BEFORE THE HEARING PANEL OF THE

CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD

In the Matter of:	**ADMINISTRATIVE DECISION**
County of Los Angeles Local Enforcement Agency, City of Los Angeles Local Enforcement Agency, and North Valley Coalition Petitioners vs. California Integrated Waste Management Board, purportedly acting as Enforcement Agency, Respondent	APPEAL OF THE CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD'S ACCEPTANCE AND PROCESSING OF BROWNING FERRIS INDUSTRIES' APPLICATION FOR A SOLID WASTE FACILITIES PERMIT FOR A COMBINED SUNSHINE CANYON LANDFILL, SYLMAR CALIFORNIA PUBLIC RESOURCES CODE §§ 44307, 44309 & 45030 Hearing Date: May 13, 2008 Time: 1:30 p.m. Location: Coastal Hearing Room, 2nd Floor, Joe Serna Cal/EPA Building, 1001 I Street, Sacramento, California

This matter came on regularly for hearing before the Hearing Panel of the California Integrated Waste Management Board ("Hearing Panel") on May 13, 2008 at 1:30 p.m. Petitioner the City of Los Angeles Local Enforcement Agency was represented by Keith Pritsker, attorney at law. Petitioner the County of Los Angeles Local Enforcement Agency was represented by Fred Pfaeffle, attorney at law. Petitioner the North Valley Coalition was represented by Isaac Stevens, attorney at law. Respondent the CIWMB Staff ("Board Staff") was represented by

Steven Levine and Michael Bledsoe, attorneys at law. Browning Ferris Industries was represented by R. Scott Pearson, attorney at law.

This matter before the Hearing Panel is an appeal by the City of Los Angeles Local Enforcement Agency, the County of Los Angeles Local Enforcement Agency (collectively "City/County"), and the North Valley Coalition ("NVC") of a determination by Staff of the California Integrated Waste Management Board ("Board Staff"), purportedly acting as Enforcement Agency, to process an Application for a Solid Waste Facilities Permit submitted by Browning Ferris Industries ("BFI") for a Combined Sunshine Canyon Landfill. Requests for a Hearing to Appeal Board Staff's determination were filed by City/County and NVC on February 15, 2008 and March 4, 2008, respectively, each accompanied by a Statement of the Issues on Appeal.

This matter presents solely legal issues for the Hearing Panel to determine, the City/County, NVC and Board Staff having stipulated to a Statement of Facts ("Stipulated Facts") to be utilized as evidence herein, to the extent that the Hearing Panel deems such facts relevant and for purposes of this appeal and any subsequent appeal to the Board only, in lieu of proceeding with an evidentiary proceeding in this matter.

The Hearing Panel, having considered the record of the matter now pending, including the written and oral arguments submitted by the parties and the Stipulated Facts, and also including a late brief filed by the County of Los Angeles' Local Enforcement Agency responding to the BFI Brief, to the extent they have been deemed relevant, and for good cause appearing, hereby issues its Administrative Decision:

ADMINISTRATIVE DECISION

The appeal of Petitioners is denied and the determination by Board Staff to act as Enforcement Agency for the processing of BFI's Application for a Solid Waste Facilities Permit for a Combined Sunshine Canyon Landfill is upheld in its entirety.

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FINDINGS OF FACT RELEVANT FOR THIS DECISION

1. Browning Ferris Industries of California, Inc. ("BFI"), is currently the operator of two adjacent Class III Sanitary Refuse Disposal Facilities ("Landfills") located in the vicinity of Sylmar, California. One Landfill (the "County Landfill") is located within the unincorporated territory of the County of Los Angeles ("County"). The second Landfill (the "City Landfill") is located within the jurisdictional limits of the City of Los Angeles ("City"). (Stipulated Facts, No. 1.)

