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File No. 31R-10.11

Margo Reid Brown, Chair  
California Integrated Waste Management Board  
1001 I Street  
P.O. Box 4025  
Sacramento, CA 95812

Dear Chair Brown:

**California Integrated Waste Management Board**  
**Direction for Phase II Regulations, May 2009**

I am writing to you on behalf of the SWANA Legislative Task Force to express concerns regarding recent Board direction for the Phase II Regulations on postclosure and corrective action financial assurance. Since the passage of AB 2296, much effort has been spent with the working group and other stakeholders to develop an approach that would be reasonable for landfill operators and owners while also protective of the state. However, in May, the Board issued significant new direction for staff regarding the Phase II regulations which, if incorporated into the regulations, would be burdensome to local residents and businesses who will ultimately bear the cost of the program.

The SWANA Legislative Task Force (LTF) believes the current regulatory framework for landfills is strongly protective of state liability. Landfills in California are operated in accordance with criteria that are among the most stringent in the country. Activities carried out beyond closure are detailed and approved prior to closure and monitored on an ongoing basis by Waste Board staff, Water Board staff and LEAs. Any changes that go into the Phase II Regulations should take this into account and appropriately balance risks to the State with impacts to landfill operators. An improper balance may precipitate the very situations that the State would prefer to avoid and may eventually cause some operators to default because they no longer have access to funds that were collected for actual maintenance activities. Our concerns and recommendations are detailed below.

**Closed Landfills**

For closed landfills, the Board directed staff to proceed on the basis of a rolling 30X cost estimate, with steps at five-year intervals to a rolling 15X, provided certain criteria are met. This is substantially different than the previously proposed approach of annual drawdowns from 30X to 15X and then five-year step-downs to a rolling 5X. At a minimum, we believe that *annual drawdowns to a rolling 15X*, rather than five-year step-downs, should be allowed. This proposal would allow operators to access funds, in the case of cash demonstrations, while still being protective of the State's interests.

Regarding the step-down criteria now proposed, operators would only be able to step-down if they 1) are not in corrective action, 2) participate in proactive monitoring (such as that suggested by EREF/ITRC), and 3) have not been issued an enforcement order or been placed on the Inventory of Facilities Violating State Minimum Standards (State Inventory). We believe *water quality* corrective actions should be excluded from the criterion. It is our understanding that approximately one-half of the landfills in the state are conducting these types of corrective actions. Without this exclusion, these operators, who are otherwise maintaining their landfills and conducting corrective action in keeping with all State requirements, would not be able to qualify for the step-down or a drawdown formula. We also recommend that any regulations regarding proactive monitoring should provide for site-specific evaluation of when and what monitoring is appropriate.

We believe that landfills already closed should be grandfathered, retaining the Subtitle D approach for these landfills. Under this approach, the State would still maintain authority to extend the postclosure maintenance period beyond 30 years, which also triggers the requirement to extend financial assurance. We assume that the State would not need to wait until the full 30 years has expired before extending the postclosure maintenance period.

#### Non-Water Quality Corrective Action

Regarding the Boards' current direction for non-water quality corrective action, we recommend separating financial assurance for *water quality* corrective action from financial assurance for *non-water quality* corrective action, for two reasons. First, State regulations already require financial assurance for water quality corrective actions for reasonably foreseeable releases. Second, there is not necessarily a direct relationship between the events that would prompt a water quality corrective action and the events that would prompt a non-water quality corrective action.

Non-water quality corrective action should be based on a site-specific evaluation of the events that might, on a reasonably foreseeable basis, occur, and not be based on a surrogate parameter. In particular, we strongly believe that there is no technical justification for using the cap replacement cost as a surrogate for the cost of conducting non-water quality corrective actions. All final cover caps are designed to last for long periods of time and are a central focus of ongoing postclosure maintenance. In particular, monolayer final covers will last indefinitely with proper maintenance. The cost of replacing an entire cap on a landfill would be exceeding large, ranging from millions of dollars to tens of million of dollars, and potentially over \$100 million for very large landfills. For public landfill operators, a requirement to provide financial assurance for this would tie up a tremendous amount of money from cities and counties that could be used to fund other projects including diversion programs and greenhouse gas reduction programs.

#### Other Comments

We recommend that it be evident in the regulations, whether the step-downs or drawdowns apply to all financial assurance mechanisms. This will greatly help operators to identify their remaining liabilities for postclosure maintenance. Public operators need this clarification to meet Government Accounting Standards Board guidelines, as well as for obtaining bonds for infrastructure projects.

Also, regarding the use of a pooled fund, cities and counties should be indemnified from being required to take on responsibility for the sites that may be abandoned in the future, since the purpose of the pooled fund would be to manage those sites. We support improvements, whether through statute or regulation, to reduce the risk to the State, as well as to local agencies, that may occur through divestitures. However, we do not support using a pooled fund, should such a fund be developed, to pay for costs that may result after divestitures. This would benefit companies that never paid into the pooled fund.

On behalf of the SWANA LTF, I would like to thank you for your consideration of these comments and I would be happy to discuss them further, if you have any questions, at your convenience.

Very truly yours,

A handwritten signature in black ink, appearing to read "Grace R. Chan", with a long horizontal flourish extending to the right.

Grace R. Chan, Chair

GRC:ee

cc: Members, California Integrated Waste Management Board  
Mark Leary, Executive Director, California Integrated Waste Management Board