



Office of the County Counsel

Memorandum

TO: René L. Mendez, County Administrative Officer
Paul N. Bruce, County Counsel

FROM: Allen R. Berrey, Assistant County Counsel *ARB*

DATE: September 6, 2001

RE: Limitation of Liability – Purchase of LADWP Landfill Liability

The following are my recommendations as to how the County can, in connection with its acquisition of the Los Angeles Department of Water and Power (LADWP) property upon which certain of the County-operated landfills are situated, eliminate, or at least minimize, the County's risk of liability for landfill-related groundwater contamination.

As discussed below, I think the best way to do this is for the County to:

- 1) Take whatever steps are necessary and feasible, as the operator of the landfills, to ensure that the groundwater beneath the landfills never becomes contaminated and, if it does, that it not migrate offsite;
- 2) In the course of negotiations with LADWP for the purchase of the landfills, gain concessions from LADWP that will help ensure that the groundwater beneath the landfills is not pumped offsite;
- 3) Exploit its status as a landowner and public entity with regulatory powers to minimize the likelihood that any contaminated groundwater beneath the landfills will be transported offsite; and
- 4) Purchase sufficient insurance to respond to any clean up-related costs and damages in the event the above efforts fail.

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DISCUSSION

As I understand the issue, the County wishes to acquire the LADWP-owned lands upon which the County operates some of its landfills. In any such acquisition, LADWP would retain its water rights associated with those lands, since it takes an affirmative vote of the people of Los Angeles to allow LADWP to divest any of Los Angeles' water rights. LADWP, as well as any other landowner would, of course, also own the water rights associated with lands adjacent to the landfills.

The concern is that, once the County becomes owner of the landfills, it could be held liable for damages and/or clean up costs in the event contaminated groundwater leaves those sites and/or is utilized by LADWP or others.

Before discussing how I think this risk could be reduced or eliminated, I make the rather obvious point that, since the County *currently* operates the landfills, it is a "covered person" under the Comprehensive Environmental Response Compensation and Liability Act ((CERCLA), 42 U.S.C. § 9601 et seq.), and is therefore *already* exposed to the above-described liability risk.

Also, since the landfills are operated pursuant to a lease that requires the County to indemnify, defend, and hold LADWP harmless from any liability associated with operation of the landfills, the County cannot currently look to LADWP to share in the cost of any groundwater-related cleanup or damage award (even though LADWP may be responsible under CERCLA for a portion thereof).

Moreover, it is likely that LADWP will, as a condition of its sale of landfill property, require the County to continue to hold it harmless etc. for any liability associated with the landfills. (Obviously, if this is not the case, the County should raise this point in its negotiations with LADWP for the purchase of the landfill properties).

Thus, it appears that, if the County were to acquire the landfill properties from DWP, it would be in the same situation, liability-wise vis-à-vis DWP and the rest of the world, as it is now. As a result, the main liability-reducing benefit to the County from its purchase of the landfills would be that, as the sole owner of the land and sole operator of the landfills thereon, the County could exercise complete control over those lands/landfills.

It should also be pointed out that, regardless of the measures the County may take to reduce or eliminate the possibility that the groundwater beneath the landfills does not migrate offsite, the geology and/or hydrology of the sites might simply render this goal impossible to achieve.

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Given these considerations, it is my recommendation the County consider taking some or all of the following steps to reduce the liability risk it will incur if/when it acquires the LADWP-owned landfill properties.

1. Action/Response Plan and Installation of Monitoring Wells

Presumably, since they are licensed pursuant to the State of California's environmental laws, the County's landfills are constructed and being operated in a manner that minimizes the likelihood of groundwater contamination.

Nonetheless, to the extent it has not already done so, an obvious prophylactic measure the County should take is for the Integrated Waste Management Department, with the assistance of the Environmental Health Department and the Water Department, to develop a plan to detect and respond to any contamination of the groundwater beneath any of the County's landfills.

To facilitate the implementation of such a plan, the County should install additional wells in and around the landfills to monitor groundwater quality and/or the migration of any contaminated groundwater.¹

This would allow the County to promptly take whatever action is necessary and feasible to prevent the migration of any contaminated groundwater from the sites if/when it is discovered.

If the County is currently constrained from doing this because LADWP owns the property and will not consent to the installation of additional wells, it should be a paramount priority of the County to install same if/when it acquires the landfill sites.