2. Since 1996, BFI has conducted operations at the County Landfill pursuant to Solid Waste Facilities Permit No. 19AA0853 (the "County SWF Permit"), which the County LEA issued with the concurrence of the CIWMB. (Stipulated Facts, No. 5.)

3. Since 2005, BFI has conducted operations within the City Landfill pursuant to Solid Waste Facilities Permit No. 19-AR-0002 (the "City SWF Permit"), which the City LEA issued with the concurrence of the CIWMB. (Stipulated Facts, No. 11.)

4. The CIWMB acknowledges that it does not have any authority to grant, modify, rescind or interpret land use entitlements granted by the City or the County to determine whether the conditions in either the County CUP or the City Zoning Amendment have been met and the CIWMB does not dispute that it has no standing to challenge or contradict the City or the County's determinations, to the extent they have been made, that BFI lacks final land-use approvals under the County CUP and the City Zoning Amendment. (Stipulated Facts, No. 13.)

5. While the City/County are in the process of designating the Sunshine Canyon Landfill LEA ("SCL-LEA"), the designation information package has not yet been submitted by the City/County to the CIWMB. Nor has the CIWMB yet approved an entity which has the authority under the California Integrated Waste Management Act to act as an LEA for processing the permit application for the combined City/County Landfill. (Stipulated Facts, No. 14.)

6. A Combined SWF Permit cannot be regulated or administered by two separate LEAs, either independently or through an agreement between the two LEAs. (Stipulated Facts, No. 15, on which the City/County take no position (City/Co. Br., p. 4).)

7. An SCL-LEA, once designated by the City and County and approved by the CIWMB, would administer any Combined SWF Permit and would regulate the Combined Landfill. Following formation, designation and certification of the SCL-LEA, the County LEA and the City LEA will continue to act as enforcement agencies in their jurisdictions for all facilities except Sunshine Canyon. (Stipulated Facts, No. 17.)

8. By letter dated June 26, 2007, the CIWMB notified the City and County Local Enforcement Agencies ("LEAs") that the CIWMB had been apprised by BFI of its

intent to file an application for a Combined SWF Permit. The CIWMB further advised that it would assume responsibility for processing an application for a Combined SWF Permit in the event the application for such a permit were to be filed by BFI prior to the SCL-LEA being formed and completing the CIWMB certification process, and that thus no LEA exists to receive and process the application. In said letter the CIWMB further offered its assistance to help facilitate the City and County efforts to form the SCL-LEA. (Stipulated Facts, No. 20.)

9. On January 8, 2008, BFI submitted to the CIWMB an application for a Combined SWF Permit. (Stipulated Facts, No. 23.)

10. By letter dated January 15, 2008, the CIWMB acknowledged to BFI the CIWMB's receipt of the application for a Combined SWF Permit. In said letter, staff of the CIWMB acknowledged to BFI that it understood that submission of the application was made on the basis that there is currently no LEA that can fully process a permit application proposing one solid waste facilities permit for a facility spanning two separate jurisdictions and, on that basis, that the CIWMB is now acting as the Enforcement Agency for purposes of processing the application. (Stipulated Facts, No. 24.)

11. The CIWMB provided the City and the County (with courtesy copies to their respective LEAs) with a January 17, 2008, correspondence, attached to the Stipulated Facts as "Attachment 1" (the "1-17 Rauh Ltr."), detailing the CIWMB's decision to act as EA to process BFI's January, 2008, application for a Combined SWF Permit. (Stipulated Facts, No. 25.)

12. The CIWMB intends to complete the processing of the application to issue the Combined SWF Permit under the time line under the Public Resources Code and the Title 27 California Code of Regulations, unless waived by BFI. (Stipulated Facts, No. 33.)

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CONCLUSIONS OF LAW

1. The Decision of Board Staff of CIWMB, Acting as the Enforcement Agency for the Combined Sunshine Canyon Landfill, To Process BFI's Application for a Solid Waste Facilities Permit Is Made Independently from Any Land Use Determinations Made by Local Land Use Authorities, such as the City of Los Angeles and the County of Los Angeles.

