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BEFORE THE CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD

STATE OF CALIFORNIA

In Re: Application to the California Integrated Waste Management Board by Browning Ferris Industries for a Solid Waste Facility Permit for the Sunshine Canyon Landfill (SWIS 19-AA-2000)	**NORTH VALLEY COALITION LEGAL BRIEF IN OPPOSITION TO FORMATION OF SUNSHINE CANYON LANDFILL LOCAL ENFORCEMENT AGENCY** [PRC §§ 44307, 44310]

SUMMARY

Browning Ferris Industries (BFI) seeks a special dispensation from California state solid waste landfill permitting laws. BFI wants its own "local enforcement agency" for its proposed Sunshine Canyon Landfill on the border between the City and County of Los Angeles.

Despite the existence of not one but two existing LEAs plenty capable of handling the job, BFI wants a new enforcement agency created just for its landfill.

Not only would the creation of such a "special purpose" regulatory agency be outside of the state's law regulating landfills, it would create a situation where enforcement would be even worse than the enforcement of the landfill to date—public assurance of adequate environmental, health and safety protection would be greatly compromised

State law mandates that landfill enforcement be accountable at the local level through the City Council or County Board of Supervisors. Enforcement of Sunshine Canyon Landfill from Sacramento, or by an insulated "board of directors" would short circuit this accountability

BACKGROUND

The Sunshine Canyon Landfill, located in northern San Fernando Valley of California, is actually two adjoining landfills for the purpose of state regulation. The landfills sit at the border of the City of Los Angeles and the County of Los Angeles—one on the City side, one on the County side.

The landfills, while jointly owned and operated, have always been regulated separately under both local and state laws and regulations. Thus the County of Los Angeles has always legislated the land use control of the County-side landfill; the City of Los Angeles has always legislated the land use control on the City-side landfill. Enforcement of state solid waste permitting, inspection and enforcement of the County-side landfill has always been conducted by the County local enforcement agency; enforcement of state solid waste permitting, inspection and enforcement of the City-side landfill has always been conducted by the City local enforcement agency.

The operator of the Sunshine Canyon Landfills, Browning Ferris Industries of California (BFI), has attempted to side-step the proper process for obtaining state solid waste facility permits by applying directly to the CIWMB, bypassing the City and County local enforcement agencies which have always been responsible for permitting the landfill.

Landfills in California are regulated according to a system of "LEAs," local government agencies appointed by local governments where the landfill is located. These LEAs are the backbone of the state's landfill regulation regime. The LEA system also serves to integrate local planning and land use with state solid waste facility regulations. This is made clear by PRC §44008(a):

> a) A decision to issue or not issue the permit shall be made by the enforcement agency within 120 days from the date that the application is deemed complete pursuant to Chapter 4.5 (commencing with Section 65920) of Division 1 of Title 7 of the Government Code, unless waived by the applicant. (Emphasis added.)

Under PRC §44009(a)(1), the CIWMB has 60 days to concur or act not to concur in the permit proposed by the LEA, not the project applicant.

The CIWMB serves as a backstop only where a LEA is not designated, or when the LEA fails to perform as required. Disqualification of the LEA must follow a regulated procedure—which has not occurred here.

The CIWMB does not have authority to serve as an alternative LEA; the permit applicant does not have an election to make between the CIWMB and the LEA for the purposes of second guessing the LEA, or for shopping for a preferred LEA or for otherwise gaming the system.

The health and environmental impacts of landfills are great and their risks well known.[1] Allowing a self-interested garbage company to dictate how its permit will be handled greatly undermines the health, safety and environmental protections of state law.

Apparently, BFI has already made an application directly to the CIWMB. Apparently, according to a January 17, 2007 letter from CIWMB permitting director Ted Rauh, the CIWMB has not officially decided to accept the BFI Sunshine Canyon landfill permitting application. Instead the CIWMB appears to be ordering the City and the County LEAs to merge their operations to provide for a single landfill regulator across their border.

Nothing in state law appears to provide authority for CIWMB staff's mandate that a joint LEA be created. Every common sense dictates against it. A joint LEA will be accountable to whom, to which legislative body, City or County? The fees that will be collected by a joint LEA will be controlled by which agency? Apparently the CIWMB is pushing for an independent regulatory body, self-sustaining, in a limbo between local and state control. Such a situation invites the collusion of the landfill operator and the regulatory agency, where the regulator's who existence is based upon the landfill.

