

DEPARTMENT OF INDUSTRIAL RELATIONS
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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dated March 30, 2005, in PW 2001-046, *Casmalia Resources Hazardous Waste Management Facility*, was affirmed in an unpublished First District Court of Appeal opinion dated February 8, 2007.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

DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL

RE: PUBLIC WORKS CASE NO. 2001-046

Casmalia Resources Hazardous Waste Management Facility

I. Introduction

By letter of September 13, 2001, the Southern California Labor/Management Operating Engineers Contract Compliance Committee ("OE") submitted a public works coverage request to the Director of the Department of Industrial Relations ("DIR") concerning work at the Casmalia Resources Hazardous Waste Management Facility ("Facility"). The Casmalia Resources Site Steering Committee ("Casmalia Steering Committee") and OE submitted extensive argument to the Director in the matter.

The Casmalia Steering Committee argued that Labor Code¹ section 1720 does not apply to a contract between private parties. It argued that the public funds contribution is too minimal, less than six percent, to create liability and that the contribution is a payment for release from legal liability, not for construction. And, finally, it argued that the Director's prior precedential public works

¹ All section references are to the Labor Code, unless otherwise specifically indicated.

decisions do not support coverage. OE asserted that the work is a public works under Section 1720 because it is at least alteration paid for in part with public funds. OE also argued that the Casmalia Steering Committee is an agent of the public and private entity members.

On September 12, 2002, the Director issued a public works coverage determination finding that the four-phased hazardous waste cleanup and closure work at the Facility ("Project") is a public works subject to the California prevailing wage law ("CPWL") because it involved construction, alteration, installation and maintenance work performed under contract, and paid for in part with public funds in the form of settlement monies from governmental entities deposited into an account set up to pay for the cleanup and closure work.

By letter dated October 15, 2002, the Casmalia Steering Committee appealed the determination and requested a hearing pursuant to California Code of Regulations, title 8, section 16002.5, subdivision (b). Through their respective counsel the Director received further written submissions from OE, the United States Environmental Protection Agency ("U.S. EPA") and the Casmalia Steering Committee.

Having fully considered the record and arguments on appeal, the undersigned hereby grants the appeal, reversing the initial coverage determination on the ground that the

Project is a federal project not subject to the requirements of CPWL. The request for hearing is denied.

II. Facts

General Background

The Facility is an inactive commercial and industrial hazardous waste treatment, storage and disposal facility located on 252 acres in Santa Barbara County ("Site"). During the 16 years of operation, from 1973 to 1989, the Facility accepted 5.6 billion pounds of liquid and solid waste from thousands of generators, including private businesses and federal, state and local governmental entities. The Facility was operated under federal interim status from 1980 through 1989 under the Resource Conservation and Recovery Act of 1976 ("RCRA"). Because of continuing deficiencies, no final RCRA permit was granted and, in 1989, the owners/operators ceased operating the Facility and initiated cleanup and closure. In 1991, the owners/operators discontinued these activities asserting that they lacked sufficient funds to close the Facility in compliance with regulatory standards.² In 1992, pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended ("CERCLA"), at the request of the State of California, U.S. EPA implemented interim

² Under RCRA, the owners/operators were required to set aside money in a trust fund for closure of the Facility. As of June 1996, there remained \$10 million in the trust fund. This money was transferred to the Casmalia Consent Decree Escrow Account to fund Phase III operation and maintenance. See footnote 5, below.

stabilization actions to prevent further deterioration and to control the most immediate threats. U.S. EPA's emergency response team concluded interim actions at the Site in 1996.

