

# ELLMAN BURKE HOFFMAN & JOHNSON

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April 5, 2006

## VIA U.S. MAIL

David Zaltsman, Esq.  
Deputy County Counsel  
Marin County  
3501 Civic Center Drive, Suite 303  
San Rafael, CA 94903

Re: Redwood Landfill 1958 Use Permit

Dear Mr. Zaltsman:

This letter responds to yours of December 23, 2005. I appreciate the fact that your office does not “quarrel with the basic legal analysis contained in” my December 7, 2005 letter regarding the County’s right to conduct hearings to investigate landfill activities. I respectfully disagree with you, however, on several of the other points you have made.

First, you claim that I based my analysis on the assumption that my client, No Wetlands Landfill Expansion (“NWLE”), had presented credible evidence of violations. Although I believe that NWLE has presented such evidence, that was not the point. The point is that the evidence cited by NWLE provides more than sufficient call for the Board to exercise its power to review the scope and conditions of the permit and to investigate potential violations, particularly potential violations that could pose a human health risk. “The authority of local governments to regulate land use within their jurisdiction ... rests on their police power, which is the inherent power of government to provide for peace, order, health, morals, welfare, and safety of its citizens.” *Berman v. Parker* (1954) 348 U.S. 26; see also *Scrutton v. County of Sacramento* (1969) 275 Cal.App.2d 412; *DeVita v. County of Napa* (1995) 9 Cal.App.4th 763. Local citizens do not bear the responsibility to gather evidence of violations. That responsibility lies primarily with the County. The responsibility to investigate credible evidence that such violations might exist necessarily invokes such responsibility – the responsibility to exercise the police power to protect the citizenry *before the fact*. Prevention of threatened harm clearly falls within both the rights and responsibilities of the police power authorities.

Rather than focusing on *whether* sufficient evidence exists to revoke or suspend the landfill’s conditional use permit as a preliminary matter at staff level, the Board should be considering that question, i.e., whether to exercise its authority to review the facts and investigate

David Zaltsman  
April 5, 2006  
Page 2

whether or not the operator has complied with its use permit as an exercise of police power in a matter potentially posing a human health risk. You seem to be insisting on conclusive proof as a predicate to Board action. Whereas I am sure that the Board will be moved by your recommendation, it is for them to make *the policy decision* to review this matter within the boundaries of their authority.

Secondly, I submit that the County need not show a public nuisance in fact to enforce, revoke or modify an existing use permit. The law states that either (1) a public nuisance or (2) violation of permit conditions can justify revocation or the imposition of new conditions. A governing body may revoke a "vested right" if the permittee fails to comply with reasonable terms or conditions expressed or implicit in the permit (*Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal.App.2d 776, 783; *Brougher v. Board of Public Works* (1928) 205 Cal. 426) or if there is a compelling public necessity (*Jones v. City of Los Angeles* (1930) 211 Cal. 304). The permit initially issued defines the limits of the rights that can vest pursuant to it.

*A permittee cannot take down a permit, expand its operations beyond the limits of the permit and then claim a vested right to the expanded use.* My clients claim not that the landfill constitutes a public nuisance but that it fails to comply with the terms of the permit initially issued in the reasonable contemplation of the Board at that time. That is a much more precise and definitive standard than the amorphous concept of nuisance.

Finally, you note that County staff typically conducts any investigation and makes the determination as to whether or not a violation has occurred. That may be County practice – but it does not absolve the Board of ultimate responsibility. In addition, the Board retains the right, to direct Staff to conduct an investigation and present the results of that investigation at a public meeting. We are asking the Board to do just that: review or direct the review of the intended scope of the land use permit and its conditions, determine whether current and planned operations go beyond the scope of the permit or violate the conditions, and consider whether additional conditions would be appropriate in light of all relevant facts. These are not matters that will be addressed in the separate state proceeding on the solid waste facility permit. And I submit that it is for the Board to make the ultimate decision as to whether a violation exists.

You asked NWLE to present evidence of violations. Please see the attached appendix detailing various permit violations that have occurred over the past few years. You may believe (without benefit of an investigation) that the information today is insufficient to revoke or suspend the permit -- but I respectfully request that you consider the nature of the operation today in contrast with the operation contemplated when the permit was initially issued. I submit that when it issued the permit in 1958, the Board of Supervisors contemplated a local rubbish dump and did not intend to authorize a regional waste processing and composting facility operating day and night with hundreds of daily truck trips, or that the resulting "dump" would

David Zaltsman  
April 5, 2006  
Page 3

reach a height of 166 feet with up to 34 million cubic yards of waste, as is currently proposed. These changes in circumstances warrant – at a minimum – additional conditions of operation such as an independent monitor or mitigation fees to protect the health and safety of the local citizenry.

Public hearings would also enable concerned citizens to make their comments within a structured forum and provide a basis for reassuring them of the absence of hazard – if that is indeed the case. It would also provide a forum for airing views concerning whether current and future landfill operations are compatible with possible County policies or goals such as achieving Zero Waste or implementing sustainability strategies as part of the Countywide Plan.

Our client, NWLE, as well as other groups such as the Sierra Club, Sustainable Marin, Sustainable Novato, the Marin Central Democratic Committee, the Novato Democratic Club, Baykeeper, and Madrone Audubon have asked the Board of Supervisors to review the land use permit. Given the health, safety and environmental issues as well as the landfill's long-term impact on Marin County, it is in the public interest to do so. As set forth above, the Board of Supervisor's authority to initiate that review rests on solid ground. And if in fact there is nothing about which the citizens should be concerned, a public proceeding is the best way to expose that fact.

I respectfully request that you reconsider your position in light of the foregoing.

Very truly yours,



Howard N. Ellman

HNE/flf

cc: Patrick Faulkner, County Counsel  
Supervisor Susan Adams  
Supervisor Harold Brown  
Supervisor Charles McGlashan  
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