

The City Attorney  
City of San Diego  
MEMORANDUM  
236-6220

DATE: December 9, 1987

TO: Mayor Maureen O'Connor  
FROM: City Attorney  
SUBJECT: Impact of Proposition H on Future Waste  
Disposal Methodology

Your memorandum of November 16, 1987 requested our views on the effect of Proposition H, the "Clean Air Initiative," approved by the voters on November 3, 1987. You asked several questions which we shall answer directly. However, because of the ramifications of the initiative on the City's overall waste management policies, we shall first address the issue in a general manner. We are attaching a copy of an earlier memorandum to the City Manager dated September 3, 1987 in which we have expressed similar views on this subject.

Proposition H amends the General Plan of the City of San Diego by adding solid waste incineration standards to the energy conservation element guidelines. It is phrased so as to establish "standards" for solid waste facilities that "will burn 500 tons or more per day of residential, commercial or industrial waste." The initiative provides that:

1. No such facility shall be built that will:
  - a. increase existing levels of toxic air pollutants within the City as those levels are determined by Federal, state or San Diego public agencies;  
or
  - b. be located within a three mile radius of a hospital, elementary school, or child care center or nursing home for the elderly licensed by a governmental entity; or
  - c. make additional demands on the treated water distribution system within the City.
2. Any such facility built shall include recycling and separation methods whereby major sources of toxic air pollutants, including but not limited to plastics, metals, industrial wastes, and coatings,

are removed from the solid waste prior to incineration. Emphasis added.

We perceive a number of problems to be associated with the lack of definitions in the initiative as well as the interpretation to be accorded to it. In the first instance, the initiative does not define what constitutes a "facility" nor what constitutes an "increase" or an "additional demand." Any change, no matter how small, would arguably be included. For example, the installation of a drinking water fountain in such a facility constitutes an additional demand. Similarly, the level of increase in toxic air pollutants restricted under the initiative may be triggered by an emission of even the smallest measurable trace of a toxic pollutant. However, it is also probably impossible to precisely measure the existing levels of toxic pollutants within the City, thereby creating a vague and potentially unenforceable standard since no comparative measurements could be made.

There are other definitions that could use clarification but it suffices to say that a citizen's initiative is subject to the same constitutional standards for specificity and clarity as is required for legislation adopted by legislative bodies.

The second aspect of our review deals with the interpretation or construction to be accorded to the initiative. You identified this aspect when you asked whether the proposition prohibits waste-to-energy incineration entirely or only certain methods of incineration. You also asked whether the City is legally permitted to pursue further waste-to-energy incineration technology.

The initiative creates restrictions on facilities that burn in excess of 500 tons per day (t.p.d.) of solid waste. It prohibits the construction of such facilities if the facilities will either increase existing levels of toxic air pollutants, be located within three (3) miles of certain schools and health care facilities or make additional demand on the treated water distribution system. If the burn is limited to less than 500 t.p.d., the restrictions do not apply, although other restrictions imposed by existing law respecting air quality will apply.

In our view, however, the initiative virtually precludes any incinerator or incineration process that burns in excess of 500 t.p.d. of refuse, regardless of whether it produces energy or not, because the net result of the water and air quality restrictions is to produce a zero net effect, and the three mile radius prohibits such facilities in all but two or three very small areas of the City.

The initiative does not prohibit the City from studying or

entertaining proposals that involve incineration technology regardless of size -- so long as the ultimate development of the project is sized to the permissible limits related to burns of 500 t.p.d.. It also does not preclude multiple facilities each burning less than 500 t.p.d., although it is conceivable that such siting would be subject to challenge.

The types of problems and additional costs associated with these restrictions will need to be addressed in further waste management studies. In our view, however, the initiative creates problems for waste management rather than solutions.

We shall be pleased to answer any further questions you may have.

JOHN W. WITT, City Attorney

By

Rudolf Hradecky

Deputy City Attorney

RH:mrh:454.4

Attachment

MS-87-11

cc John Lockwood

Coleman Conrad

Bob Epler