

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

Waste Connections, Inc., Waste Connections of California, Inc., and Madera Disposal Systems, Inc.

Cases Nos. 07-0245-PWH
and 07-312-PWH

From Civil Wage and Penalty Assessments issued by:

Division of Labor Standards Enforcement.

DECISION OF THE ACTING DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Waste Connections, Inc., and its affiliates Waste Connections of California, Inc. and Madera Disposal Systems, Inc. (Waste Connections) timely requested review of two civil wage and penalty assessments (Assessments) issued by the Division of Labor Standards Enforcement (Division) with respect to Waste Connections's operation of the Tehama County-Red Bluff Landfill (Project). A hearing on the merits was held in Sacramento on May 19, 20, and 21, 2009, before hearing officer John Cumming. Richard A. Leasia and Karen Cogbill appeared for Waste Connections, and Ramon Yuen-Garcia appeared for the Division. The parties filed post-hearing briefs, and this matter was submitted for decision on September 14, 2009.

The issue for decision is¹:

- Whether the Project was a public work under Labor Code section 1720, subdivision (a)(1).²

As seen more fully below, the unique facts of this case, including the minimal public funds paid for disposing of municipal waste, lead to the conclusion that the Project was not a public work. I therefore find that Waste Connections did not have to pay prevailing wages to its workers and dismiss the Assessment in full.

¹ Because this Decision finds the Project was not a public work, all other issues raised for a decision, such as the timeliness of the Assessments and the proper prevailing wage rate are moot.

FACTS

Waste Connections operates the Project pursuant to a long-term agreement (Agreement) with a joint powers agency known as the Tehama County-Red Bluff Landfill Management Agency (JPA). The Project is located in an unincorporated part of the County of Tehama (County) and is jointly owned by the County and the City of Red Bluff (City). The principal purpose of the Project was to process solid waste and recyclable materials delivered by the County and City or by their designated haulers. This operation included a continuous process of constructing waste disposal cells and grading access roads to reach the cells. Waste Connections heavy equipment operators would then compact waste deposited into the cell and cover the waste with dirt. When the cells reached capacity, Waste Connections created new waste disposal cells, again using heavy equipment operators to do the work. Waste Connections also accepts recyclable materials, which were never deposited in the disposal cells.³

The Agreement required that Waste Connections receive and accept for disposal all solid waste delivered to the Project by the County and City's designated haulers, as well as "self-hauled" solid waste and recyclable materials delivered by county residents or other entities operating within the county. Waste Connections collected "Tipping Fees" as the compensation for these services.⁴ Waste Connections paid prescribed percentages (ranging from three to 15 percent) of the Tipping Fees it received to the JPA, the County, and the City.

The Agreement established the initial Tipping Fees Waste Connections collected. Waste Connections was authorized to adjust the fees annually based on changes in the Consumer Price Index or Waste Connections' operating expenses. However, the JPA retained authority to review and to approve or disapprove the reasonableness of fees based on public interest considerations.

There were three identifiable sources of payment of Tipping Fees. First, there was trash collected from businesses and residences by private haulers who were paid directly by the private

² All further references are to the Labor Code unless otherwise specified.

³ The Agreement assigns certain responsibilities to Waste Connections for the excavation and stockpiling of soil for use in closing the Landfill for which the JPA is required to compensate Waste Connections separately. However, there is no claim or evidence that any such work has occurred or was covered in the Assessment. This Decision should not be interpreted to include this activity once it occurs.

⁴ The only other source of revenue comes from Waste Connections' sale of recyclables.

customers. One such hauler, Green Waste of Tehama, had a franchise from the City to collect residential waste and to deliver it to the Project. In addition, Green Waste collected some municipal trash and did not charge the City or County a fee. All of the funds Green Waste received for its regular service were paid by residents, not the County or City. Green Waste paid these entities a percentage of fees it collected.

The second source of payment was private residents who "self hauled" material to the Project. These private residents paid Tipping Fees from their own private funds.

The third source of payment was from the County and City. The County and City paid Tipping Fees for materials delivered from county-owned transfer stations or for the municipal trash Green Waste hauled as part of its agreement, such as construction site waste. The fees that County and City agencies paid for these extra materials accounted for less than one percent of the total Tipping Fee revenues collected by Waste Connections. This is substantially less than the three percent of Tipping Fee revenues that Waste Connections paid the County and City.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [citations omitted] (*Lusardi*.) DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a), and *Lusardi, supra*.)

