



NAPA-VALLEJO WASTE
MANAGEMENT AUTHORITY

4-25-13

To: RICH LUTHY - Executive Director

From: ROB PAUL - Authority Counsel

RE: Authority Liability related to Hazardous Waste at Disposal Facilities

Issue: What liability is associated with the Authority's disposal of municipal waste at a disposal facility in the event of a hazardous release at the disposal facility?

Conclusion: In the event of a hazardous release, and required remedial cleanup, at a disposal facility under contract with the Authority to accept its municipal solid waste, the Authority could face some liability for remedial costs. Most likely, the potential liability would be some proportional amount of remedial expenses based on total waste volumes deposited. However, the franchise agreements for transfer station operations and disposal require indemnity by the franchisees for such liability, as well as provide insurance coverage for the Authority's protection.

Discussion: Under any number of legal theories, the Authority could be found legally liable for a hazardous waste release, and a share of remedial cleanup expenses, at a disposal facility under contract to accept the Authority's solid municipal waste. Common law theories for Authority liability could be based on nuisance, negligence and trespass. Statutory schemes, of which there are many, include among the best known the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, 42 USC §9601 et seq.) and the Carpenter-Pressley-Tanner Hazardous Substance Account Act (HSAA, Health & Safety Code §25300 et seq.). Depending on the nature of the hazardous release, statutory schemes covering transportation, air and water pollution might also apply.

CERCLA is probably best known from a disaster headline standpoint, and provides for strict liability for anyone found to be a property owner, transporter, or arranger of hazardous waste (the Authority would qualify under the latter). Most likely, the Authority's liability for remedial expenses would be based on its pro-rata contribution of solid waste to the overall quantity in the disposal site. Further, the federal Environmental Protection Agency, recognizing the peculiar position of municipalities in the scheme of waste disposal, has some advantageous settlement mechanisms for public entities such as the Authority.

However, whether liability is based on common law or statutory theories of liabilities, the Authority would sue a plethora of other defendants, including the Authority's franchisees, for full contractual indemnity, equitable indemnity, and contribution. As a practical matter, both the

current transfer facility and proposed disposal facility franchise agreements contain indemnity clauses in favor of the Authority relating to hazardous substances actions. The stronger the financial position of the franchise, the more protection the indemnity clauses provide. Additionally the franchise agreements provide insurance coverage for pollution and environmental impairment, and errors and omissions relating to releases, in amounts ranging from \$3-10 million, which flow to the benefit of the Authority.

Finally, some comfort can be taken in the fact that most of the large hazardous release sites which have been litigated involved disposal sites long since closed and which were not actively regulated. Today, solid waste disposal facilities are extensively regulated by the State of California (Title 27 of the California Code of Regulations as administered by CalRecycle and the Local Enforcement Agency) and even the federal government for municipal solid waste landfills (Title 40 of the Code of Federal Regulations). Those requirements include landfill operation, design, and permitting. Additionally, landfills must obtain approved closure and postclosure maintenance plans and provide financial assurances to carry out such closure and postclosure activities. Given the regulatory oversight of disposal sites, and the contractual indemnity and insurance coverage provided the Authority by its franchisees, the Authority's potential legal exposure for hazardous materials release liability appears to be reasonably addressed.