In or around March 1993, U.S. EPA notified 65 of the largest waste generators, alone responsible for approximately one-half of the total waste accepted at the Facility, of their liability for remediation as "potentially responsible persons" ("PRP") under CERCLA. Approximately 52 of the notified generators, including the City and County of Los Angeles and the City of Oxnard, responded and formed the Casmalia Steering Committee. U.S. EPA then began negotiations with PRPs to implement a comprehensive framework for remedying the problem. On or around September 17, 1996, U.S. EPA filed suit against the Casmalia Steering Committee members³ in the U.S. District Court, Central District of California, seeking cleanup and closure of the Facility and payment of response costs. Soon thereafter, the Casmalia Steering Committee began work on Phase I of the Project, as described below. On or around June 23, 1997, the court entered the Casmalia Consent Decree, a settlement agreement between U.S. EPA and the "settling defendants" addressing both the reimbursement of past response costs incurred by

³ On or around December 23, 1997, U.S. EPA filed a separate lawsuit against the owners/operators of the Facility. The consent decree requires that monies recovered from this lawsuit be deposited into a segregated account used to pay for Phase III operation and maintenance with the exception that U.S. EPA has the authority to transfer 25 percent of these funds to a different segregated account used to pay for Phase II work. See footnote 5, below.

U.S. EPA and the funding and performance of remaining cleanup and closure work. The consent decree disposes of all claims against the settling defendants and the settling defendants make no admission of liability. The consent decree is intended to govern all regulatory and enforcement activities at the Site.

Under CERCLA, the state of California was given notice of U.S. EPA's negotiations with the settling defendants but declined the invitation to become a party to the consent decree.⁴ The State of California supports the consent decree's reliance on CERCLA as the regulatory framework for remediation and agreed to U.S. EPA assuming lead agency responsibility. The consent decree states that U.S. EPA intends to provide an opportunity for state involvement in the CERCLA response activities and, to this end, will rely on the California Department of Toxic Substances Control as the "support agency." U.S. EPA has informed DIR that the state support agency is the point of contact for notification and comment purposes only. The state support agency has no ability to direct, manage or supervise the work at the Site, or to gainsay the decisions of U.S. EPA.

⁴ The state of California subsequently settled its liability with the U.S. EPA for \$15 million. The consent decree requires that the \$15 million be deposited in a segregated escrow account used to pay for Phase III operation and maintenance, with the exception that the U.S. EPA has the authority to transfer certain percentage of these funds to a different segregated account used to pay for Phase II work. See footnote 5, below.

Funding and Performance of the Work

The Casmalia Consent Decree identifies the remedy as two-fold: controlling the migration of contaminated groundwater and containing contaminated landmasses. The remedy is to be carried out by "future response actions," defined as those activities undertaken by U.S. EPA or *its authorized representatives* associated with removal (short-term abatement) and remedial (permanent solutions) action at the Site. The future response actions are divided into four phases, described generally as follows: Phase I (six years) involves the pumping, collecting, treating and monitoring of contaminated liquids and the design and construction of the pesticide/solvent landfill cap; Phase II (12 years) involves continued cleanup and closure work, the construction of three other landfill caps and a five-year operation and maintenance base period; Phase III (30 years) and Phase IV (indefinite period extending beyond Phase III) involve the long-term operation and maintenance of the Site. Total past and future response costs of U.S. EPA and the Casmalia Steering Committee are estimated to be \$271.9 million.

The Casmalia Steering Committee agreed to perform and pay for Phase I work as well as perform (but not pay for) Phase II work.

Work other than Phase I work is being paid for with funds from cash-out settlements between U.S. EPA and entities identified by U.S. EPA as *de minimis* generators,

including 32 federal agencies and many California counties, cities and districts. Cash-out settlements are deposited into the Casmalia Consent Decree Escrow Account, set up under the consent decree.⁵ In 1999, the court entered the Administrative Order on Consent De Minimis and by September 5, 2000, U.S. EPA had settled with 432 *de minimis* generators, collecting \$27.6 million in cash-out settlements in exchange for a full release from liability. Of the \$27.6 million, approximately 6 percent is from public entities in California; 3 percent from federal agencies, and 91 percent from private businesses.

