

OFFICE OF THE
COCHISE COUNTY ATTORNEY
CIVIL DIVISION
P.O. Drawer CA
Bisbee, Arizona 85603



EDWARD G. RHEINHEIMER
COCHISE COUNTY ATTORNEY
Telephone No.: (520) 432-8700
Fax No.: (520) 432-8778

December 30, 2013

Mr. John T. Hestand
Assistant Attorney General
Environmental Enforcement Section
1275 West Washington Street
Phoenix, AZ 85007

Re: Cochise County Western Regional Landfill, Notice of Violation, August 8, 2013

Dear John:

Let me say at the outset that although this letter is going to present reasons why, because of the extraordinary factual circumstances of this case, we don't believe judicial intervention and civil monetary penalties would be appropriate, we are very uncomfortable as a County administration taking an adversarial stance on this point because we do not have, or wish to ever take, an adversarial view of the role of the Arizona Department of Environmental Quality (ADEQ). To the contrary, we are grateful for the oversight it provides, which is essential to us in maintaining the integrity and public safety of facilities that we operate.

We further understand that sometimes the most efficacious way for ADEQ to assure compliance with public health and environmental quality standards is to require that we stipulate to terms of an administrative consent order, violation of which may result in sanctions, and that sometimes it is appropriate for ADEQ to take the more drastic action of going directly to court to seek a consent judgment, which may result in imposition of civil monetary penalties, pursuant to A.R.S. § 49-783(B). And of course we are aware that just because a violation is immediately cured does not mean that ADEQ may not still proceed to seek to impose civil penalties. In other words, we fully recognize and welcome the authority and discretion that ADEQ has to monitor and enforce regulations to assure the proper management of solid waste landfills. I do not wish my comments below to be construed to cast any doubt on our respect for the importance of the mission or breadth of discretion of that agency.

That said, in this case, with respect to the Notice of Violation ("NOV") issued August 8, 2013, due to the nature of the violations, the history of the landfill, the extraordinary

circumstances surrounding the timing of this particular inspection and the confusion caused by the departure from past practices by the ADEQ inspectors in this instance, I would urge that this is not a case that merits court action and imposition of civil penalties. I believe an administrative order issued by ADEQ concerning these infractions, putting our solid waste department staff on notice that no infractions will be tolerated, will have the most positive effect and, under the circumstances, would be the fairest way to dispose of this matter. As for the NOV issued April 8, 2009, involving much more serious charges, which our Solid Waste Department responded to with a substantial commitment to preventing them from ever recurring, in light of the remedial actions taken by our Solid Waste staff, the absence of any recurrence of the more serious of those infractions and the staleness of the NOV, which is now more than four and a half years old, I would argue that it makes no sense to continue to pursue any further enforcement action with respect to those violations and that, in any event, it appears to me that the statute of limitations on those counts may have already expired.

Let me first address specific issues we would like to bring to your attention concerning the Notice of Violation (NOV) issued by ADEQ on August 8, 2013. Following that I address issues related to the violations identified by ADEQ in its NOV of April 8, 2009, and remedial actions taken by the County in response thereto.

A. Notice of Violation issued August 8, 2013, based on inspection conducted on July 10, 2013

1. **Recent past (improved) inspection record.** First, to put this matter into proper historical context, after being cited for some very serious violations based on an inspection back in 2008, involving mishandling of toxic materials, substantial remedial actions were taken by the County, which drastically and permanently changed the way the County managed its operations, as discussed and demonstrated in Subsection B, below, and evidence of the success of those efforts was reflected in fact that a spot inspection undertaken by ADEQ June 27, 2012, uncovered no problems and landfill was found to be in full compliance with all ADEQ solid waste regulations. So I would urge that the present violations should not be seen as a perpetuation of sloppy practices by a recalcitrant government agency, but rather as a momentary lapse in compliance with some regulations due to extraordinary circumstances outlined below.