City/County[1] argue that Board Staff decided to act as EA for the Proposed Combined Landfill only after it determined that BFI had obtained land use entitlements from local land use authorities for the merger and joint operation of the then separate landfills. City/County Brief ("City/Co. Br."), p. 10, ll. 13-16. Board Staff argue, on the other hand, that LEAs and CIWMB carry out their statutory duties respecting SWF Permit applications independently from decisions made by land use authorities and other governmental agencies, no matter how essential those other decisions are to the establishment or operation of a solid waste facility. CIWMB Br., p. 11, ll. 1-4. State law is clear in distinguishing the land use function, which is within the realm of the local government, from the design and operation of solid waste facilities, which is the responsibility of CIWMB and LEA. Notwithstanding the Integrated Waste Management Act ("IWMA"), cities and counties "may determine…(1) Aspects of solid waste handling which are of local concern, including…[the] nature, location, and extent of providing solid waste handling services." Public Resources Code ("PRC") § 40059(a); see also, PRC § 43021 – CIWMB shall develop "standards for the design, operation, maintenance and ultimate reuse of solid waste facilities, but shall not include aspects of solid waste handling or disposal which are solely of local concern."

The fact that CIWMB amended it regulations in 2007 to delete a requirement that an

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[1] It is the Hearing Panel's understanding, based on the parties' briefs, that NVC joins in the arguments of City/County, raising independently only the two arguments addressed later in this Administrative Decision. Accordingly, when reference is made herein to the arguments of "City/County," it is intended to incorporate the related arguments made by NVC in its brief.

applicant for a SWF Permit submit a copy of its land use entitlements to the LEA as part of its application reinforces this conclusion. See, Title 27, California Code of Regulations ("CCR"), § 21570(f)(9). As explained in the Final Statement of Reasons accompanying the adopted regulation, CIWMB stated that "[t]his subsection [former section 21570(f)(9)] is deleted to remove the specific requirement that the operator include as part of a complete and correct application package a copy of land use entitlements for the facility. This is necessary to avoid promoting/creating any conflict between the local jurisdiction's land use permit/entitlement and the solid waste facilities permit process…State law has not mandated that the EA be an agency required to verify if the information in the land use approval is correct or if the facility has the approval of the local government to operate as proposed under a solid waste facilities permit. The appropriate agency for making local land use determinations is the local government having jurisdiction, in most cases, the city or county in which the facility is located." Addendum, p. 1, Final Statement of Reasons, December 2006.

Simply put, LEAs, and Board Staff when CIWMB is acting as the Enforcement Agency for a jurisdiction, are governed by the IWMA in determining whether to process an application for a SWF Permit. They are not governed by locally-imposed land use restrictions. Therefore, we reject City/County's assertion that local land use proscriptions which may prevent BFI from operating the Combined Sunshine Canyon Landfill preclude BFI from applying to Board Staff for a SWF Permit, when CIWMB is acting as EA.

2. Public Resources Code Section 43202 Imposes a Mandatory Duty Upon the CIWMB to Act as Enforcement Agency for a Combined Landfill Straddling Two Jurisdictions Where the Governing Bodies for These Jurisdictions Have Yet to Complete the Designation Process for Establishing a Local Enforcement Agency to Fulfill Such a Role.

The IWMA calls for the CIWMB to act as the enforcement agency of last resort where, among other cases, a governing body has failed to designate an LEA. Specifically, Public Resources Code Section 43202 imposes a mandatory duty upon the CIWMB to assume such a

role: "If an enforcement agency is not designated and certified, the board, in addition to its other powers and duties, shall be the enforcement agency within the jurisdiction…."