Since a relatively small amount of water would be used in such monitoring activities, it should be of little concern to LADWP that the County might, in the course of performing such monitoring, technically be interfering with LADWP's reserved groundwater rights.

More importantly, however, since the County would be an overlying landowner, it would have a right to pump as much groundwater from beneath its landfill property as it wanted, as long as it did not interfere with LADWP's correlative rights in that groundwater, i.e. LADWP's reserved water rights in the landfills would not be exclusive.

¹ It is my understanding that there are already groundwater monitoring wells at all of the County-operated, DWP-owned landfills.

2. Acquisition of “Buffer Zones” Around the Landfills

One of the main advantages of the County’s owning the landfill sites (which, frankly, it may already enjoy as lessee thereof) is that, as the landowner, it could prevent anyone from coming onto the sites and drilling or utilizing a well.

This is important because it would seem that, except for its natural movement, the only way contaminated groundwater could be removed from the beneath the landfills is if someone pumped that groundwater from a well on or near the landfill and conveyed it somewhere else.

Thus, to maximize its ability to restrict access to the groundwater beneath the landfills, the County should purchase from LADWP not only the “footprint” of the actual landfill site, but also as large a “buffer zone” of land surrounding the landfills as is possible. To the extent any of the land in such a buffer zone is not owned by LADWP, the County should acquire same via purchase and/or condemnation.

2.a. LADWP’s Access to the Landfills

With respect to LADWP’s access to the landfill property, it should be noted that, although it will in all likelihood “reserve” its water rights in the landfill property, such reservation will not by itself guarantee LADWP a right of access to the landfill property to exploit those rights.

That is, unless LADWP, in the deed by which it transfers the landfill property to the County, reserves to itself a right to enter onto the property to exploit its reserved water rights, it will have no right to do so, even though it may have reserved its water rights in the transferred land.

Thus, the acquisition of large buffer zones around the landfills would allow the County to prevent any person or entity, including the LADWP, from constructing a well anywhere near the landfills and thereby gaining access to the groundwater beneath them.

This is important because, if only the County has access to the groundwater, then no one but the County could be threatened by the use of that groundwater should it become contaminated. The County could still be held liable under CERCLA for cleanup costs, however, even if only the County was using or had access to the groundwater.

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If any doubt exists on this point, the County should, without conceding anything and in the course of its negotiations concerning the County's purchase of the landfills, obtain from LADWP a promise that it will not enter onto the landfill sites for the purpose of exploiting its reserved water rights therein.

It would seem that LADWP could make such an agreement without running afoul of the above-mentioned City charter provision that (allegedly) prevents LADWP from selling or transferring any water right without a vote of the people of Los Angeles, because it would not be giving up any water right even though, as a practical matter, it could no longer exploit those rights at the landfills.

3. Amendment/Application of County's Water Well Ordinance

In addition to exploiting its authority, as a landowner, to prevent the construction of wells on the landfill sites and, if acquired, within any "buffer zones" surrounding those sites, the County could exercise its regulatory authority to achieve that purpose.

One obvious way to do this would be for the County to amend Chapter 14.28 of the Inyo County Code, entitled "Water Wells," so as to prohibit the construction of any wells on the landfills themselves, as well as within hydrologically-based zones around the landfills.

This would be in keeping with the purpose of that Chapter, described in § 14.28.010 of the County Code as follows:

"It is the purpose of the ordinance codified in this chapter to provide for the construction, repair, modification and destruction of wells in a manner that the groundwater of this county will not be contaminated or polluted, and that water obtained from wells will be suitable for beneficial use and will not jeopardize the health, safety or welfare of the people of this county."

In addition to amending Chapter 14.28 to prevent the construction of wells on the landfills and within any buffer zones around the landfills, that Chapter could be amended so as to allow the construction of a well within an area surrounding the buffer zones, but only upon proof that the well will not cause or promote the migration of groundwater from beneath the landfills.

In other words, there could be a specific burden imposed on persons wishing to construct wells within a second "buffer zone" around a landfill to show that the well will not "tap into" any water beneath the landfill.

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Since the permitting requirements of Chapter 14.28 apply to both private persons and public entities (§ 14.28.030), the restrictions imposed by the above-discussed amendments to that Chapter would be applicable to LADWP.