2. **Failure to properly stack tires not (an appealable) violation.** On July 10, 2013, inspection, none of the violations involving mishandling of toxic waste that were uncovered in 2008 was found to presently exist. Although there was one violation with respect to tires, it was not of the serious nature of the previous tire-related violation (disposal of tires in a landfill), but was only a matter of failure to segregate them in a sufficiently small area for recycling (failure to store tires in a grid system that does not

exceed 50' by 100'). This was remedied immediately and we were instructed in an advisory letter from the agency that "No further action is required at this time." In fact, that same that letter expressly stated that, although ADEQ could issue an appealable administrative order compelling compliance, "this letter has no such force or effect." And the letter was not denominated as a "Notice of Violation," but rather as an "Opportunity to Correct Deficiencies." Hence, we conclude that this issue, since addressed, should not be a basis for further action by you or ADEQ. *See* Opportunity to Correct Deficiencies, Case ID # 142309 (August 8, 2013), attached as Exhibit 1.

3. **"No further action" required of County on remaining 3 violations, which were cured before NOV.** The remaining three violations all concerned failure to adequately cover solid waste and prevent wind dispersion; specifically (i) the west slope was partially uncovered, part of which was necessary to allow for dumping of incoming waste on the day of inspection; (ii) failure to adequately control wind dispersion, in part because of the reason stated in (i), above, and in part due to extraordinary weather (wind and rain) conditions extant on the day of inspection and the days immediately preceding, as noted more fully in paragraph 4 below; and (iii) failure to maintain the integrity and effectiveness of final cover, due again in large part to the extraordinary weather conditions discussed below. All three of those violations were found to have been cured within less than two weeks of day of inspection and, in fact, before the Notice of Violation was issued or we were even advised that it might be. Further, the ADEQ NOV noted that "No further action is required at this time." *See* NOV, Case ID # 142312 (Aug. 8, 2013), attached as Exhibit 2. As we acknowledged at the outset, we are aware that the agency has authority to seek civil penalties even when violations are cured immediately, but where, as here, as elaborated in paragraph 6, below, we had reason to believe that no violation would be found, and all alleged deficiencies had been cured by the time a finding of violation was even disclosed to us and, possibly, even before it was determined that the deficiencies that were found rose to the level of a violation, it is not entirely clear to us whether imposition of a civil penalty would be appropriate.

4. **Extraordinary weather.** This, to be candid, is the most compelling factor I wish to highlight: As noted in the attached report on weather conditions in Sierra Vista, Arizona, the location closest to the landfill where Weather Service data is collected, ADEQ inspectors chose literally the morning after the windiest day of the year to make their inspection of this facility, with wind gusts of up to 48 miles per hour recorded on that day. *See* Historical Weather for the Last Twelve Months in Sierra Vista, Arizona, USA, attached as Exhibit 3. Inspectors arrived on the morning of July 10, 2013. The windiest day of the year was July 9, 2013. Also, as the above-referenced weather report will confirm, this inspection occurred during a period of extraordinarily heavy rainfall during an already wet monsoon season for the area. The days before inspection were also some of the wettest of the year, rendering it difficult to remediate lesions in the final

cover due to storm run-off before inspectors arrived because the weather was too inclement and the grounds so muddy that it impeded workers' ability to even go on the site to perform remedial work. The inspection date was preceded by several weeks of heavy rains that, at one point, on June 15, had become so severe that the entire landfill had to be closed because it was impossible to gain access due to deep accumulations of mud. *See* Cochise County Western Regional Landfill Daily Operations Log and summary e-mail statement attached as Exhibit 4. And on June 20 a temporary alternative dump site had to be established on the premises because the designated dumping area had become too flooded. *See* Exhibit 4, *supra*. Landfill staff did, nonetheless, manage to maintain the integrity of the facility through this period. It is worthy of note, however, that these were extraordinary conditions that occurred not just on that single day before inspectors arrived, but that had been accumulating over a period of weeks prior to that date. The combined effects of the degeneration of the grounds due to heavy rains and flooding over a period of weeks, combined with the record wind gusts for the year immediately preceding inspection rendered it virtually impossible for existing staff to guarantee complete absence of any deficiency on that one particular day. Despite these adverse conditions, landfill staff managed to keep the facility largely in compliance with ADEQ regulations and to rectify all violations within two weeks thereafter. *See* copies of photos sent to ADEQ inspectors by Mohd Hasan, Environmental Compliance & Safety Engineer, Cochise County Western Regional Landfill, dated July 17, 23 and 25, 2013, attached as Exhibit 5.

