

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WQO 2002 - 0020

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In the Matter of the Petition of

**THE COUNTY OF SAN DIEGO, SAN MARCOS LANDFILL**

For Review of Assessment of Administrative Civil Liability  
San Diego Regional Water Quality Control Board  
Order No. 2002-0017

***SWRCB/OCC FILE A-1471***

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BY THE BOARD:

This matter is before the State Water Resources Control Board (State Board) for review for a second time. In May 2000, the San Diego Regional Water Quality Control Board (Regional Board) issued to the County of San Diego (County) an order assessing administrative civil liability in the amount of \$305,050 for its failure to comply with certain requirements concerning the closed San Marcos Landfill (Order No. 2000-82.) The decision to impose the assessment was based on a finding that the County had failed to comply with the terms of a cease and desist order issued by the Regional Board in 1998 (Order No. 98-39) and with waste discharge requirements issued in 1992 (Order No. 92-02) that were modified by the State Board in its Order No. WQ 93-08.

The violations concerned three issues: (1) failure of the County to provide an adequate top cover for the landfill; (2) failure to file a quarterly report for the period covering October through December 1998; and (3) failure to report a sheer crack in the north slope of the landfill. The Regional Board assessed \$300 per day for the first violation, which they found extended for 671 days. This assessment totaled \$201,300. The Regional Board assessed \$250 per day for the second violation over a period of 407 days. This assessment came to \$101,750. The third assessment was for the violation of two reporting requirements for one day each at \$1,000 per day.

In Order No. 2001-01, the State Board reviewed the Regional Board Order No. 2000-82 and remanded the matter to the Regional Board with directions to reconsider the amount

of the assessment. The State Board Order indicated that the assessment for the sheer crack was appropriate, that the assessment for failure to file a quarterly report should be limited to the time before the next quarterly report was filed, and that the accuracy of the assessment for the failure to provide an adequate cover could not be confirmed by evidence in the record.

On remand the Regional Board conducted another hearing, on March 13, 2002, at which it adjusted the assessment for failure to file a report. In addition, the Regional Board considered a staff recommendation to once again assess administrative liability for 671 days of violation in failing to provide adequate cover for the landfill. Additional evidence and testimony were provided by Regional Board staff, the County, and other interested persons. After much discussion, the Regional Board voted to assess administrative civil liability for failure to maintain an adequate cover for a total of 455 days, from November 10, 1998 until February 7, 2000.<sup>1</sup> At \$300 per day, that part of the assessment came to \$136,500.

The County filed a timely petition seeking review of that portion of the administrative civil liability assessment.

## **I. BACKGROUND**

The County operated the class III San Marcos Landfill until March 1997, at which point the County ceased the discharge of additional waste to the site. (Correspondence from the County to the Regional Board indicates that the final work to guarantee adequate cover was not completed until November 1, 2000.) In March and April 1998, after the County ceased operations at the site, Regional Board inspections found a number of ongoing problems involving the cover, erosion, and general maintenance. The cease and desist order mentioned above was issued by the Regional Board in May 1998. It required compliance with the terms of the waste discharge requirements and established a timetable for both immediate and longer term measures. Among the requirements of the order was:

3c. Landfill cover on the top deck of the San Marcos Landfill shall be constructed to minimize percolation of precipitation through the wastes. The landfill cover shall be not less than 24" thick and achieve a permeability of  $3 \times 10^{-5}$  cm/sec. The structural integrity and effectiveness of the landfill cover and all containment structures shall be maintained as necessary to correct the effects of settlement and other adverse factors.

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<sup>1</sup> Because the Regional Board decided to drop any liability assessment before November 10, 1998, we do not consider any alleged violations before that date.

The other terms of the cease and desist order are not at issue in this petition.

## **II. CONTENTIONS AND FINDINGS**

Contention: The County contends that evidence in the record does not support the Regional Board's conclusion that the cover was improperly maintained for 455 days.

Finding: We agree. As we indicated in our earlier order, it is absolutely clear from the record that the County did not properly maintain the cover on the landfill. The only question is how many days of violation occurred. The Regional Board bears the burden of proving each and every day of violation and, although we can infer certain facts from the evidence presented, we cannot make broad assumptions based on a few facts.