In the alternative, the County could amend Title 15 of the County Code, entitled "Environmental Impact" to state specifically that a water well permit is a "discretionary" project under the California Environmental Quality Act (CEQA).²

This would trigger environmental review of water well permit applications and, obviously, permit their denial or significant modification/mitigation; one mitigation measure could be that the permittee monitor the water pumped from the well and cease pumping and/or close the well if any contamination was detected.

4. Amendment of Zoning Ordinance and General Plan

Another way the County could exploit its regulatory authority to prevent, or at least minimize the likelihood of, the extraction and transport of groundwater from the landfill sites is via its General Plan and Zoning Ordinance.

With respect to the latter, the County could amend Title 18 of the County Code to either: 1) create specific "landfill" zoning districts wherein the permitted uses are limited to landfills and associated uses, and the construction or use of water wells is prohibited; or 2) prohibit the construction or use of water wells on landfills in the zoning districts wherein landfills are currently a permitted use (i.e. the Open Space (OS) zone (County Code § 18.12.040.H)); this restriction would be placed in the "development standards" applicable to those zones.

This restriction on water well construction or use could be made applicable to the "buffer zones" around the landfills either: 1) by establishing the boundaries of the "landfill" zoning district to include the buffer zones; or, 2) if the "development standards" alternative is followed, by prohibiting the construction of water wells within any officially-designated buffer zones surrounding the landfills.

² It could reasonably be argued, however, that, under the current language of the County Code, a water well permit is *already* a discretionary project under CEQA. Also, if the County Code were amended to state that a water well permit could only be issued in the "buffer zone" around a landfill if certain conditions are met, such a permit would in all likelihood have to be considered a discretionary project under CEQA, since an element of discretion would have been added to the permit-issuance equation.

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Alternatively, the County could amend its Zoning Ordinance to make the installation/use of a water well within the "landfill zones" or in the Open Space zone a conditional use, i.e. requiring a conditional use permit (CUP). Such a permit would be a discretionary project and therefore subject to CEQA review.

The advantage of the CUP alternative would be that, in addition to being able to mitigate the environmental impacts of the well under CEQA as mentioned above, the County could place conditions on a water well CUP; one such condition could be that the permittee hold the County harmless from any liability resulting from its use of the well CUP.

If the County decides to enact these changes to the Zoning Ordinance, it should also take the opportunity to include in its update of the General Plan provisions that similarly restrict the construction or use of wells at or near the landfills.

This should be done not only to ensure that the Zoning Ordinance, if amended to address wells at the landfills, is consistent with the General Plan, but also to provide a clear policy statement that the County is concerned with the exportation of groundwater from the landfills. This health and safety-based policy could then be used to support other actions taken by the County to address the issue, i.e./e.g. the condemnation of water rights, as discussed below.

Since it is a city, it is debatable whether these zoning restrictions would apply to Los Angeles, i.e. to the LADWP. The restrictions would, however, be applicable to any private person who either has water rights on land within or adjacent to the landfill sites, or acquires same from LADWP (both of which are, admittedly, rather unlikely scenarios).

5. Amendment of Siting Element of County's Integrated Waste Management Plan

In addition to amending its well ordinance and zoning code, or, at least in lieu thereof, the County should amend the Siting Element of its Countywide Integrated Solid Waste Management Plan to prohibit the construction of wells at any of the landfill sites, except for wells delivering water for use by the County onsite.

This could be done under the authority of Public Resources Code § 41701, which states that such a siting element shall contain, among other things "(a) A statement of goals and policies for the environmentally safe ...disposal of solid waste."

6. LADWP's Creation of a Covenant not to Drill/Use Wells

Another way of ensuring, or at least increasing the likelihood, that groundwater from beneath the landfills will not be exported offsite would be for LADWP to impose a "covenant" on its lands surrounding the landfills (or surrounding the "buffer zones" around the landfills, if same can be acquired from LADWP) that prevents it from installing or using any water wells on those lands.