Section 1775, subdivision (a), requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a Civil Wage and Penalty Assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that “[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty Assessment is incorrect.”

Waste Connections argues the Project was not a public work because the work involved was not “construction, alteration, demolition, ...” and because the Project was not “paid for in whole or in part out of public funds.” The Division disputes both contentions

The Project Constituted Alteration Within The Meaning of Section 1720, Subdivision (a)(1).

Section 1720(a) states in pertinent part:

(a) As used in this chapter, public works means:

(1) Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds,....

Alteration can include the alteration of land. The term was first discussed in *Priest v. Housing Authority of the City of Oxnard* (1969) 275 Cal.App.2d 751, which concerned the applicability of prevailing wage requirements to a contract for the removal of pipes, asphalt road beds, concrete curbs and sidewalks, driveways, and cement footings, the court observed as follows (275 Cal.App.2d at 756).

[E]ntirely ignored by both parties is the word “alteration” appearing in section 1720. To “alter” is merely to modify without changing into something else. While, in connection with a building, one ordinarily thinks of “alteration” as being a modification or addition to it, such a limited meaning has not been here

provided by the Legislature. The section does not refer to alteration of a “building” or “structure”; for aught that appears the term may, as well as not, apply to a changed condition of the surface or the below-surface.

Here, it is undisputed that heavy equipment was used to grade roadways, compact large piles of trash within the trash cells and cover the piles with dirt, among other activities. This activity squarely fits within the definition of alteration as filling the disposal cells altered the contours of the land. Attorney General George Deukmejian followed *Priest* in a formal opinion concluding that landfill activities of the same type that occur regularly at the Tehama Landfill constituted alteration of the land surface within the meaning of section 1720. 64 Ops.Cal.Atty.Gen. 234 (1981) (Opinion). Waste Connections concedes the Department has consistently applied this standard since the Opinion.⁵

Waste Connections asserts, however, that the Opinion and the determinations by this Department were wrong. According to Waste Connections landfill operations are outside the type of work that the legislature intended to cover in section 1720, subdivision (a)(1) and are outside the definition of “alteration” found in *Priest*. Waste Connections further argues without further explanation that covering landfill operations such as the Project would lead to absurd results in other contexts. However:

We are guided by several well-established principles in determining the effect of section 1720, subdivision (a)(1). “To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning.” In making this determination, an individual phrase or term may not be divorced from the statute as a whole; rather, all parts of the statute must be considered. Finally, our foremost concern is enforcing the purpose of the legislation.

Oxbow Carbon & Minerals, LLC, v. Department of Industrial Relations (2011) 194 Cal.App.4th 538, 549 (citations omitted). *Priest*, the Opinion and the subsequent determinations by the Di-

⁵ For example, former Directors followed the analysis in the Opinion to find work covered in *PW 1991-017, Concrete Recycling Plant for Highway 12 Interchange at Stoney Point Project, City of Santa Rosa* (November 26, 1994) (quarry project was found to be alteration). Work was not covered in *PW 2002-011, Heavy Equipment Operators - County of San Bernardino Transfer Stations - Burrtec Waste Industries* (October 16, 2002) because the work involved was at a transfer station, not at the landfill). In *PW Case 2005-026, San Bernardino Tree Removal* (July 8, 2006), a former Acting Director did not find that the work was “alteration” because the removal of dead trees did not “modify a particular characteristic of the land.” In all of these determinations, the former Directors consistently relied on the analysis in *Priest* and in the Opinion. These public works coverage determinations are not precedential (see, <http://www.dir.ca.gov/dlsr/Notices/09-04-2007%28pwc%29.pdf>.) and therefore cannot be relied on as authority in these proceedings. (Gov. Code, § 11425.10, subdivision (a)(7).)

rector do precisely this: carefully follow the language of the statute to find that making and filling disposal cells is "alteration." Waste Connections offers nothing authoritative to question this interpretation. (See, *State Building and Construction Trades Council v. Duncan* (2008) 162 Cal.App.4th 289, 302-303 (*SBCTC*) [longstanding agency interpretation of the public works law entitled to deference].) The activities subject to the Assessments clearly met the definition of "alteration." Accordingly, Waste Connections' challenge to the Assessments as incorrect because the Project did not involve "construction, alteration, demolition, ..." is rejected.

