California Integrated Waste Management Board

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To: All Local Enforcement Agencies

Subject: Temporary Waiver of Permit Terms and Conditions (Title 14, California Code of Regulations, §§ 17211 et seq.)

This letter is being sent to provide guidance on the use of Stipulated Agreements to authorize a temporary waiver from specific terms or conditions of a solid waste facilities permit pursuant to Title 14, California Code of Regulations, Division 7, Chapter 3, Article 3.5 (§§ 17211 et seq.) -Temporary Waiver of Terms. The California Integrated Waste Management Board (Board) regulations authorizing Stipulated Agreements have been in place since late 2001. Since then, Local Enforcement Agencies (LEAs) have issued a number of Stipulated Agreements in a wide range of circumstances. Many Stipulated Agreements that LEAs issued were entirely appropriate. An example includes authorizing a facility to temporarily exceed disposal height because of delays in construction of a new disposal cell caused by unusually excessive rainfall. There have also been some Stipulated Agreements that Board staff feels were issued without sufficient justification for a "temporary emergency" and which instead addressed changing market conditions, operator convenience, or cost savings. An example includes authorizing an increase in tonnage and vehicles using a facility because of new contractual agreements or because of growth in a waste shed, both of which are foreseeable and linked to market changes. This letter is intended to enhance statewide consistency in the application of these regulations.

Stipulated Agreements are available to help operators continue to provide solid waste handling and disposal services during "temporary emergencies." The regulations define "temporary emergency" as "a temporary, unforeseeable circumstance" (Title 14, CCR, §§17211.1(b)). Labor strikes or competitive market changes are expressly excluded from that definition. The Final Statement of Reasons (FSOR) supporting the regulations explains that "the regulations use the word 'temporary' to distinguish emergencies for which a stipulated agreement is available from long-term problems which are properly addressed by revising the facility's solid waste facility permit, and use the word 'unforeseeable' to distinguish circumstances that could and, perhaps, should have been foreseen and planned for" (FSOR, February 2003, p.4.). The FSOR then gives examples of circumstances that an LEA might find to be temporary emergencies: excessive amounts of solid waste generated by a fire or building collapse or caused by the unexpected temporary closure of a facility that handled some of a community's waste. The regulations contemplate that an LEA will waive permit terms and conditions only when extraordinary circumstances occur – those times when an unforeseeable event happens that is not a permanent condition that creates a need to change the way a solid waste facility operates.

Population growth and changing market conditions are not temporary emergencies for which Stipulated Agreements may be issued. Board staff is aware that in some situations the existing solid waste handling, processing, and disposal infrastructure in an area may not be able to handle increased generation of solid waste associated with population growth and development. This is an important long-term planning issue that city and county planners and decision-makers, as well as the solid waste management industry and the Board, must grapple with. However, market changes in available capacity that potentially impact permitted capacity at other facilities do not constitute temporary emergencies that allow LEAs to issue Stipulated Agreements. Section 17211.1(b) of the regulations explicitly states that a temporary emergency cannot result from competitive market changes.

Furthermore, a temporary emergency does not exist where an operator has, or could have had, prior knowledge of a situation. As noted above, Section 17211.1(b) also explicitly states that a temporary emergency is an unforeseeable circumstance. A failure to plan for future solid waste handling or disposal needs does not constitute an unforeseeable circumstance. An operator's or hauler's desire to save money also does not constitute a basis for the issuance of a Stipulated Agreement. How to deal with these types of situations in the future is clearly an issue that requires continued discussion among LEAs, operators and Board staff.

Other tools are available to the LEA in certain circumstances, including the following:

- If a disaster or health emergency were declared, the Emergency Waiver process described in regulations (CCR Title 14, §§ 17210 et seq.) would be available to LEAs and operators of facilities that need to make changes to operations to deal with the situation.
- An LEA could issue an enforcement order to a facility that is not in compliance with its permit. The Notice and Order could either include a schedule for the facility to come into compliance or could require immediate compliance with the permit requirements. If the operator failed to comply with the Order's compliance schedule, the LEA could impose the appropriate penalties to gain compliance or take other enforcement action.

Some longer-term approaches could also reduce the potential for noncompliance with permit requirements when competitive market changes occur. An operator can plan for future flexibility by seeking a permit that allows enough room for growth and for temporary fluctuations in amounts of waste received. LEAs can foster such flexibility with permit conditions that allow facilities to deal with unexpected short term changes. Each of these approaches would require some level of California Environmental Quality Act review that supports predicted growth or added flexibilities, to assure that there would continue to be adequate protection of public health and safety and the environment.

Another longer-term approach available to LEAs is the permit review process. The LEA can use a permit review to gain information about the facility and factors that may affect it in the future, such as waste generation data, waste characterization, and waste shed information. By bringing to the operator's attention how these factors may affect the existing permit, the LEA can create an opportunity for the operator to request adjustment to the permit to prevent future conflicts. On the other hand, if the permit were not adjusted accordingly after the LEA provided this information to the operator, then any future argument by the operator that a temporary emergency based on those facts existed would be greatly diminished.

Additional guidance regarding the use of the Temporary Waiver of Terms and Conditions regulations may be warranted. We would welcome your comments on whether additional guidance would be helpful to you and to facility operators. In the interim, Board staff strongly recommends that LEA staff and LEA legal counsel meet and confer with Board staff and Board legal counsel prior to acting upon a request for a Stipulated Agreement to authorize a temporary waiver of permit terms or conditions. We recognize that a very short timeframe is involved in these situations and will strive to accommodate such requests.

If you have any questions, please do not hesitate to call me at (916) 341-6311 or Mr. Mark De Bie at (916) 341-6331.

Sincerely,

Howard Levenson

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