-existent; only one Kettleman City resident was notified; primarily Spanish-speaking and

monolingual Spanish-speaking Kettleman City and Avenal residents were effectively precluded from meaningful participation by the absence of a Spanish translation of the TSO; and the date, time, and location of the public hearing effectively precludes participation by Kettleman City and Avenal residents because the public hearing will be far away during working hours on a date that may not be specified until ten days before the hearing. Lastly, selection of the designated parties at the public hearing did not represent the interests of Kettleman City and Avenal residents and effectively precluded them from meaningful participation in the permitting process.

Greenaction and El Pueblo urge rejection of the Special Order because of CWMI's atrocious history of environmental violations, and these violations are chronic and serious. CWMI at KHF was fined millions of dollars over the last two decades. The Bioreactor should not be permitted when it is sited at a hazardous waste facility with CWMI's poor track record of environmental violations that include years of monitoring violations.

Greenaction and El Pueblo support rejection of the Special Order because the administrative record is incomplete to justify a renewal of the permit. The Bioreactor sits on top of a closed hazardous waste landfill, and it is unclear whether leachate from the Bioreactor is migrating through the hazardous waste portion of the landfill. These questions need to be resolved before renewal of the Bioreactor permit can proceed. Also prior to the renewal of the Bioreactor permit, Staff and the Water Board need to provide further justification for the continued operation of the Bioreactor, which is a research, development, and demonstration project.

Greenaction and El Pueblo also urge the Water Board to reject the Bioreactor permit due to the discriminatory and disproportionate impact the Bioreactor's operation would have on the low-income, people of color and Spanish-speaking residents. As a state agency that receives

federal funds and is subject to non-discrimination regulations, the Water Board/Cal EPA cannot take actions such as permit decisions that would have a discriminatory and disproportionate impact on protected populations.

Greenaction and El Pueblo request an extension to the commenting period to submit additional testimony, evidence, and/or comments in writing because the notice was defective and the administrative record regarding the Bioreactor is not publicly available. Greenaction and El Pueblo require an extension to review volumes of data about the Bioreactor to ensure a just and transparent permitting process.

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