MEMORANDUM OF LAW

DATE: April 27, 1994

TO: F.D. Schlesinger, Director, Metropolitan Wastewater Department

FROM: City Attorney

SUBJECT: Administrative Civil Liability Order No. 93-105

You have asked for our review of the recently received letter of April 19, 1994 from Arthur Coe, Executive Officer of the California Regional Water Quality Control Board, asserting that suspended civil liability of $2.5 million is now due and payable based on a claimed violation of Administrative Civil Liability Order No. 93-105 which was issued to mandate adequate sludge processing facilities.

As you know, this office assisted in the March 3, 1994 response of Mayor Golding which refuted the original February 22, 1994 demand for the suspended liability. For ease of reference, I am attaching the entire Administrative Civil Liability ("ACL") Order No. 93-105 and Mayor Golding's reply as Exhibits A and B.

Our review of Mr. Coe's April 19, 1994 letter discloses no new or valid basis for imposing liability. Rather the letter lists six "points" which assert at Points 2-4 that the "project, as described by City staff, was not completed until sometime in March, 1994." (Point 4) Mr. Coe concludes from this that ACL No. 93-105 has been violated. This is plainly erroneous from the following:

1. NO ORDER DEFINES WHAT "PROJECT" IS NECESSARY TO PROVIDE ADEQUATE SLUDGE PROCESSING.

Addendum No. 6 to Cease and Desist Order No. 87-113 and ACL No. 93-105 were issued together as a result of the October 25, 1993 hearing and respectively provide:

> 2. No later than January 27, 1994, the City shall provide adequate sludge processing facilities and operations, to ensure compliance with the effluent limits and other requirements of Order No. 93-32 and CDO No. 87-113 under all weather conditions.

Addendum No. 6, page 4.

> The City shall pay the entire $2,500,000 suspended civil liability if the City does not complete its project (the Fiesta Island Facilities Project) to provide adequate sludge dewatering facilities to meet the 75% suspended solids removal requirement of Cease and Desist Order No. 87-113 by January 27, 1994, unless factors beyond the control of the City result in the project not being completed by that date.

ACL No. 93-105, page 5.

As is plain from the language, Addendum No. 6 does not even mention any "project" but rather requires compliance with effluent limits and ACL 93-105 does mention "projects" but for the purpose of providing adequate sludge facilities to meet the 75% removal requirement.

2. NO PROJECT WAS SPECIFIED IN THE ORDERS BECAUSE ANY SUCH SPECIFICATION WOULD BE ILLEGAL.

The intimation in Mr. Coe's letter that ACL No. 93-105 impliedly requires a project as testified to by the staff is fallacious both factually and legally. Factually it is fallacious because as detailed in Mayor Golding's letter, my letter of December 9, 1993, and the reply of Mr. Posthumous of December 15, 1993, all confirm that no specific number of mechanical dewatering devices are required to meet the defini-tion of adequate. Legally it is fallacious because there can be no specific project mandated by an enforcement order.

> Section 13360. Circumstances justifying order to comply with requirements in specific manner
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> (a) No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner .
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> . . .

California Water Code section 13360

This section makes it illegal to specify the project or manner of compliance as Mr. Coe implies is required in ACL No. 93-105. As the California Court of Appeals said of section 13360:

> Plaintiffs contend that the Plan is invalid because it conflicts with section 13360. Section 13360 says that the Water Board may not prescribe the manner in which compliance may be achieved with a discharge standard. That is to say, the Water Board may identify the disease and command that it be cured but not dictate the cure.
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> . . . .
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> Section 13360 is a shield against unwarranted interference with the ingenuity of the party subject to a waste discharge requirement; it is not a sword precluding regulation of discharges of pollutants. It preserves the freedom of persons who are subject to a discharge standard to elect between available strategies to comply with that standard.

Tahoe Sierra Preservation Council v. State Water Resources Control Board, 210 Cal. App. 3d 1421, 1438 (1989) emphasis added

ACL No. 93-105 properly mandates adequate sludge processing facilities to ensure compliance with the 75% suspended solids removal rate. Just as the court said, it sets the discharge standard but it may not set the manner of compliance. Hence if the department chose compliance by a combination of mechanical and solar dewatering, it would be protected by Section 13360 from any "order of the regional board" that attempted to impose the manner of compliance. Since the manner of compliance cannot be prescribed, there can be no implied staff project read into ACL No. 93-105.

CONCLUSION

ACL No. 93-105 neither factually nor legally contains any specified project to achieve compliance with required adequate sludge processing facilities. Per Mr. Coe's offer, it is recommended that staff meet with him to review the above points and the prohibition of placing any specified facilities in such

an order and a transcript of the Board's direction has been ordered to facilitate that review. If no resolution of the suspended liability is achieved, it is recommended that the Mayor and City Council be briefed in closed session to review possible legal action against the Regional Water Quality Control Board to prohibit the illegal assessment of the suspended liability via a Writ of Prohibition.

JOHN W. WITT, City Attorney
By
Ted Bromfield
Chief Deputy City Attorney

TB:mb:452.1.1(x043.2)
Attachments:2
Exhibits A and B
ML-94-40