The basic facts are these. In March and again in April 1998, Regional Board staff inspected the landfill and found a number of significant problems. In response to those concerns, the Regional Board adopted the cease and desist order in May 1998. No follow-up staff inspections occurred until April 8, 1999. The inspection report, as well as the notice of violation that followed on April 21, point out several problems concerning the site in general and the cover in particular. However, section 3c of the cease and desist order, the portion that specifically requires the 24 inch cover, is never discussed in either. The notice mentions several other sections of the cease and desist order but omits any reference to section 3c.

The staff next inspected the site on September 15, 1999 and used an auger to drill some bore holes to determine the thickness of the cover. Three out of four holes showed less than a 24 inch cover. Returning on November 5, 1999, staff again drilled some holes. While the findings were different from those of the September visit (indicating, perhaps, some work on the cover in the interim), violations of the cover requirement were still noted.

Although the Regional Board staff did few inspections, many others were carried out on behalf of the Local Enforcement Agency (LEA), an independent arm of the County that enforces state law and the regulations of the Integrated Waste Management Board. We noted these inspections in our earlier order but the Regional Board has shown convincingly that the LEA inspector was looking for compliance or non-compliance with a decidedly different set of requirements. Therefore, a finding of compliance or non-compliance by the LEA inspector has little probative value before the Regional

Board or in this review. The Regional Board insists, however, that observations made by the LEA inspector should be admitted as evidence of non-compliance in some cases.<sup>2</sup>

The Regional Board argues that any notation by the inspector indicating that there is some exposed waste can support a finding of inadequate cover. While this makes some sense, it cannot be the basis for the assessment of civil liability. The LEA inspector was charged, among other things, with making sure that the intermediate cover was at least 12 inches thick, half of what the Regional Board required. On several occasions, the LEA inspector noted that he could see some exposed garbage in the vicinity of one or more of the drains yet indicated on the same form that there were no violations of the 12 inch cover requirement. Clearly, the inspector did not regard the visible garbage as proof of the County's failure to maintain the 12 inch intermediate cover. Under such circumstances, we cannot base a finding that the County failed to maintain a 24 inch cover on the LEA inspector's reports. The burden of proof is somewhat higher than that.

Given the admission by the County that it was out of compliance after July 21, 1999 and the evidence in the record that supports the Regional Board's finding that the County remained out of compliance at least through February 7, 2000, we conclude that the assessment of administrative civil liability should be applied at the rate of \$300 per day, as determined by the Regional Board, for a period of 202 days for a total assessment, for failure to maintain an adequate cover on the landfill, of \$60,600. The record does not support the finding that the County maintained an inadequate cover between November 10, 1998 and July 21, 1999. This, added to the other portions of the assessment, results in a total assessment of \$84,850.

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### **III. CONCLUSION**

It is generally the case that the State Board will not review the decision of a regional board with regard to the issuance of an order assessing administrative civil liability. However, when it

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<sup>2</sup> The Regional Board staff produced the LEA inspector as a witness at the hearing. However, the inspector who testified only took over at the San Marcos site in June 1999. He could offer no personal observations concerning the landfill before that date.

appears that the decision involves some abuse of discretion, the State Board will not forego such review. This petition raises such issues.

The Regional Board bears the burden of proof to show that a violation of the cease and desist order occurred. The number of days of violation cannot be assumed but must be based on some quantum of evidence. Reliance on the hearsay observations of the LEA inspector is not sufficient, especially in light of the somewhat contradictory conclusions in his reports. While it is likely that more days of violation actually occurred than can be proven, we must limit the assessment of administrative civil liability to that which is supported by some direct evidence. Combining the admissions of the County with the observations of staff in two site inspections provides ample proof of violations from July 21, 1999 through February 7, 2000.

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#### IV. ORDER

IT IS HEREBY ORDERED THAT the Regional Board order assessing administrative civil liability be amended to reflect a sum of \$60,600 for failure to maintain an adequate cover and a total of \$84,850 for all violations addressed by that order.

#### CERTIFICATION

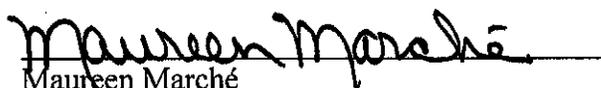
The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 19, 2002.

AYE: Arthur G. Baggett, Jr.  
Peter S. Silva  
Gary M. Carlton

NO: None

ABSENT: Richard Katz

ABSTAIN: None

  
Maureen Marché  
Clerk to the Board