In this instance, BFI is also attempting to gain advantage by improperly adding to the confusion. The permit application submitted by BFI is unsupported by the environmental review previously conducted for the landfill expansion project. Indeed, because of significant changes to the project, and the potential for additional, significant environmental impacts, a supplemental or new environmental review should be conducted on the project.

Furthermore, the permit application itself is extremely confusing and fails to correspond to the environmental review previously conducted. This may be especially so in the instance of the financial guarantees as required by state law and for the mitigation cited in the previous environmental documentation.

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[1] *California Integrated Waste Management Board: Limited Authority and Weak Oversight Diminish Its Ability to Protect Public Health and Safety*" Bureau of State Audits, 2000.

STATEMENT OF LAW

A. THE LEA HAS THE JOB OF ACCEPTING AND REVIEWING A LANDFILL PERMIT APPLICATION.

In order to change operations of a landfill, an operator is required to revise the permit governing operating conditions. PRC §44004.

Under the regulatory scheme, the state-certified "local enforcement agency" (LEA), almost always a local government health or environmental agency, reviews and prepares the application for the landfill permit revision, then forwards it for "concurrence" by the CIWMB.

PRC §44008(a):

> A decision to issue or not issue the permit shall be made by the enforcement agency within 120 days from the date that the application is deemed complete pursuant to Chapter 4.5 (commencing with Section 65920) of Division 1 of Title 7 of the Government Code, unless waived by the applicant. (Emphasis added.)

Under PRC §44009(a)(1), the CIWMB has 60 days to concur or act not to concur in the permit proposed by the LEA. If the CIWMB board does not act affirmatively within those 60 days, the permit is deemed concurred in by operation of law.

Nothing in the record here indicates that BFI ever made an application for expanding its Sunshine Canyon Landfill operations to either the City of Los Angeles LEA (for the City side) or the County of Los Angeles LEA (for the County side).

Yet such application to the existing LEAs is clearly what is required.

B. THE SECTION 44310 HEARING PROCEDURE.

The administrative review provided under PRC §44307 creates an informal quasi-judicial process enabled in PRC §44310.

Section 44307 clearly states that the procedures governing the hearing are the same as those found in Section 44310. That section spells out simple procedures and specifically states that the procedures will follow the informal APA process under Chapter 4.5. 3 CCR §1310.3. See Gov. Code §11445.20(c).

Provision for a hearing officer to hear §44307 appeals was not enabled until the 2004 passage of AB 2159. Prior to AB 2159, statute required hearing before a locally appointed panel. Either the local panel or a hearing officer may now conduct the hearing. PRC §44308.

C. JURISDICTION.

The NVC has resort to the Superior Courts if dissatisfied with the findings or decisions of the PRC §44307 hearing. See Public Resources Code §§ 45033 and 45040 and California Code of Civil Procedure §1085.

Ordinarily, a petitioner seeking a writ of mandamus must show that it is beneficially interested in the outcome. See CCP § 1086. *Associated Builders & Contractors, Inc. v. San Francisco Airports Comm'n* (1999) 21 Cal.4th 352, 361–362. However, where the question is one of *public right*, and the writ would compel enforcement of a *public duty*, the petitioner need not show any special interest in the result. "It is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced." *Green v. Obledo* (1981) 29 Cal.3d 126, 144; see *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1116–1117.

Here the North Valley Coalition has long been interested in the public's right to the safe operation and proper regulation of BFI's Sunshine Canyon Landfill

DISCUSSION

The following list enumerates the issues taken by the North Valley Coalition with the CIWMB order to form a joint LEA for Sunshine Canyon, and with the acceptance of the solid waste facility permit submitted by BFI for the joint operation of the landfill under a proposed landfill-specific LEA.

1. **Any CIWMB requirement that the City of Los Angeles and/or the County of Los Angeles form a single LEA for the purpose of regulating the Sunshine Canyon Landfill is improper, in that it is not authorized in state law.**

As pointed out in the brief submitted by the City and County of Los Angeles, under PRC 43202, the CIWMB may perform the role of LEA only in the absence of a certified LEA for that area. The same

restriction would apply to the proposed, new City-County LEA—there is already a City LEA for the City side of the proposed landfill, with separate land use restrictions and other jurisdiction specific conditions and approvals; there is already a County LEA for the County side of the proposed landfill, with separate land use restrictions and other jurisdiction specific conditions and approvals.

In this instance the only apparent basis for the CIWMB taking over as LEA, or for the creation of a unique "landfill specific" LEA, is the contention of BFI, the project applicant that the permit is not moving fast enough.