5. Emergency caused by extraordinary weather. In addition, because of the extraordinary weather conditions, emergency problems arose at a pit that was being dug adjacent to the landfill that required diversion of employees to remove flood waters so that contractors who had arrived from Oregon and California to perform substructure installation work (plastic welding) in connection with the laying of a foundation for that pit according to schedule in order to avoid huge cost overruns for the County. And this transpired at a moment when the Solid Waste Department happened found itself temporarily short-staffed, due to unanticipated staff resignations and prison inmate reassignments. *See* E-mail Statement of Mohd Hasan, Environmental Compliance & Safety Engineer, Cochise County Western Regional Landfill, Dec. 3, 2013, attached as Exhibit 6; and *See, also*, Affidavit of Solid Waste Department Director Martin Haverty, attached as Exhibit 7. Because adverse weather conditions rendered it almost impossible, if not impossible, for those employees who were on staff to get onto the existing landfill site to check for and remediate any possible deficiencies during this period of harsh weather, it was determined that at least some of them would be reassigned to removal of flood waters from the new pit so that at least cost overruns resulting from out-of-state contractors running up hours of billable inactivity could be avoided, as confirmed by the Director of our Cochise County Solid Waste Department in the attached affidavit. *See* Exhibit 7. In short, inspectors arrived at a moment of a figurative "perfect storm" of

circumstances, combined with a literal perfect storm of bad weather. It is doubtful that existing staff could have prevented some wind-blown material from escaping and some leakage from storm run-off and exposure of trash even without these added problems, as the weather conditions made it nearly impossible for staff to perform this work on the site at the moment this inspection occurred. But the emergency need to divert staff to the job of removing ponding water from the site of the adjacent construction site only served to aggravate the crisis conditions on that day.

6. **Departure from past agency practices.** As noted by the landfill manager on duty at the time of inspection, the ADEQ inspectors who conducted this inspection advised him that due to all of these extraordinary circumstances it was not anticipated that any notice of violation would be issued by ADEQ if deficiencies could be cured within two weeks. *See Exhibit 6, supra.* Despite the continued adverse weather conditions, landfill staff met that deadline. *See Exhibit 5, supra.* I have been advised by our Solid Waste staff that this is contrary to past custom and practice of the ADEQ which, I have been told, routinely states at time of inspection whether a notice of violation will issue and then honors such statements in deciding whether to proceed with such notices.

7. **Missed opportunity to appeal on grounds of impossibility, due to confusion of landfill staff concerning oral, written statements of agency.** Lastly, no appeal of the notice of violation was ever lodged because, as noted above, based both on the oral statements by inspectors that no notice of violation would issue, *see Exhibit 6, supra,* and the written statement in the one Notice of Violation that did, nonetheless, issue concerning three deficiencies, that “No further action is required at this time,” staff at the landfill had concluded that no further enforcement action would result. *See Exhibits 1 and 2, supra.* The written notice and information provided orally by inspectors was confusing and ambiguous for them, and as a result, the Solid Waste staff did not timely notify County legal counsel of the notice of violation. Had counsel been advised of the NOV, the County would have appealed on grounds of impossibility. We do not, by mentioning this, mean in any way to impugn the good faith of the agency. We only request that it consider this when deciding whether to proceed with litigation.

In conclusion, while we are grateful for the oversight that ADEQ provides for us and, I believe, have developed a record that demonstrates a commitment to eliminating any violations of health and safety standards that ADEQ has identified and of implementing policies to assure that violations that are found do not recur, there are nonetheless some rare occasions when minor infractions may occasionally crop up for brief periods due to circumstances briefly beyond our control, such as the weather events and confluence of other factors herein referenced. And so, accordingly, while we wish to do everything in our power to comply with every request and demand of ADEQ and to avoid an adversarial relationship with that agency, which has always served us well, in this case,

Mr. John T. Hestand
Assistant Attorney General
Environmental Enforcement Section
December 30, 2013
Page | 6

for all of the reasons above-stated, we would have to contest any civil legal action filed in superior court seeking civil penalties. We believe this would be an apt case for a court to decline to grant an agency request for such penalties. We simply don't believe they are appropriate or would have a beneficial effect in this case. I hope it doesn't come to that.

We do, however, want to maintain the highest possible standards at our landfill site and would welcome continued close monitoring by ADEQ to assure that we meet those standards. For this reason we would have no objection to agency issuance of an administrative order, in lieu of a judicial consent judgment, holding our Solid Waste Department to a commitment to take extraordinary ongoing care to prevent any further infractions. We hope that the agency will concur with this approach, and will appreciate the good faith with which we have responded to all past oversight of our operations.