The Project Was Not Paid For In Whole Or In Part With Public Funds And Consequently Was Not Subject To Prevailing Wage Requirements.

Section 1720, subdivision (b) defines "paid for in whole or in part out of public funds":

(b) For purposes of this section, paid for in whole or in part out of public funds means all of the following:

- (1) The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.
- (2) Performance of construction work by the state or political subdivision in execution of the project.
- (3) Transfer by the state or political subdivision of an asset of value for less than fair market price.
- (4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven by the state or political subdivision.
- (5) Money loaned by the state or political subdivision that is to be repaid on a contingent basis.
- (6) Credits that are applied by the state or political subdivision against repayment obligations to the state or political subdivision.

The Agreement provided for payment by the JPA, the County, or the City in limited circumstances, most of which had not occurred (e.g. the excavation and stockpiling of soil for use in closing the Project). Primarily, the Agreement required Waste Connections to pay the public entities a percentage of the revenues that Waste Connections collects from its users.

Waste Connections argued that the Agreement was comparable to the lease and royalty payment arrangement that was found not to be a payment of public funds under former section

1720, subdivision (a). (*International Brotherhood of Electrical Workers v. Board of Harbor Commissioners of the City of Long Beach* (1977) 68 Cal.App.3d 556 (*IBEW*) [payment of oil and gas royalties for the use of land leased from the city did not create a public work].) The Opinion distinguished *IBEW* as not applying to the rigidly controlled landfill situation where both the use of the property and fixed tonnage payments to the public entity was distinguishable from *IBEW*, in which a lease to drill for oil in exchange for royalties was not deemed a payment of public funds. The Opinion characterized *IBEW* as a situation

where, under an oil and gas lease calling for payment of royalties to the city, the city assumed no risk of loss incurred in the operation of drilling, production and sale of oil from the tidelands involved and retained no interest apart from the receipt of its percentage of oil and gas produced and sold by the contractor at its own expense. In such a case, the public entity has simply leased its interest in designated lands to a private industrial enterprise, as a source of revenue.

Opinion, *supra*, at p. 237. The Attorney General did not regard *IBEW* as being closely analogous to a landfill case because the guaranteed revenue stream provided through the collection of prescribed tipping fees might satisfy the “public funds” element of section 1720. Thus, *IBEW* does not control here as the Agreement is not a simple lease of the County’s interest but is an agreement for Waste Connections to perform the public duty normally required of the County on county land.

The more difficult question is whether the tipping fees paid for the disposal of waste are payments of public funds for alteration. As Waste Connections states:

Any “alteration” occurring, in the hypertechnical [sic] sense that the Division urges be the standard for determining coverage, is simply incidental to the basic purpose and activity for which the Agreement was entered into: the receipt and disposal of community garbage into a sanitary landfill. . . . The instant Assessment, accordingly, is based on the day-to-day tasks performed by the claimants in operating the Landfill.

(Waste Connections Reply Brief, pp. 14-15 (August 4, 2008).) Thus, Waste Connections argues that the payment of public funds was for services not for alteration. In *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576, the Court held that payments for the placement of children were not the same as a payment to construct a shelter, even if the provider had to engage in construction to accomplish the goal of the contract.

We hold that paying public funds for public services does not make incidental

construction work done by a private provider of those services "public works" under section 1720, subdivision (a). The statute requires payment for "construction"; to take that as meaning "services" would violate plain, unambiguous language, which we cannot do.