In fact, the evidence indicates that there are several remaining obstacles to the acceptance of a permit application by any LEA, including BFI's failure to meet land use entitlement conditions imposed by both the City and the County of Los Angeles.

All that needs to be done by BFI to apply for a landfill permit is to make that application to the City of Los Angeles for the City side of the landfill, and to the County for the County side of the landfill.

There has simply been no statutory or regulatory basis established for doing otherwise. Nothing has been offered to show that BFI cannot apply to the City and/or the County for its permit. There is a statutorily required process for establishing the LEA to accept the permit application. There is a statutory and regulatory process established to review the permit application, and to issue the permit.

Here it is proposed to throw out this process to suit the landfill operator. The statutes and regulations are in place to assure the public that landfill permits are handled in the public interest—not BFI's.

2. BFI's claims of land use approvals by the City and County for "merged operations" do not impose a mandatory duty upon the CIWMB under PRC §43202 to replace the County or City LEA as the enforcement agency within the County or City-side landfills respectively.

BFI may argue that the City and County both approved merged operations for the landfill. But this does not dictate—or enable—the creation of a joint LEA or CIWMB assumption of that role. Local jurisdictions must comply with the landfill regulatory structure provided under state law. And that regulatory structure dictates that a <u>local</u> enforcement agency be created for the landfill within the <u>local</u> area, and the enforcement of state regulations is the obligation of the <u>local</u> agency within its jurisdiction.

3. **The CIWMB is legally obligated to follow the procedures for permitting a solid waste landfill as found under PRC §43214 et seq., before the CIWMB can usurp the separate enforcement authority of the County or City LEA for the County or City landfill areas.**

Before the current LEA activities of the City or County of Los Angeles can be modified, there must be public notice, a public hearing, admission of evidence and a formal final action by the CIWMB. 14 California Code of Regulations §18087. This process assures, in part, that the public has an opportunity to be assured of the adequacy of the enforcement which will be provided.

There can be—nor should there be—shortcuts to the process of approving or changing LEAs or their status. The process protects the public from landfill operators gaming the system to facilitate their self-interest in permitting landfill space.

4. **In the absence of fulfilling the requirements of PRC §43214 et seq., only the City has authority to act as the enforcement agency for the landfill in the City-side area of Sunshine Canyon Landfill; only the County has the authority to act as the enforcement agency for the landfill in the County-side area of Sunshine Canyon Landfill.**

Until the proper process is conducted pursuant to 14 California Code ity and/or County LEAs have authority to accept and issue a solid waste landfill permit for a landfill within their jurisdiction. That process cannot be changed just to suit the convenience of BFI.

5. **Any action by the CIWMB to review, comment upon, accept, propose or review any solid waste facility permit application for a joint Sunshine Canyon Landfill operation without providing the full PRC §44307 hearing review, and without requiring submittal of the BFI application to the City and/or County LEA would be unlawful.**

Nor can BFI evade the hearing before the PRC §44307 hearing process regarding the the CIWMB evade As indicated in the briefing on this matter submitted by the City and County, there is no pressing need to usurp the roles of the City and County in regulating the landfill. Land use approval conditions have not been met, and thus BFI's "right" to even submit an application for a permit is not yet timely.

6. **Land use approvals by either or both of the City and County of Los Angeles do not create a joint landfill for the purpose of state solid waste facility permitting. Thus any permit application by BFI for a single landfill operation and LEA was not authorized by the City or County as the conditions imposed by the respective CUPs necessary for the submittal of the permit application have not met compliance.**

The City and County of Los Angeles have each adopted land use resolutions requiring compliance with a long list of conditions before a landfill can be approved in either jurisdiction. Both resolutions of approval indicate the approval of a joint LEA. Therefore, even if the "landfill specific" LEA demanded by BFI was otherwise authorized, the joint LEA is not an option until the City and the County have both accepted the conditions of land use entitlement fulfilled. This has not occurred. Therefore the City and County cannot concur in the creation of a joint LEA until then.

7. **The CIWMB is legally obligated to follow the due process requirements for the public and for the NVC which are contained in the PRC, including under PRC §§ 43214 et seq., before the CIWMB can prevent the City and County LEAs from acting as the exclusive enforcement agencies for the City Landfill area.**

As noted above, the state Public Resources Code requires an administrative process under PRC §43214 et seq before it changes the facilities governed by an LEA. This administrative process has not been met in respect to either the CIWMB's assumption of the LEA role for the City-side landfill or the County-side landfill.

Failure of the CIWMB, BFI or the City or the County to comply with these procedures results in a loss of due process rights to which NVC and the public are entitled.