Such a covenant could be imposed pursuant to Civil Code § 1471, which states in part:

"Notwithstanding Section 1468 or any other provision of law, each covenant made by an owner of land or by the grantee of land to do or refrain from doing some act on his or her own land which doing or refraining is for the benefit of the covenantee, regardless of whether or not it is for the benefit of the land owned by the covenantee, runs with the land owned by or granted to the covenantor; and, except as provided by Section 1466 or as specifically provided in the instrument creating the covenant, it shall be binding upon each successive owner, during his or her ownership, of any portion of the land affected thereby and upon each person having any interest therein derived through any owner thereof, where all of the following requirements are met:

- (a) The land of the covenantor which is to be affected by the covenant is particularly described in the instrument containing the covenant.
- (b) The successive owners of the land are expressed to be bound thereby for the benefit of the covenantee in the instrument containing the covenant.
- (c) Each such act relates to the use of land and each such act is reasonably necessary to protect present or future human health or safety or the environment as a result of the presence on the land of hazardous materials, as defined in Section 25260 of the Health and Safety Code.
- (d) The instrument containing the covenant is recorded in the office of the recorder of each county in which the land or some portion thereof is situated and the instrument includes in its title the words "Environmental Restriction."

This statute seems well-suited to addressing the issue at hand, since its clear purpose is to prevent/reduce health risks associated with hazardous materials. However, as with the sale to the County of "buffer zones" around the landfills and its promise not to enter the landfill lands in order to exploit its reserved water rights, LADWP would have to agree to the imposition of this type of environmental covenant on its lands.

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In any event, in negotiating with LADWP on such a proposal, and wherever else appropriate, the County and LADWP should make clear that hazardous materials *may* be present at the landfills and/or the surrounding LADWP lands, and that the creation of the covenant is a preventative, rather than remedial, measure.

It is noteworthy that, as with its promise not to enter onto landfill lands, if LADWP created such a covenant on its lands it would not be selling or otherwise transferring any water rights. As a practical matter, however, those rights would be unavailable for exploit by LADWP. Thus, this device would seem to provide an assurance that groundwater would not pumped from under the landfills, but without LADWP running afoul of its City charter regarding the sale of water rights.

Further, it is always possible that future Boards of Supervisors might amend the water well ordinance, the zoning code, and the General Plan to allow for the drilling of water wells on the landfills and/or the exportation of groundwater therefrom. Thus, the County might consider imposing a Civil Code § 1471 covenant on the landfill lands, if/when it acquires same, that prohibits *it* from drilling wells thereon or exporting groundwater therefrom.

Finally, it should be noted that LADWP could also create a covenant prohibiting it from drilling/using a well on its lands adjacent to the landfills pursuant to Civil Code § 1468. Unlike Civil Code § 1471, which allows for the creation of land use covenants to deal with risks presented by hazardous materials, § 1468 is generic, i.e. it allows for the creation of covenants that restrict the use of land for virtually any reason.

A covenant created under Civil Code § 1468, however, must benefit *the land of the covenantee*, whereas a covenant created under § 1471 may be created *regardless of whether* it benefits the land of the covenantee. Thus, were LADWP to use § 1468 to create a well drilling/use covenant on its land, it would have to be shown that the County's (the covenantee's) *land* would benefit from the covenant.

However, since the main, if not sole, reason for the covenant in the first place would be to reduce the County's risk of liability for the migration/use of contaminated groundwater from beneath the landfills, it may be difficult to show how LADWP's covenant benefits the County's *landfill property*; i.e. the real benefit of the covenant would concern risk management, not the landfill property.

Thus, it would seem that, as between a covenant created pursuant to Civil Code § 1471 and one created under § 1468, the former would be more appropriate.

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As mentioned, however, Civil Code §1471 states that a covenant created thereunder must impose a limitation reasonably necessary to protect “present or future human health or safety or the environment as a result of *the presence on the land of hazardous materials.*”

Since, as far as we know, there are no such hazardous materials on/adjacent to any of the landfills, it may likewise be inappropriate to use Civil Code § 1471 to create the covenant. The obvious remedy to this dilemma, it would seem, would be to create a covenant that conforms to the requirements of both Civil Code § 1468 and 1471; then, if the covenant were challenged, it could be defended on alternative statutory grounds.

7. Acquisition of Water Rights via Eminent Domain

LADWP may be unwilling to do, or incapable of doing, the things suggested above that would minimize the likelihood that groundwater would be exported off the landfill sites. In that case, the County should consider condemning LADWP’s water rights (and everyone else’s) in and around the landfills. This would prevent LADWP from exploiting those rights and, hence, would prevent it from pumping and exporting groundwater from the vicinity of the landfills.

Again, this would further the County’s strategy of limiting its risk of liability for contamination of groundwater beneath the landfills by minimizing the likelihood that that water will ever be exported offsite.

