

CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD

Its New Regulations Establish Rules for Oversight of Construction and Demolition Debris Sites, but Good Communication and Enforcement Are Also Needed to Help Prevent Threats to Public Health and Safety

Audit Highlights . . .

Our review of the California Integrated Waste Management Board (board) and local agencies' oversight of solid waste facilities found:

- The board had not finalized regulations for construction and demolition debris sites when a large fire broke out at the Archie Crippen Excavation Site (Crippen Site), which accepted construction and demolition waste in Fresno.*
- The board's interim directions did not provide the local enforcement agencies (LEAs) with clear guidance on how to handle construction and demolition debris sites.*
- Representatives of several agencies visiting the Crippen Site before the fire failed to cite and remediate conditions that ultimately made the fire difficult to suppress, raising concerns about public health.*
- The board does not track "excluded" solid waste sites because regulations do not require it to do so.*

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Responses of the California Integrated Waste Management Board, the County and the City of Fresno, and the County and the City of Sacramento as of December 2004

Each year Californians generate an estimated 66 million tons of solid waste, which must be properly handled to prevent health and environmental threats. In 1976 Congress enacted the Resource Conservation and Recovery Act of 1976, which expanded the federal government's role in regulating the disposal of solid wastes and required that all solid waste landfills comply with certain minimum criteria adopted by the U.S. Environmental Protection Agency. In that same year, when cities and counties became responsible for enforcing these standards, each local government, with the California Integrated Waste Management Board's (board) approval, designated a local enforcement agency (LEA) to enforce state minimum standards and solid waste facility permits.

Our audit concluded that, although the board has established regulations for many types of solid waste streams, it could have improved its interim guidance in its LEA Advisory #12 (advisory) for areas pending regulation. While the board was preparing regulations for construction and demolition debris waste sites, a serious fire broke out at the Archie Crippen Excavation Site (Crippen Site), which accepted construction and demolition debris, in Fresno, resulting in a threat to public health and suppression and cleanup costs of over \$6 million. Further, the board has established a system for reviewing LEAs' performance that meets statutory requirements for scope, but not for frequency.

- ☑ *The board does not complete a review of each LEA every three years, as required by law.*
 - ☑ *Through legal challenges to enforcement actions, solid waste facility operators can delay correction of identified problems.*
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Finding #1: Until recently, the board had only an advisory statement in place of regulations for construction and demolition debris sites.

While working on regulations for construction and demolition debris sites during the last six years, the board advised the LEAs to follow its advisory for permitting of “nontraditional” facilities, including construction and demolition debris waste sites. The advisory’s purpose is to guide LEAs and board staff on the permitting of nontraditional facilities with activities not yet covered by regulations. “Nontraditional facilities” are those facilities other than landfills, transfer stations, and composting facilities that handle or process solid waste. Although not precluding LEAs from accepting applications for solid waste facility permits at these sites, the advisory strongly encourages LEAs not to accept applications for solid waste facility permits for materials and handling methods that are under evaluation. However, the advisory also states that should an LEA consider a facility proposal that appears to fall into the nontraditional facility category, but not be certain whether the advisory’s interim policy applies to the particular facility, the LEA can contact the board’s permitting branch representative for assistance.

In August 2003, after many draft proposals and public comments, the first phase of the regulations became effective, covering the transfer and processing of construction and demolition debris. At that time, work was also progressing on the second phase, dealing with the disposal of construction and demolition debris. The board has indicated it adopted regulations for construction and demolition debris disposal in September 2003, and they are scheduled to become effective in January 2004.

We recommended that to meet the goals of the California Integrated Waste Management Act of 1989 (Waste Act) and improve regulation of solid waste, the board should complete and implement as promptly as possible its work on the second phase of regulations for construction and demolition debris sites, covering the disposal of the waste materials.

Board Action: Corrective action taken.

The board stated that on September 17, 2003, it adopted the second phase of regulations for construction and demolition debris sites. On November 10, 2003, the regulations were submitted to the Office of Administrative Law (OAL) for approval. OAL filed the regulations with the secretary of state on December 26, 2003. The regulations became effective on

February 24, 2004. The board also stated that it is working with the local enforcement agencies and operators through training and ongoing assistance to effect prompt implementation of the regulations.

Finding #2: Concerns about the Crippen Site were not addressed.

In the two years before the Crippen Site fire, staff of the city of Fresno Code Enforcement Division, the city of Fresno Fire Department, the Fresno LEA, and the board visited the site. According to the city of Fresno's Planning Commission resolution to revoke the Crippen Site's conditional use permit after the fire, the Crippen Site had accumulated material in type and quantity that violated the terms of the conditional use permit, and the debris pile had existed for at least seven years before the fire. Thus, staff of each of these agencies observed the conditions at the Crippen Site. However, because of questions about the board's written direction in its advisory and verbal directions to the LEA at the time of the board staff's visit to the Crippen site, lack of communication between some of these agencies, and failure to cite the conditions, the problems at the Crippen Site were not remediated.