Role of U.S. EPA

As lead agency, U.S. EPA has complete oversight authority, which means that U.S. EPA is responsible for overseeing settling defendants in the performance Phase I and Phase II work.⁶ As lead agency, U.S. EPA makes all

⁵ The Casmalia Consent Decree Escrow Account is comprised of six segregated accounts, three of which have segregated sub-accounts, organized numerically in order of descending work priorities. Account #1: cash (used as an interim holding account until disbursement into one of the other designated accounts); #2: Phase II (with two sub-accounts for work and future response costs); #3: 30-year operation and maintenance (with two sub-accounts for work and governmental oversight); #4: past response costs (however, other language in the consent decree indicates that monies collected in the escrow account for past response costs are to be immediately disbursed from the cash account to the Hazardous Substance Superfund to reimburse the federal government for past response costs); #5: post-30 year operation and maintenance (with two sub-accounts for work and governmental oversight); and #6: support costs. It is noted that there is no account for Phase I work. Phase I work, which includes construction of a cap for the pesticide/solvent landfill, is being funded directly by Casmalia Steering Committee, which includes several public entities.

⁶ The Casmalia Consent Decree does not designate lead agency for Phase III and Phase IV operation and maintenance, instead deferring that issue for future resolution. Under the consent decree, if U.S. EPA is designated as lead agency for Phase III and Phase IV work, monies held in a segregated escrow account specifically for those phases will be

decisions regarding remedy selection, performance standards⁷, technical issues, acceptance or approval of work, and compliance with consent decree and enforcement.

U.S. EPA has the right to disapprove Casmalia Steering Committee's supervising contractor, which is responsible for directing and supervising Phase I and Phase II work. The consent decree states that neither the Casmalia Steering Committee nor its contractors are to be considered agents of U.S. EPA.

The Casmalia Steering Committee is required to submit written reports to U.S. EPA on its work plans. If U.S. EPA disapproves, the Casmalia Steering Committee is required to proceed at the direction of U.S. EPA to implement the non-deficient portion of the plan and, if the deficiency is not corrected, penalties against the Casmalia Steering Committee begin to accrue.

The Casmalia Steering Committee is required to have two project coordinators. U.S. EPA must approve the specific elements of work to be managed by each coordinator. The

transferred to U.S. EPA. If state of California is designated as lead agency, those monies may be transferred to the state. The maintenance aspects of Phase III and Phase IV may be a public works subject to CPWL depending on the designation of lead agency and its role. Therefore, the scope of the coverage decision contained herein is limited to Phase I and Phase II of the Project. U.S. EPA has informed DIR, however, that the Site is now on a federal list of the Nation's most polluted sites. Therefore, U.S. EPA does not anticipate a time when it would give authority over the Site to the state of California and fully expects to continue as lead agency for Phase III and Phase IV.

⁷ One incident involving procedural deficiencies associated with implementation of the Casmalia Steering Committee's first groundwater monitoring and sampling event resulted in a temporary "stop work" order by U.S. EPA; in response to which the Casmalia Steering Committee took corrective action.

selection of the coordinators, is subject to U.S. EPA's disapproval.

In addition, U.S. EPA selects its own project coordinators and may also designate other representatives, including U.S. EPA employees, federal contractors and consultants, to observe and monitor the progress of the work at the Site. U.S. EPA's project coordinators have authority to halt work and to take any response action believed necessary.⁸

U.S. EPA is to certify completion of Phase I and Phase II work. If work is not fully performed, U.S. EPA is to send notice of the tasks that must be undertaken to complete the work.

U.S. EPA has the right to approve the escrow agreement, which governs the Casmalia Consent Decree Escrow Account. The escrow manager is to submit quarterly and annual reports both to settling defendants and U.S. EPA. Settling defendants are to submit to U.S. EPA for approval an annual work budget to satisfy Phase II work. The initial, interim and final cost estimates prepared by settling defendants are to be approved by U.S. EPA. Prior to certification of Phase II work, U.S. EPA is authorized to request transfers of monies from low-priority accounts to high-priority accounts,

⁸ U.S. EPA has one project manager for enforcement activities and community relations support. A second U.S. EPA project manager oversees the technical work being performed by the Casmalia Steering Committee. Also, U.S. EPA has hired a contractor to oversee field activities; the contractor spends Monday through Friday, and weekends when necessary, at the Site.

which decision by U.S. EPA is not subject to dispute resolution.⁹

III. Issues

New issues raised by the appeal¹⁰ are as follows:

- (1) Whether CPWL applies to projects that are under the control of the federal government.
- (2) Whether Article III, Section 3.5 of the California Constitution precludes the Director from finding that the Project is not subject to CPWL.