The CIWMB must first obtain an agreement with the City of Los Angeles City Council that is required of the CIWMB pursuant to PRC §§ 43212.1 or 43312.1 or 43310.1 before the CIWMB can act as enforcement agency within the territorial boundaries of the City of Los Angeles, including, more specifically within the City Landfill area.

Statute requires that the City of Los Angeles provide its express agreement to the CIWMB's assumption of its LEA duties. This has not occurred. Therefore the CIWMB cannot proceed to accept the landfill permit application submitted to it by BFI.

8. The CIWMB must first obtain an agreement with the City of Los Angeles City Council and County of Los Angeles Board of Supervisors that is required of the CIWMB pursuant to PRC §§ 43212.1 or 43312.1 or 43310.1 before the CIWMB can act as enforcement agency within the territorial boundaries of those jurisdictions.

Statute requires that the County of Los Angeles and the City of Los Angeles provide express agreement to the CIWMB's assumption of its LEA duties. This has not occurred. Therefore the CIWMB cannot proceed to accept the landfill permit application submitted to it by BFI.

9. Any joint operations permit issued by the CIWMB for joint operations will supersede the current solid waste facility permits for the City-side and County-side landfills. Thus the landfill must be closed, as any joint permit will <u>not</u> comply with the terms of the land use conditions imposed by the City of Los Angeles and the County of Los Angeles.

The City and the County have each individually imposed land use conditions which must be met before the landfill can be permitted. These conditions have not been met and therefore the permit cannot be processed.

10. The public does not have full opportunity for hearing of the issues raised here because of the procedure used by BFI of applying to the CIWMB directly for its permit.

The proper method for hearing under PRC §44037 is to first hear the matter at the local enforcement agency level. Here BFI seeks to skirt the local public review and take its permit to Sacramento, making local public participation much more difficult. The CIWMB should redirect hearing under PRC §44307 to the local enforcement level before hearing the matter on any appeal which might be brought.

11. The Sunshine Canyon Landfill permit application submitted by BFI is not supported by proper environmental review under the California Environmental Quality Act (CEQA), PRC §§ 21000 et seq.

The project approved previously for environmental review has changed substantially with the permit application submitted by BFI to the CIWMB. Those changes or new potentially significant environmental impacts include the following:

a. Unanalyzed slope stability. The slope stability of the landfill, in an earthquake zone, has changed because the project was modified to add a double-liner leachate control system, rather than the single liner analyzed in the previous environmental review. See the February 7, 2008 letter of the Regional Water Quality Control Board's senior engineering geologist "(the RWQCB letter"), submitted herewith. The change to the slope stability has not been analyzed as required by CEQA.

b. Leachate collection. The leachate collection sump must be replaced according to the RWQCB, but the alternative has never been proposed or analyzed. Discharge of any leachate is a potentially significant environmental impact. See the RWQCB letter.

c. Settlement analysis. Any changes to the settlement of the landfill may affect the surface water drainage system in the area—a potentially significant environmental impact. The proposed permit does not present a settlement analysis for the landfill after closure. See the RWQCB letter.

d. Fill sequencing. The permit application fails to provide a fill sequencing plan for a combined landfill that has been subject to CEQA environmental review. The fill sequence will potentially cause significant environmental impacts in the form of disruption of the leachate collection, lining and slope stability concerns cited above.

e. Conflict with local plans and policies. CEQA requires both a stable project description and a description of the project's impacts on local policies and plans. Here the County has adopted a new conditional use permit which was modified to conform to City CUP conditions. But the project proposed to the CIWMB either fails to properly describe these

conditions, or fails to describe how the potentially significant environmental consequences of the project's conformance or failure to conform to the conditions.

f. Mitigation measures. The revised CUP conditions of the City and County are essential to the enforcement and monitoring program for the landfill which were developed by the previous environmental review for the project. The effective removal of the conditions and their consequent mitigation functions by the CIWMB's refusal to recognize those conditions will require new or supplemental environmental review, as the impacts of the project can no longer be considered mitigated.

Because of the changes to the project and its failure to address the changes in a new or supplemented environmental impact report, the permit application cannot be accepted by the CIWMB or an LEA pursuant to PRC §§ 21166(a), (b) and (c).

CONCLUSION

For the reasons given above the North Valley Coalition respectfully requests that the hearing panel find that only the existing City LEA can accept a permit application for the City-side Sunshine Canyon Landfill and that only the County LEA can accept an application for the County-side landfill.

DATE: April 28, 2008

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