

MEMORANDUM OF LAW

DATE: January 13, 1995

TO: Colleen Johnson, Assistant to the General Services Director

FROM: City Attorney

SUBJECT: Potential Liabilities Associated with the SANDER Site

On December 2, 1994, you requested a written opinion regarding potential liabilities associated with ownership of the SANDER Site, a portion of which includes closed landfill material. The following is a brief analysis of the potential liabilities associated with owning property containing landfill material.

LIABILITY RELATED TO OWNERSHIP OF THE SANDER SITE

A. THE RESOURCE CONSERVATION AND RECOVERY ACT OF 1976 ("RCRA")

RCRA was adopted in 1976 as amendments to the Solid Waste Disposal Act of 1965. The purpose of RCRA is to promote the protection of health and the environment and to conserve valuable materials and energy resources. RCRA has separate subtitles for solid waste and hazardous waste. Hazardous waste is governed by Subtitle C and solid waste is governed by Subtitle D. In short, materials are solid waste when no one wants them and they are discarded; they are hazardous when they pose a threat to human health or the environment. (See 42 U.S.C.S. Sections 6903(27) and 6903(5).)

In 42 U.S.C.S. Section 6972(a)(1)(B) it provides that a citizen may file an action "against any person, . . . including any past or present . . . owner or operator of a . . . disposal facility, who has contributed . . . to the past or present . . . disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." If this "imminent and substantial endangerment to health or the environment" standard is met, the City is subject to, among other things, certain corrective actions with monitoring and testing requirements (see 42 U.S.C.S. Section 6934) and \$25,000 per day civil penalties for noncompliance (see 42 U.S.C.S. Section 6928(c)).

B. COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT OF 1980.

The environmental law problems posed by older landfill sites are many. These older landfill sites are sometimes called "toxic time bombs" because of the expense of future cleanup orders that may be

imposed under the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA" or "Superfund"). (See 42 U.S.C.S. Section 9601.) CERCLA provides for cleanup of closed or abandoned sites in which hazardous waste is present. (42 U.S.C.S. Section 9607(a).) Although municipalities enjoy immunities from certain federal liabilities under the Eleventh Amendment to the Constitution, these immunities were unilaterally waived by Congress in enacting Superfund. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). Consequently, CERCLA imposes joint and several liabilities on "responsible parties." (42 U.S.C.S. Section 9607.) The City, as operator of the now inactive South Miramar Landfill ("SML") a portion of which is included in the SANDER site, is a potential responsible party.

CERCLA will impose liability upon the City if SML contains hazardous substances as defined in 42 U.S.C.S. Section 9601(14) and there is a release or threatened release of the defined hazardous substance. *B.F. Goodrich Co. v. Murtha*, 754 F. Supp. 960, 963 (D. Conn. 1991).

Hazardous substances pursuant to 42 U.S.C.S. Section 9601(14) are defined as follows:

33 U.S.C.S. Section 1321. Subsection (b)(2)(A) provides for the EPA to develop regulations designating a substance as hazardous, if, when it is discharged into the waters of the United States it may affect natural resources.

42 U.S.C.S. Section 9602 provides for the EPA to promulgate regulations designating as hazardous substances, such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment.

42 U.S.C.S. Section 6921, Solid Waste Disposal Act, provides in subsection (b)(3)(A):

Each waste listed below shall, except as provided in subparagraph (B) of this paragraph, be subject only to regulation under other applicable provisions of Federal or State law in lieu of this subchapter until at least six months after the date of submission of the applicable study . . . .

(i) Fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.

(ii) Solid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore.

(iii) Cement kiln dust waste.

33 U.S.C.S. Section 1317(a) requires the EPA to publish a list of toxic pollutants subject to regulation under this chapter. This list is located in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and

Transportation of the House of Representatives.  
42 U.S.C.S. Section 7412, Clean Air Act contains a list of pollutants which are considered hazardous.

15 U.S.C.S. Section 2606, Imminent Hazards. Subsection (f) defines the term "imminently hazardous chemical substance or mixture" to mean "a chemical substance or mixture which presents an imminent and unreasonable risk of serious or widespread injury to health or the environment. . . ."

The EPA has designated over 700 substances as "hazardous substances" and these are listed in 40 C.F.R. 302.4. A substance need only be designated as hazardous under any one of the environmental statutes or listed under 40 C.F.R. 302.4 to be a hazardous substance under CERCLA.

Where a substance is not exempted from the definition of hazardous substance in CERCLA, but merely is exempted from regulation under a separate statute, courts have refused to incorporate the exemption into CERCLA's definition of hazardous substance. A regulator exemption cannot take precedence over Congress's concerns spelled out in 42 U.S.C.S. Section 9601(14) of CERCLA.

Therefore, if any of the regulated substances are present and there is a release or threat of release of these regulated substances, the City may incur liability under CERCLA.

It is possible for a site containing non-hazardous waste to result in liability under CERCLA as a hazardous substance.

The analysis required to determine if a waste contains a hazardous substance is distinct from the question of release. . . . The court believes that if a defendant's waste is a non-hazardous substance, a plaintiff must show that the defendant's waste is capable of generating or releasing a hazardous substance at the site in order to show that the defendant's waste "contains" a hazardous substance within the meaning of CERCLA.

United States v. New Castle County, 769 F. Supp. 591, 597 (D. Conn. 1991).