McIntosh, supra, at p. 1586. Nothing that has occurred since *McIntosh* changes this basic analysis. Section 1720 was substantially amended in 2001 and 2002 (Stats 2001, ch. 938, §2 (SB 975); Stats 2002, ch. 1048, §1 (SB 972).) to include a dramatically expanded definition of "paid for in whole or in part out of public funds" in subdivision (b). However,

[t]here is nothing in the language of subdivision (b) that furnishes a basis for concluding that the Legislature intended to overthrow the *McIntosh* ordinary meaning approach to determining what qualifies as "paid for in whole or in part out of public funds." Indeed, precisely the opposite appears true, that the trigger for application of the Prevailing Wage Law carried over from the *McIntosh*-era version of section 1720 ... is still the payment of public funds. The various provisions of section 1720, subdivision (b), demonstrates that the Legislature was guided by the *McIntosh* language that "payment" meant " 'the delivery of money or its equivalent.' " (*McIntosh, supra*, 14 Cal.App.4th 1576, 1588.)

SBCTC, supra, 162 Cal.App.4th at p. 311. Thus, the substantial revisions to former section 1720 do not change the analysis here.

The Opinion, which addressed a similar factual situation to the one here, found that a private contractor who operates a landfill for the county is engaged in a public work and must pay prevailing wages. Attorney General opinions are entitled to "great respect." (*Riverside County Sheriff's Department v. Zigman* (2008) 169 Cal.App.4th 763, 772.) The Opinion, however, is silent on the source of payment to the private contractor, whether it was county money paid for the collection of rubbish or, as here, private funds paid for the operation of a public service. This silence makes it impossible to know whether Attorney General would have found the relationship here to be a public work since there is no way to determine the source of funds for alteration. It is possible that the Opinion assumed the existence of public funds simply because the landfill operation was a public function.

The Attorney General did not have the benefit of the court's decision in *McIntosh*, decided 12 years later in 1993, which first made the distinction between payment for construction and payment for services. (See also, *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 950.) As seen above, the *McIntosh* court found that the payment of pub-

lic funds for services did not make incidental construction into a public work.⁶ This is the position taken by Waste Connections.

The Division argues that the user fees collected by Waste Connections are public funds because the fees are generated or derived from property owned by the JPA and because the user fee rates “are under the complete control of the JPA.” (Division’s Post-Hearing Opening Brief at p. 3.) There is no support for assertion section 1720, subdivision (b) includes all fees “under the complete control” of a public body are public funds even if the fees never enter public coffers. Section 1720, subdivision (b) cannot be construed to embrace other forms of public involvement that the legislature chose not to include. *SBCTC, supra*, 162 Cal.App.4th 289, 309.⁷

The Project involved not only the road building, trash compaction and trash covering, but also the operation of the recyclable transfer station and related activities. The percentage of fees Waste Connection received from the County and City for all of this work were virtually nonexistent and might be better characterized as a payment for services. Under the unique facts of this case, therefore, the Project is not a public work and prevailing wages are not required.

FINDINGS

1. Affected contractor Waste Connections, Inc. and its affiliates Waste Connections of California, Inc. and Madera Disposal Systems, Inc. filed timely requests for review from two civil wage and penalty assessments issued by the Division of Labor Standards Enforcement with respect to Waste Connections’ operation of the Tehama County-Red Bluff Landfill.

2. Under the unique facts of this case, the work was not a public work and prevailing wages were not required to be paid. Accordingly, the civil wage and penalty assessments are dismissed.


⁶ Prior Directors have followed a similar analysis in finding that projects were not public works. (See, Public Works Case No. 2008-025 *Construction of Animal Community Center, Humane Society Silicon Valley* (August 5, 2009) [one of the public funds was a payment to the Humane Society for the placement of animals, for the construction of the shelter that necessarily followed; see also, Public Works Case No. 2010-008, *Southwest Community Health Center Construction of Tenant Improvements at 3569 Round Hill Circle County of Sonoma* (April 8, 2010).)

⁷ The Division also argues that “public funds” must be found in light of the holdings in *East Bay Garbage Co. v. Washington Township Sanitation Co.* (1959) 52 Cal.2d 708, and *Boydston v. Napa Sanitation District* (1990) 222 Cal.App.3d 1362. These cases concerned competitive bidding requirements for sanitary and sanitation district contracts under former Health and Safety Code section 6515.5 and do not “state who must pay the [specified amount] before the statute applies” (*East Bay Garbage Company, supra*, 52 Cal.2d at pp. 711-12)

ORDER

The civil wage and penalty assessments in Cases Nos. 07-0245-PWH and 07-0312-PWH are dismissed. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 10/20/2011



Christine L. Baker
Acting Director of Industrial Relations