B. Notice of Violation issued April 8, 2009, based upon inspection conducted on October 28, 2008

The violations of April 8, 2009, were numerous and serious and have been studiously and responsibly addressed so as to prevent their recurrence. Specifically, they included twelve (12) waste tires that were visible on the working face of the landfill, failure to properly manage mixtures of used oil and hazardous waste, failure of a used oil generator to perform clean-up upon detection of a release of used oil into the environment, failure to transport used oil and liquid paint to an off-site recycling facility, failure to properly label containers or above ground tanks or fill-pipes used to store oil at a generator facility, and containment operation of surface water and oil in an unlined impoundment area without an aquifer protection permit, as well as the more common failure to control wind dispersion of land fill materials, failure to adequately cover solid waste with six inches of earthen material at the end of each operating day, and failure to prevent storm water run-off.

Most of the violations (five out of nine) were related to sloppy management practices with regard to used oil and paint, which are highly toxic to the environment and so of great public concern, and a sixth involved identifiable waste tires visible on the working face. The remaining infractions, involving failure to adequately cover solid waste and prevent storm water run off, all of which contribute to wind dispersion of waste, are also serious because they defeat the purpose of the landfill and pose a hazard to neighbors that is more than *de minimis* (including risk of fatalities to live stock that ingest such materials), so we don't mean to indicate that we do not also take them seriously.

Frankly, we were mortified, ourselves, by the seriousness of these violations and we acted quickly and decisively to remediate. As should be reflected in ADEQ records, within 15 days of receipt of the NOV, we instituted a campaign to diligently picking up

Mr. John T. Hestand
Assistant Attorney General
Environmental Enforcement Section
December 30, 2013
Page | 7

all wind blown debris on a daily basis and to assure adequate earthen coverage and prevent improper surface water drainage by use of a scraper. These, of course were obvious and necessary first steps to take, but more than that, we drastically changed almost everything about how we do business at the landfill.

A rigid hazardous waste drop-off program policy was instituted and all landfill and transfer station employees received training in its implementation from an outside consultant hired to perform the training, and each of them were required to sign a commitment to compliance. That program provided for and mandated proper disposal and recycling of tires, batteries, used oil and liquid paint. We have previously provided ADEQ with written documentation of these measures, but would be happy to also supply you with them upon request.

Two pits (impoundment areas) that had contained residual used oil and paint were excavated and their contents were placed in lined containers and sent to an ADHS certified laboratory for testing and ultimate disposal, with test results forwarded to ADEQ. Soil samples were collected from the excavated pits and an extensive scheme of soil testing in other areas was undertaken by an outside engineering firm retained to check for background concentrations of toxic materials, with test results forwarded to ADEQ.

Two 55-gallon drums of material that appeared to contain a mixture of old oil and paint and the contents of a 150 gallon tote were removed from the site and properly disposed of by our used oil contractor and all paint and hazardous material formerly located in the area was removed and properly disposed of by Southwest Hazard Control in Tucson.

Steps were taken to mitigate sheet flows of storm water to prevent ponding. Three monitoring ground water wells at the Western Regional Landfill were tested and continue to be tested on a bi-annual basis to check for aquifer water quality standards, and test results have shown that none of these three wells have exceeded water quality limits established by ADEQ in the Arizona Administrative Code, at R18-11-406.

All of the above-referenced documentation has previously been supplied to ADEQ, but, again, we would be glad to supply you with all of this data upon your request.

After taking these steps to respond to the NOV issued in April of 2009 we were pleased that ADEQ did not act to commence any civil litigation against Cochise County. We presumed the agency had elected not to do so in response to evidence of the County's good faith efforts, although there had been some discussion at that time of the possibility that civil penalties might be sought.

Mr. John T. Hestand
Assistant Attorney General
Environmental Enforcement Section
December 30, 2013
Page | 9

- (5) Copies of photos sent to ADEQ inspectors by Mohd Hasan, Environmental Compliance & Safety Engineer, Cochise County Western Regional Landfill, dated July 17, 23 and 25, 2013.
- (6) Email Statement of Mohd Hasan, Environmental Compliance & Safety Engineer, Cochise County Western Regional Landfill, Dec. 3, 2013.
- (7) Affidavit of Martin Haverty, Director of the Cochise County Solid Waste Department.