"If a chemical reaction would be required to cause a party's non-hazardous waste to generate a hazardous substance, then the likelihood that the reaction could occur at the CERCLA site must be established in order to hold the party liable for disposing of a hazardous substance." Id. at 596.

#### C. CALIFORNIA HAZARDOUS SUBSTANCE ACCOUNT ACT

Health and Safety Code section 25323.5 provides

(a) "Responsible party" or "liable person," for the purposes of this chapter, means those persons described in Section 107(a) of the federal act. (42 U.S.C.S. Section 9607(a).)

(b) For the purpose of this chapter, the defenses available to a responsible party or liable person shall be those

defenses specified in Sections 101(35) and 107(b) of the federal act (42 U.S.C.S. Sections 9601(35) and 9697(b)).

Consequently, a liable party under this act is any party liable under CERCLA.

#### D. WASTE MANAGEMENT ACT

The Waste Management Act ("Act"), Public Resources Code section 40000 et seq., governs the permitting, operations, and closures of landfills within California. The Act authorizes the creation of the Integrated Waste Management Board. The Board is then charged with establishing regulations to fulfill their legislative mandate. The Board has adopted numerous regulations specifically addressing closure and postclosure maintenance of landfills. These are found in California Code of Regulations ("CCR"). The two main sections are CCR Title 23, Chapter 15, Article 8, Closure and Post-Closure Maintenance and CCR Title 14, Chapter 3, Article 7.8, Disposal Site Standards Closure and Postclosure.

CCR Title 23, Article 8, provides regulations regarding postclosure maintenance and monitoring. However, within Article 8, Section 2580 states this article applies only to new and existing classified waste management units. This site is neither a new or existing unit. "Exist" is defined in Black's Law Dictionary, 574 (6th ed. 1990) as, "to be in present force, activity, or effect at a given time. . . ." This site has not been active since shortly before the land was returned to the Navy in 1973. These regulations do not appear to be retroactive and therefore would not apply to this inactive landfill site.

Regulations regarding disposal site standards, located in CCR Title 14, Article 7.8 are also not retroactive and therefore do not affect this inactive landfill site. In Article 7.8, Section 17760, it states this article applies to:

(b)(1) Solid waste disposal sites that did not commence complete closure prior to August 18, 1989 . . . ; and

(b)(2) new postclosure activities that may jeopardize the integrity of previously closed sites or pose a potential threat to public health and safety or the environment.

Since the City commenced complete closure prior to August 18, 1989 which was implemented by November 18, 1990, CCR Title 14, Section 17760(b)(1) and the Waste Management Act governing the permitting, operation, and closure of landfills within California are not applicable to this inactive landfill site. However, postclosure activities may change the status of that exemption from regulations.

#### E. SANITARY LANDFILL VERSUS OPEN DUMP

It is the City's position that this inactive landfill was and still is a sanitary landfill and not an open dump. Based on the regulations at the time the facility was operating, it was classified as a sanitary landfill. Even if the current regulations were applicable, it is yet to be determined that this inactive landfill would be classified as

anything other than a sanitary landfill. If this inactive landfill is classified as an open dump, it may be subject to all the closure and postclosure requirements contained within the Act.

The regulations differentiating between a sanitary landfill and an open dump are based on certain criteria. One criterion relates to the concentration of explosive gas. Explosive gas, as defined in 40 C.F.R. Section 257.3-8(e)(3), means methane gas. Explosive gas must not exceed the lower explosive limit ("L.E.L."). If the L.E.L. is exceeded then this inactive landfill could be classified as an open dump and subject to closure and postclosure requirements in the Act.

#### F. CITY OWNERSHIP OF SANDER SITE TO ADDRESS POTENTIAL LIABILITY ISSUES

As a result of the significant liabilities attached to an inactive landfill site, the City may want to maintain ownership of the SANDER site. The City at the present time is in litigation regarding a burn site located north of UCSD (Torrey Pines Burn Site). Soil with high lead content was discovered by the Developer of the property during excavation activities. The Developer has sued the City along with the federal government as responsible parties under CERCLA for the cleanup and disposal of the soil. The City would have reduced the probability of litigation if it still owned the property in question.

The City has been seeking to resolve issues relating to a parcel adjacent to the SANDER site which is owned by Allred-Collins. A portion of the Allred-Collins parcel contains landfill material of the inactive SML. The City has existing liability as a result of it being the operator of SML. There is a threat of litigation regarding this Allred-Collins parcel unless we are able to 1) purchase the parcel, or 2) sign a "Settlement Agreement" indicating the City would expressly indemnify Allred-Collins and others of any liability or damages resulting from the existence of SML.

The ownership of the SANDER Site does not change the existing liability under both federal and state statutes since we were the operators of SML. However, if the City maintained ownership of the property the risk of litigation would be reduced. If litigation did occur, the cost to the City would also be reduced because the City would control the activities on the property.

#### CONCLUSION

This is a representative list of the potential liabilities the City faces as it relates to the ownership of the SANDER site. It is presented as a survey of potential exposure, however, we have not quantified that exposure or attempted to place a monetary figure on this exposure of liability that exist in federal and state statutes.

Don't hesitate to call if I can answer specific questions regarding this memorandum of law.

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By

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Deputy City Attorney

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cc Coleman Conrad, Deputy City Manager

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