The specific circumstances here are unusual in that the City and County each have LEAs designated and approved within their jurisdictions. Nevertheless, the City/County are not challenging in these proceedings the premise that "a Combined SWF Permit cannot be legally regulated or administered by two separate LEAs, either independently or through an agreement between the two LEAs." (City/Co. Br., p. 4.) Thus the City/County are not asserting in this appeal that the existing City and County LEAs could simply continue to exercise their enforcement authority over their respective jurisdictional "sides" of the Combined Landfill and forego a new LEA designation and approval process. Instead, for purposes of this appeal it is not in dispute that there can only be one LEA for the Combined Landfill, and that the LEA designation and approval process for such an LEA has yet to be completed. The Hearing Panel notes that such a designation need not be of a newly established entity to serve the function of the sole LEA (although that is apparently the City/County's preference). The City/County could have designated either of their existing LEAs as the sole Enforcement Agency for the new facility (or any other presently existing LEA for that matter) and (upon CIWMB approval) the City/County would retain their jurisdictional authority. Yet where as here the City/County have yet to bring to conclusion any of the above LEA designation alternatives, then there is an "enforcement void" which the CIWMB is obliged to fill, as there presently is no LEA that can process the application for the Combined Landfill.

Notwithstanding the fact that the required enforcement agency designation has yet to be made by the City and County for the combined landfill, Board Staff's determination that it is obliged to fill the "enforcement agency void" for permit application processing is challenged in this appeal. The City and County contend that since each have made designations for their respective jurisdictions, the statutory mandate has been fulfilled and thus the Board should not step in as the enforcement agency. (City/Co. Br., Sec. A, p. 7.) Moreover, the enforcement agency impasse created by the failure of the two governing bodies to designate an LEA for the

combined landfill could theoretically extend into perpetuity, effectively precluding the landfill from ever combining unless and until the impasse is broken.

The above positions of the City and County are contrary to statutory intent. Clearly, governing bodies play the principal role in the formation of landfills within their jurisdictions through, among other means, their conditional use permit process. This assures that if the CIWMB issues a SWF Permit for a facility which has not yet obtained such local approval for formation (since the CIWMB does not interpret and acts irrespective of local land use determinations), the permit would in essence be for a landfill that does not exist and would thus have no force or effect or otherwise impact the jurisdictional authority of the governing bodies. On the other hand, if local authority for formation is in place (albeit potentially subject to conditions on certain "merged operations"), State law provides a mechanism for putting an agency in place to enforce the permit, to assure that any potential void presented by the lack of a local designation does not arise.

Finally, the statutory intent must be applied consistently regardless of whether one or both of the jurisdictions in cases such as this desire that the Board "fill the void." For example, hypothetically a situation could arise where a new landfill straddling two jurisdictions obtains local approval for formation from both jurisdictions, yet the two governing bodies are at an impasse in agreeing upon a single LEA for the combined landfill. Moreover, in this hypothetical the new capacity offered by the merged landfill is critical to the capacity needs of at least one of the jurisdictions. In such a case the impacted jurisdiction would likely be actively calling upon the CIWMB to fulfill its responsibilities and step in so that the merged landfill could commence operations and fulfill such critical capacity needs. If the Hearing Panel were to take the position that the CIWMB is powerless to step in as enforcement agency in the case before us today, then its hands would be similarly tied in the hypothetical presented above.

3. **The appeal of Board Staff determination of the Combined Permit Application as "complete" was not properly raised, argued, or supported by relevant evidence in the record.**

City/County argued at the hearing that Board Staff had improperly found BFI's application for a Combined Landfill SWFP to be complete because changes were being made to documents that were a part of that application such as the Joint Technical Document. However, this issue was not properly raised as it was not included in the Statement of Issues for Hearing. The County asserted at the hearing that it was included in an amended Statement of Issues, but none was ever received by the Hearing Panel or Counsel for the Hearing Panel. Furthermore, no legal arguments were included regarding this issue by any of the petitioners in their briefs. When questioned at the hearing, the County pointed to a stipulated fact (No. 43) that referenced an attachment showing changes being made to the slope stability analysis in the application, but nothing in that stipulation or attachment alleges, argues or explains how those documents relate to or are determinative of the "completeness," issue. Furthermore, there are no documents in the record regarding the Board Staff determination that was supposedly being challenged that would allow the Hearing Panel to review that determination. Therefore, petitioners did not provide the Hearing Panel sufficient evidence to allow the Panel to deliberate on the issue, even if it had been properly raised.