IV. Discussion

(1) The main issue presented in this matter is whether CPWL applies given the level of control exercised by the federal government over this Project.

The Project is controlled and carried out by U.S. EPA. As lead regulatory agency for Phase I and Phase II, U.S. EPA has complete regulatory, enforcement and oversight authority. The Casmalia Steering Committee performs removal and remedial actions only as U.S. EPA's "authorized

⁹ The consent decree provides for informal and formal administrative resolution of disputes between the parties. Judicial review is by appeal to the federal district court.

¹⁰ The appeal raises a number of issues that were previously raised and discussed in the initial public works coverage determination and, therefore, will not be repeated here. See Introduction, above. The appeal also raises the following issues, the resolution of which is unnecessary to the outcome reached: (1) whether settlement monies, which derive from public coffers and are deposited into an escrow to pay for the cleanup and closure work under the consent decree, lose their character as public funds; (2) whether CPWL is preempted by CERCLA; and (3) whether the Project falls within Section 1720, subdivision (c)(3), which provides that an otherwise private development project is not subject to prevailing wage requirements if the public subsidy to that development is "de minimis."

representative" at the Site. The Casmalia Steering Committee answers only to U.S. EPA, a federal public entity. Work performed at the Site is mandated by federal law, overseen by the federal government and sanctioned by the federal court. Given the complete and exclusive control exercised by the federal government over the Project, the Project is deemed a federal project not subject to prevailing wage requirements under CPWL.

Southern California Labor Management Operating Engineers Contract Compliance Committee v. Lloyd W. Aubry, Jr. (1997) 54 Cal.App.4th 873 ("Seven Oaks Dam") involved a similar issue arising out of a flood control project undertaken pursuant to a cooperative agreement between the federal Department of Army and three California county flood control districts. Under the agreement, the Army and the counties paid their respective share of costs into an escrow fund, from which the Army paid for the construction. The Army was responsible for performance of the construction work, including awarding the contracts. Upon completion of each phase of the work, the Army would turn the completed work over to the respective county for long-term operation and maintenance. The specific work at issue in the case was the construction of Seven Oaks Dam. Under the contract awarded by the Army for performance of this work, workers were to be paid in accordance with the federal Davis-Bacon

Act, what was then 40 United States Code, section 276a (subsequently amended and renumbered).

After reviewing CPWL, its statutory scheme and purpose, the court held that:

No sections, either individually or collectively, mandate that contracts awarded by, or construction jobs under the supervision of, federal authorities are subject to the PWL Read as a unit PWA (sic) and DBA set out two separate, but parallel, systems regulating wages on public contracts. The PWL covers state contracts and DBA covers federal contracts. [¶] ... [¶] [T]hose laws [PWL] cannot be applied to a project which is under the complete control of the federal government. This is also the distinction made by respondent's regulations

(*Southern California Labor Management Operating Engineers Contract Compliance Committee v. Lloyd W. Aubry, Jr.*, supra, 54 Cal.App.4th 873 at pp. 883-886 (italics added).)

In *Seven Oaks Dam*, under the cooperative agreement the federal government was given "ultimate authority over the actual construction, financial audits, paying the construction companies, determination of what to do if hazardous substances are discovered and determination that a project is complete." (*Southern California Labor Management Operating Engineers Contract Compliance Committee v. Lloyd W. Aubry, Jr.*, supra, 54 Cal.App.4th 873 at p. 886.) On the basis of those facts, the court concluded that the dam project was not covered by CPWL.

Here, U.S. EPA selected the remedy for the Site, makes all decisions regarding performance standards and technical issues and is responsible for compliance by the Casmalia

Steering Committee with the consent decree and with enforcement directives. U.S. EPA has the right to disapprove the supervising contractor and the project coordinators selected by the Casmalia Steering Committee. U.S. EPA has the responsibility to approve the specific elements of the work to be managed by each of the Casmalia Steering Committee's coordinators. U.S. EPA approves the escrow agreement and the Casmalia Steering Committee's annual work budget and cost estimates. Only U.S. EPA has authority to request that the escrow manager transfer monies from one sub-account within the escrow account to another.

