STATE OF CALIFORNIA Arnold Schwarzenegger, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

To All Interested Parties:

Re: Public Works Case No. 2001-046
Casmalia Resources Hazardous Waste Management Facility

The Decision on Administrative Appeal, dated March 30, 2005, in PW 2001-046, *Casmalia Resources Hazardous Waste Management Facility*, was affirmed in an unpublished First District Court of Appeal opinion dated February 8, 2007. See *Southern California Labor/Management Operating Engineers, et al. v. John M. Rea, as Acting Director of DIR*, Case No. A113481 (2007 WL 417498).

STATE OF CALIFORNIA GRAY DAVIS, *GOVERNOR*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

September 12, 2002

Donald C. Carroll, Esq.
Law Offices of Carroll & Skully, Inc.
300 Montgomery Street, Suite 735
San Francisco, CA 94104-1909

Re: Public Works Case No. 2001-046
Casmalia Resources Hazardous Waste Management Facility

Dear Mr. Carroll:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the four-phased "Superfund" cleanup and closure work at the Casmalia Resources Hazardous Waste Management Facility ("Project"), a component of which is the construction of landfill caps, is a public work subject to the payment of prevailing wages.

The Casmalia Resources Hazardous Waste Management Facility ("Site") is an inactive commercial hazardous waste treatment, storage and disposal facility located on 252 acres in Santa Barbara County. During the 16 years of its operation, 4.453 billion pounds of liquid and solid wastes from thousands of generators, including private businesses and federal, state and local governmental entities, were accepted onto the Site. The owners of the Site ceased operations in 1989 but asserted that they lacked the financial resources necessary to remediate and close the Site in compliance with state and federal standards.

Facing the threat of hazardous substances being released from the Site into the environment, the United States Environmental Protection Agency ("EPA") intervened under the authority of the Comprehensive Environmental Response, Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act, ("CERCLA") and the Resource Conservation and Recovery Act ("RCRA"). From 1992 through 1996, the EPA undertook emergency action to stabilize the Site. Then, on September 17, 1996, the EPA filed suit in federal court against the generators[1], seeking cleanup of the Site and reimbursement of past response costs

[1] A separate lawsuit was filed against the owners of the Site on December 23, 1997.

incurred by the EPA. On June 23, 1997, the court entered the Casmalia Consent Decree, establishing a comprehensive framework for addressing the issues of Site remediation, reimbursement of past response costs and financing of future cleanup and closure activity.

The Project is four-phased, generally described as follows: Phase I (six years) involves the pumping, collecting, treating and monitoring of contaminated liquids. Phase II (12 years) involves cleanup and closure work, including the construction of landfill caps. Phases III (30 years) and IV (indefinite) involve the long-term operation and maintenance of the Site.

Under the consent decree, the Casmalia Resources Site Steering Committee ("CRSSC"), an informal association comprised of 52 out of 150 entities identified by the EPA as major generators of hazardous waste deposited at the Site[2] (including the City and County of Los Angeles and the City of Oxnard), settled with the EPA by agreeing to direct and supervise Phase I and II work with EPA oversight.

Phase I work is being paid for by CRSSC. Phase II work is being paid for with funds from cash-out settlements between the EPA and entities identified by the EPA as de minimis generators, including California counties, cities, municipal bodies and districts. On April 30, 2001, Governor Davis announced his agreement to resolve the state's own potential liability for $15 million. Total cleanup, closure and maintenance costs are estimated to be $271.9 million, which breaks down as follows: $16.4 million in past response costs incurred by the EPA through July 1997; $72.7 million for Phase I work; and $182.8 million for Phase II, III, and IV work.

In or about March 2001, as part of the continuing cleanup and closure work at the Site, CRSSC entered into a contract for landfill cap construction with Ford Construction Company.

Under what is now Labor Code section 1720(a)(1)[3] (as amended by statutes of 2001, chapter 938, section 2 (Senate Bill 975)), a public work is defined as "[c]onstruction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds ... ." In

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[2] The non-settling major generators are subject to future enforcement action by the EPA.

[3] Unless otherwise indicated, all subsequent statutory references are to the Labor Code.

addition, maintenance work is covered as a public work under section 1771.

The Project, as a whole, involves construction, alteration, installation and maintenance work. The landfill cap construction work, in particular, is being done under contract between CRSSC and the Ford Construction Company. The Project is being paid for in part out of public funds, in that the parties financially responsible for the work include governmental entities, including the state, counties, cities and districts. The landfill cap construction itself is being paid for in part with funds from cash-out settlements with de minimis generators, including California counties, cities other municipal entities and districts. Therefore, the Project, including the landfill cap construction, is a public work requiring the payment of prevailing wages.

CRSSC argues against coverage on the following grounds: (1) CRSSC is a private party, and a construction contract between private parties is not subject to California's public works laws, unless it falls under Labor Code section 1720.2; (2) the landfill cap construction work is not being paid for with funds from CRSSC members but with cash-out settlements from de minimis generators[4] and less than six percent of the cash-out settlements received to date derive from public coffers; and (3) the benefit of the bargain between the EPA and the settling defendants is not really a public work, but rather a release from legal liability.[5]

Regarding CRSSC's first argument, the definition of a public work under section 1720(a)(1) does not require that the party to the construction contract be a public entity in order for a project to be deemed a public works. *Precedential Public Works Coverage Determination Case No. 1999-052, Lewis Center for Earth Sciences Construction* (November 12, 1999).

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[4] It should be noted that there is a conflict in the record on this point. There is some indication that the design and construction of the landfill caps actually began in Phase I and continued into Phase II, and that Phase I and II are not distinct periods but run together in time. This factual discrepancy is, however, irrelevant because both Phase I and Phase II are part of a larger public works project, which when considered as a whole indisputably was paid for in part with public funds.

[5] The parties to this coverage determination also argue over the application and interpretation of various precedential public works coverage determinations. Suffice it to say that none of the determinations cited bears on the relatively straightforward issues involved here.

As to CRSSC's second argument, it matters not that the landfill cap construction was financed with funds, only six percent of which derived from public coffers. Section 1720(a)(1) requires only that the construction was paid for in part with public funds. Even considering the landfill cap construction work on its own and not as part of a larger public works project, six percent qualifies as "in part" under the above statute.

As to CRSSC's final argument, no one would dispute that the motivation behind the contribution of public funds to this Project was to resolve legal liability rather than to fund a public work. The various motivations of the parties are irrelevant, however, to the determination of whether a construction project is a public work under California law. The sole requirements are that the construction work be performed under contract and paid for in part with public funds. Under the facts of this case, these requirements have been met.

Based on the foregoing, I find that the Project is a public work requiring the payment of prevailing wages.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Chuck Cake

Chuck Cake
Acting Director