

MEMORANDUM OF LAW

DATE: November 1, 1995

TO: Mary Vattimo, Supervising Economist, Financial Management

FROM: City Attorney

SUBJECT: Miramar Landfill Closure Reserve Fund

In a memorandum dated September 26, 1995, you asked several questions regarding the Miramar Landfill Closure Reserve Fund ("Reserve Fund"). The following is our brief response to each question.

First Question: Does the addition of Public Resources Code section 43604(b) prohibit the balance of the Reserve Fund from falling below the amount required to support all closure and postclosure maintenance costs?

Short Answer: No. Public Resources Code section 43604(b) does not prohibit the balance of the Reserve Fund from falling below the amount required to support all closure and postclosure maintenance costs.

Analysis: Pub. Res. Code Section 43604 provides,

(a) During the closure and postclosure maintenance period, a solid waste landfill owner or operator shall maintain evidence of financial ability sufficient to pay post-closure maintenance costs, except that the owner or operator may request reimbursement for costs of postclosure maintenance as they are incurred if the remaining amount of funds is at least equal to the remaining post-closure maintenance cost (emphasis added).

(b) Notwithstanding the effective date of this section, owners and operators shall be required to comply with this section on the effective date of those regulations set forth in Part 258 (commencing with Section 258.1) of Title 40 of the Code of Federal Regulations.

Title 40, Code of Federal Regulations Section 258.70(b) of Part 258 indicates that the effective date of the federal regulations referred to in Pub. Res. Code Section 43604(b) is April 9, 1995. Consequently, the City is required to comply with Section 43604.

Section 43604 requires the City to maintain evidence of financial ability to meet its obligations of closure and postclosure maintenance for Miramar Landfill during the closure and postclosure maintenance time frame. Section 43601(a) provides that, "the evidence of financial ability shall be sufficient to meet the closure and postclosure maintenance costs when needed." (See attached memoranda dated September 9, 1992 and September 30, 1993 which analysis and conclusion is still applicable.) The City is required to ensure that sufficient monies will be available to cover closure and postclosure maintenance costs "when needed." Thus, the Reserve Fund amount may fall below the required amount to support the current cost estimate of closure and postclosure maintenance of Miramar Landfill. However, the City is obligated to "maintain evidence of financial ability sufficient" to meet its obligations of closure and postclosure maintenance when required.

In Title 40, Code of Federal Regulations part 258 section 258.74 provides, "the mechanisms used to demonstrate financial assurance under this section must ensure that the funds necessary to meet the costs of closure, post-closure care, and corrective action for known releases will be available whenever they are needed (emphasis added)." One of these financial mechanisms is a "Trust Fund" as indicated in subsection (a) of Section 258.74. In Section 258.74(a)(3), it provides in part that a

... trust fund used to demonstrate financial assurance for closure and post-closure care, the first payment into the fund must be at least equal to the current cost estimate for closure or post-closure care ... divided by the number of years in the pay-in period as defined in paragraph (a)(2) of this section. The amount of subsequent payments must be determined by the following formula:

$$\text{Next Payment} = \frac{\text{CE}-\text{CV}}{\text{Y}}$$

where CE is the current cost estimate for closure or post-closure care, (updated for inflation or other changes), CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

40 C.F.R. Section 258.74(a)(3).

In conclusion, the Reserve Fund may fall below a dollar amount required to support all closure and postclosure maintenance costs for Miramar Landfill. However, that Reserve Fund should not fall below the required yearly and cumulative yearly amounts as specified in Section 258.74(a)(3), unless the City can demonstrate that it has the financial

ability sufficient to pay closure and postclosure maintenance costs from sources outside the Reserve Fund when needed.

Question 2: Should the Reserve Fund monies be utilized for "partial closure activities" only when the Reserve Fund is funded at a higher level than required to cover all costs of closure and postclosure maintenance costs?

Short Answer: The Reserve Fund may be used for "partial closure activities" when the Reserve Fund maintains the balance required by Section 258.74

Analysis: See analysis in answer to question number 1.

Question 3: Can the Reserve Fund monies be used for more than "partial closure activities?"

Short Answer: Yes. The Reserve Fund should maintain a balance as required by 40 C.F.R. Section 258.74 and any excess can be expended in a manner consistent with how Landfill Disposal Fees may be utilized.

Analysis: See attached letter addressed to William H.. Kronberger, Jr., Esq., dated February 18, 1994; and Memorandum of Law dated April 26, 1988, which addresses some of the issues as to the proper expenditures of Landfill Disposal Fees which is the financial resource utilized to pay into the Trust Fund.

Question 4: What constitutes "partial closure activities"?

Short Answer: See Analysis.

Analysis: Section 258.60 of C.F.R. indicates activities that would constitute partial closure activities. Subsection (a) provides that

(a) Owners or operators of all MSWLF units must install a final cover system that is designed to minimize infiltration and erosion. The final cover system must be designed and constructed to:

(1) Have a permeability less than or equal to the permeability of any bottom liner system or natural subsoils present, or a permeability no greater than 1×10^{-5} cm/sec, whichever is less, and

(2) Minimize infiltration through the closed MSWLF by the use of an infiltration layer that contains a minimum 18-inches of earthen material, and

(3) Minimize erosion of the final cover by the use of an erosion layer that contains a minimum 6-inches of earthen material that is capable of sustaining native plant growth.

40 C.F.R. Section 258.60.

Section 258.61 provides direction as to what constitutes a postclosure activity. It provides in part, "(1) maintaining the

integrity and effectiveness of any final cover, ... (2) maintaining and operating the leachate collection system, ... (3) monitoring the ground water ... and (4) maintaining and operating the gas monitoring system ..." are all postclosure activities.

Miramar Landfill has been closed in increments. South Miramar Landfill is closed. North Miramar Landfill is closed. West Miramar Landfill is in operation. The above-stated closure and postclosure activities could potentially pertain to each "sub-landfill," and thus constitute partial closure and postclosure activities. Reserve Fund monies may be used for partial closure and postclosure activities of these landfills prior to the ultimate closure of Miramar Landfill estimated to be between 2005-2015, as long as the City maintains evidence of financial ability to meet closure and postclosure maintenance requirements when needed.

Please don't hesitate to call if you have any questions regarding this memorandum of law.

JOHN W. WITT, City Attorney

By

Elmer L. Heap, Jr.

Deputy City Attorney

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Attachments (4)

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