U.S. EPA has a presence at the Site in the form of two project managers and a hired contractor. The project managers oversee enforcement, community relations and the technical work undertaken by Casmalia Steering Committee. The project managers have the authority to halt work on the project and take any response action deemed necessary under the circumstances. U.S. EPA's hired contractor is at the Site on a daily basis to oversee field activities and observe and monitor the progress of the work. Finally, it is up to U.S. EPA to certify completion of Phase I and Phase II work. The work must be performed to U.S. EPA's full satisfaction. These facts leave no room to dispute the federal nature of the Project.

In *Seven Oaks Dam*, the federal government awarded the contract for construction of the dam. In this matter, the

responsibility for procuring the work contracts lies with the Casmalia Steering Committee, not with the federal government. The court in *Seven Oaks Dam* held that "contracts awarded by, or construction jobs under the supervision of, federal authorities" are not subject to CPWL. The Project here involves the latter, a construction job under the supervision of federal authorities.

OE argues that the holding in *Seven Oaks Dam* is distinguishable because there is no federal contract here. This distinction is immaterial under CERCLA because U.S. EPA is responsible for deciding how best to effectuate federal policy of cleaning up hazardous waste sites and making polluters pay for the damage they cause. Under CERCLA, U.S. EPA can commence cleanup using funds from the Hazardous Substance Superfund, as it did initially in this matter, then seek to recover its costs from PRPs. (42 U.S.C. § 9604.) Or, by use of injunctive relief, U.S. EPA can order, or ask a court to order, PRPs to undertake cleanup. (42 U.S.C. § 9606.) Or, U.S. EPA can enter into settlement agreements in the form of a consent decree with PRPs, as it did in this case with the Casmalia Steering Committee, which requires those parties to undertake cleanup. (42 U.S.C. § 9622.) Given the exclusive control exercised by U.S. EPA over the work undertaken by the Casmalia Steering Committee and performed by its contractors pursuant to the enforcement

method selected, it is of no material consequence that U.S. EPA was not the contracting party.

The fact that the remediation work here is performed under contract with the Casmalia Steering Committee under the third option described above makes that work no less a federal project than the response actions initially undertaken by U.S. EPA itself under the first option described above. U.S. EPA emergency response team was replaced by the Casmalia Steering Committee for performance of Phase I and Phase II work under the consent decree. The state of California accepted CERCLA as the framework for remediation and it accepted U.S. EPA as the lead regulatory and enforcement agency on this Project. The State of California's role is limited to that of support agency for notification and comment purposes only. U.S. EPA is fully responsible for selection of the parties undertaking the work, the collection and disbursement of funds used to finance the work, and the successful execution and completion of the work itself. Under these facts, this Project is a federal project beyond the scope of CPWL and, as such, prevailing wages are not required.

Finally, under CPWL, "the application of state prevailing wage rates when higher is required whenever federally funded or assisted projects are controlled or carried out by California awarding bodies of any sort." (Cal. Code Regs., tit. 8, § 16001, subd. (b).)

The Project here is a federally funded or assisted project. This is made patently clear by the fact that it exists only by virtue of the authority vested in U.S. EPA to carry out federal policy under CERCLA, a comprehensive federal statute that grants the President of the United States broad power to command government entities and private parties to remediate hazardous waste sites. (See *U.S. v. Bestfoods* (1998) 524 U.S. 51, 118 S.Ct. 1876.)

Under the regulation cited above, application of state prevailing wage rates is required whenever such a federally funded or assisted project, such as this Project, is controlled or carried about by a California awarding body. Section 1722 defines awarding body as "department, board, authority, officer or agent awarding a contract for public work." Awarding body is further defined as "[a]ny state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, or agent awarding/letting a contract/purchase order for public works." (Cal. Code Regs., tit. 8, § 16000.)