This tactic would be authorized by a combination of statutes found in the Government Code and in the Code of Civil Procedure (C.C.P.), the latter of which contains the “Eminent Domain Law” (C.C.P. § 1230.010 et seq.).

First, the County has the authority to acquire by eminent domain any property necessary to carry out any of its powers or functions (Government Code § 25350.5). Since it has power to operate a landfill (Government Code § 25823), the County can therefore use eminent domain to acquire any property necessary for the operation of a landfill, including water rights (C.C.P. §§ 1235.125, 1235.170, and 1240.110).

Second, in determining whether property is “necessary” for a project, public health considerations may taken into account (*City of Oakland v. Oakland Raiders* (1982) 32 Cal. 3d 60, 70, 183 Cal. Rptr. 673, 679) and, further, a public entity can exercise its power of eminent domain to acquire property that will be used for the protection of the “safety” of the underlying project (C.C.P. § 1240.120).

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Finally, the Eminent Domain Law allows one public entity to acquire the property of another public entity if the condemning entity has a "more necessary use" for the property (C.C.P. § 1240.610). A rebuttable presumption exists, however, that, where property is already owned by a public entity, the use to which that entity has put the property is more "necessary" than the use to which the property might be put by any other public entity (C.C.P. § 1240.660).

Thus, the County could acquire LADWP's water rights associated with the real property in and around the landfill sites if it could convince a Court, in an eminent domain proceeding, that the County's need to own those water rights in order to prevent the spread of potentially contaminated groundwater outweighs LADWP's current need for those water rights.

Given that the water rights sought to be acquired by the County would be a tiny fraction of LADWP's water rights throughout the Owens Valley, coupled with the obvious public health reason for which the County would be acquiring those rights, it is probable that the County could overcome the presumption afforded LADWP by C.C.P. § 1240.660.

It is noteworthy that a public entity whose property is being acquired by another public entity is entitled to continue its use of the property if the continuance of such use would not "unreasonably interfere with or impair" the more necessary use to which the acquiring entity intends to put the property (C.C.P. § 1240.630(a)).

Moreover, if the entity whose property is being acquired objects to the acquisition on the grounds that it is entitled to continue its use of the property, and if the Court agrees with that contention, the parties "shall make an agreement determining the terms and conditions upon which the defendant may continue [its] public use ...and the manner and extent of the use of the property by each of the parties." (C.C.P. § 1240.630(b)).

In the event the County pursues an eminent domain action against LADWP, this provision may be of use in that it would allow LADWP to permit the County to have significant control over the use of the water in and around the landfills without it actually parting with those rights.

In other words, this provision may allow LADWP to do indirectly that which it could not do directly, i.e. give the County control over its water rights, but in a circumstance so limited as to prevent any sort of precedent from being set. Whether LADWP would participate in such a "friendly" lawsuit is, of course, difficult to predict.

8. Liability Insurance

As stated, due to its operation of landfills, the County already faces a risk of liability for, among other things, pollution of groundwater. Although it may not be the case, it would seem that this risk would only increase if the County purchases the landfill sites from LADWP.

Moreover, given the hydrology and/or geology of some, if not all, of the landfill sites, it may be impossible to prevent the natural migration of groundwater off those sites and into wells operated by LADWP or others.

Therefore, while the County should take some or all of the steps described above to *prevent* the migration of groundwater off the landfill sites, it would also be prudent for the County to increase the amount of its pollution liability insurance coverage to address the possibly inevitable migration of contaminated groundwater from the landfills as well as other any increased risk posed by the County's ownership of the landfills.

Obviously, the Risk Manager should be consulted in this regard. One of the benefits of getting the County's insurance underwriters involved in this issue is that they may be able to suggest alternative or additional ways by which the County could reduce its risk of pollution liability associated with its ownership and operation of the landfills.

Summary

Three unavoidable facts confront the County in its attempt to limit the groundwater pollution-related liability risk associated with its operation of landfills.

First, as a "covered person," i.e. the "operator" of the landfills, the County is and always will be exposed to a risk of clean-up and other liability under CERCLA for any groundwater contamination attributable to the landfills.

Second, despite the County's efforts to prevent the migration of groundwater from underneath the landfills and the use of that groundwater by offsite users, the natural hydrology at and around the landfill sites may be such that migration of the groundwater to distant locations is inevitable.

Third, LADWP will not sell the County the landfill properties unless it can shift all financial responsibility and liability associated with those landfills to the County.