4. **When CIWMB Is Acting as the Enforcement Agency, Hearings under Public Resources Code Section 44307 Are Held by a Hearing Panel Appointed by the Chair of the CIWMB Pursuant to Section 44309.**

NVC argues that, under PRC § 44307, a hearing must be held at the local level before it may proceed to the level of CIWMB. NVC Brief, p. 7, ll. 19-26; p. 9, ll. 21-26. There is no such requirement in law. Sections 44307 and 44308 provide, in relevant part, that a person who alleges that the EA has failed to comply with law or regulation shall be provided a hearing before

the Hearing Panel or Hearing Officer. When CIWMB is acting as the EA for a jurisdiction, hearings under Section 44307 must be heard by a three-member Hearing Panel appointed by the Board's Chair. PRC § 44309. In this instance, CIWMB is acting as the EA regarding the application in question, not the City LEA or the County LEA, since neither has jurisdiction over the entire Landfill. CIWMB shall act as the EA when there is no local EA in place. PRC §§ 43202, 43205(a). Therefore, CIWMB is acting in accord with applicable statutes by providing Petitioners a hearing before CIWMB's Hearing Panel.

5. NVC's Claim That CIWMB Has Violated the California Environmental Quality Act ("CEQA") Is Not Ripe for Adjudication because CIWMB Has Not Approved a Proposed Project That Is Subject to CEQA.

NVC also argues that CIWMB is proceeding in violation of CEQA (PRC §§ 21000, et seq.) because, NVC alleges, the SWF Permit application BFI has submitted fails to satisfy various CEQA requirements. NVC's argument is not ripe for adjudication. Board Staff of CWIMB, acting as EA, has not made any decision to approve the SWF Permit application submitted by BFI. CEQA requirements must be satisfied before a public agency approves a project. Title 14, CCR, §§ 15074, 15090. Since CIWMB has not approved a SWF Permit for the Landfill, it is premature for NVC to assert that CIWMB has violated CEQA.

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6. NVC raised a number of issues that were not relevant to the legal issues in this appeal.

NVC raised a number of issues at the hearing, such as environmental justice and lack of public participation. These issues were not relevant to the determination of legal issues that were being considered by the Hearing Panel. Therefore, the Hearing Panel makes no findings regarding those other issues.

IT IS SO ORDERED

Dated: 5-14-08

Rosalie Mule, Chair
Hearing Panel
California Integrated Waste Management Board

DECLARATION OF SERVICE BY EMAIL

Case Name: APPEAL OF THE CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD'S ACCEPTANCE AND PROCESSING OF BROWING FERRIS INDUSTRIES' APPLICATION FOR A SOLID WASTE FACILITIES PERMIT FOR A COMBINED SUNSHINE CANYON LANDFILL, SYLMAR CALIFORNIA

Case No.: NONE

I declare:

I am employed in the Legal Office of the California Integrated Waste Management Board, which is the office of a member of the California State Bar under which member's direction this service is made. My business address is California Integrated Waste Management Board, P.O. Box 4025, Sacramento, CA 95812-4025 and my business electronic mail address is GBell@ciwmb.ca.gov. I am 18 years of age or older and not a party to this matter.

On May 15, 2008, I served the attached **Administrative Decision** by electronic mail by sending a true copy of the document identified above to the following persons at the indicated email addresses, which transmission was reported as complete and without error:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on the 14th day of May 2008, at Sacramento, California.

Gloria Bell

Gloria Bell
Declarant