The Casmalia Steering Committee is made up of private and public entities that formed themselves into a group to respond to notice by U.S. EPA of their potential liability under CERCLA for cleanup of a hazardous waste site. Under the consent decree, the Casmalia Steering Committee is responsible for undertaking Phase I and Phase II work. In

the course of carrying out its responsibilities, the Casmalia Steering Committee entered into a contract with Ford Construction Company for landfill cap construction.¹¹ The parties to the contract are the Casmalia Steering Committee and Ford Construction Company. The Casmalia Steering Committee is not a state or local government agency, department, board, commission, bureau, district, office, authority, political subdivision, regional district officer, employee, nor is it an agent of any of the above. Under the definition cited above, the Casmalia Steering Committee is not a California awarding body. Accordingly, the regulation requiring the payment of state prevailing wage rates does not apply because the Project is not controlled or carried out by a California awarding body.

(2) OE also asserts that the Director must find this Project to be subject to CPWL under Article III, section 3.5(c) of the California Constitution. Section 3.5(c) states:

An administrative agency ... has no power: ... (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

¹¹ While Phase I and Phase II involved more than landfill cap construction, the parties discuss only the Ford Construction Company contract in their papers. It is referred to here to illustrate the manner in which the work is being carried out under Phase I and Phase II - under contract between a contractor and the Casmalia Steering Committee.

The California Supreme Court stated that the purpose of Article III, section 3.5 of the California Constitution is as follows:

to prevent agencies from using their own interpretation of the Constitution of federal law to thwart the mandates of the Legislature. Its language, however, cannot reasonably be construed to place a restriction on the authority of the Legislature to limit the scope of its own enactments. [Footnote omitted.] By limiting the implementation of a statute as directed by the Legislature, an agency neither "declares it unenforceable" nor "refuses to enforce it." Indeed, far from thwarting the Legislature's mandate, such action precisely fulfills it.

(*Reese v. Kizer* (1988) 46 Cal.3^d 996, 302.)

In making public works coverage determinations, the Director decides whether a particular project falls within the scope of the pertinent Labor Code provisions, consistent with the overall statutory scheme of CPWL and its legislative purpose. This case is no different. In finding that this Project is not covered by CPWL, the Director is neither declaring CPWL unenforceable under the constitution nor refusing to enforce CPWL on the basis of federal preemption. Consistent with the California Code of Regulations, title 8, section 16001, subdivision (b) and the First District Court of Appeal decision in *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Lloyd W. Aubry, Jr.* (1997) 54

Cal.App.4th 873, the Director finds that this Project falls outside the scope of CPWL.¹²

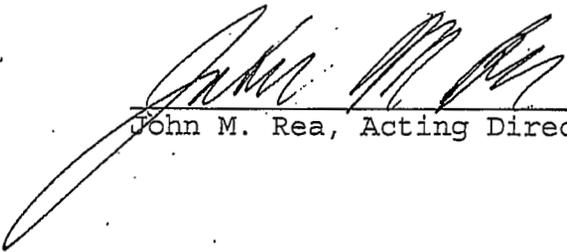
V. Request for Hearing

The Casmalia Steering Committee requests a hearing pursuant to California Code of Regulations, title 8, section 16002.5. As this regulation provides, the decision whether to hold a hearing is within the sole discretion of the Director. A hearing may be needed when the material facts of a case are in dispute and resolution of the factual disagreement cannot be determined on the basis of the record. Here, the material facts of the case are not in dispute. For this reason, a hearing is unnecessary and the request is denied.

VI. Conclusion

In summary, the appeal filed by Casmalia Steering Committee is granted, the request for hearing is denied, and the determination that the Project is a public works is reversed for the reasons stated above. This decision constitutes final administrative action in this matter.

Dated: 30 March 04



John M. Rea, Acting Director

¹² Even if Article III were applicable, administrative agencies are not restrained by Article III if there has been a determination by an appellate court, which is controlling. In this case, that determination is *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Lloyd W. Aubry, Jr.*, *supra*, 54 Cal.App.4th 873.