We recommended that to ensure sites are adequately monitored, the board should clarify the intent of the advisory for currently known or newly identified nontraditional sites for which regulations are not yet in place. For example, the board should resolve the ambiguity between the advisory's statement that LEAs are strongly encouraged not to accept applications for solid waste facility permits for materials and handling methods under evaluation, on the one hand, and its statement that it is ultimately the responsibility of the LEAs to determine whether to require solid waste facility permits for such sites, on the other hand. In addition, when it determines that an LEA has inappropriately classified a site—for example, treating a composting site as a construction and demolition debris site—the board should work with the LEA to correct the classification.

Board Action: Corrective action taken.

The board stated that on January 22, 2004, it sent a notice to all LEAs rescinding the advisory. With the adoption of the Construction and Demolition Waste and Inert Disposal regulations, the board's regulations provide a comprehensive regulatory permitting structure. In addition, existing regulations now address the permitting

requirements for any solid waste facility; therefore, the advisory is no longer necessary. Further, the board stated that it will continue to assist LEAs in determining what activities require a permit and where the activities fit in the existing tiered regulatory structure. Also, the board has posted detailed responses to questions from LEAs regarding the compostable materials and construction and demolition debris regulations on its Web site.

Finding #3: Questions arose about the city of Fresno's handling of the Crippen Site fire.

During a hearing of a Senate select committee on air quality in the Central Valley, questions arose about the city of Fresno's preparedness for the Crippen Site fire, its fire-fighting techniques, and its timing of requests for expert assistance. In April 2003 a city of Fresno task force made up of concerned citizens, representatives of various interest groups, city and county officials and staff, and current and former members of the City Council issued its report on the events associated with the Crippen Site fire and made 24 recommendations for addressing identified problems. Areas the recommendations covered included, but were not limited to, issuing of permits, monitoring sites with conditional use permits, setting staffing levels and providing training, determining the adequacy of policies and procedures for code enforcement, establishing adequate means for communicating warnings about health hazards, and assessing the adequacy of the emergency response plan. As of late October 2003 the city's status report on its implementation of the recommendations indicated that only seven recommendations remained outstanding.

We recommended that to ensure it appropriately permits, monitors, and enforces compliance with the terms of its conditional use permits and has an adequate system in place to deal with emergencies, such as the Crippen Site fire, the city of Fresno should continue to implement the remaining recommendations from its task force report on the response to the Crippen Site fire. In particular, it should ensure the proper training of staff to ensure they identify existing problems at sites with conditional use permits and effectively enforce compliance with regulations and the terms of conditional use permits, and Code Enforcement should continue implementing its proactive, risk-based monitoring of conditional use permits. It should also take steps to ensure its response to emergencies is effective and prompt.

Board Action: Corrective action taken.

As of January 18, 2005, the city of Fresno reported that it had implemented all 24 recommendations.

Finding #4: New regulations address the lack of oversight of construction and demolition debris sites, but certain operations still lack adequate regulation.

The board's new requirements for processing construction and demolition debris now provide regulatory guidance for oversight of facilities and operations. However, some construction and demolition operations and facilities may fit into the excluded tier of the board's regulatory system. The board's regulations do not require operators in the excluded tier to notify the LEA of their intent to operate, and such operators who increase their activity enough to require a permit are merely "honor bound" to notify the LEA of any changes that modify their current operations. If the LEA is not aware that an excluded tier activity is taking place, the LEA is unable to monitor the activity. Relying on operators to self-report or the industry to self-monitor is insufficient to ensure that all excluded tier activities are accounted for, tracked, and monitored to ensure that materials on site are stable and will not harm public health and safety.

Regulations specify that the LEA or the board can inspect an excluded tier activity to verify that the activity continues to qualify as an excluded tier activity and can take any appropriate enforcement action. However, our survey of LEAs indicated that 26 of 48 responding LEAs, including the two LEAs we reviewed, monitor excluded tier activities only by responding to complaints or reports from other entities. None of these LEAs stated that it performs periodic on-site visits or inspections outside of receiving a complaint.

Of the 48 LEAs responding to our survey, 43 told us that they track the existence of excluded tier activities when they are notified that a local government is considering a conditional use permit or when another entity or department files a complaint with the LEA. However, regulations do not require this tracking, and our visit to one LEA identified that after initially confirming that an activity falls in the excluded tier, the LEA does not track or perform any further monitoring of that activity to determine whether the operator has maintained or changed its activity level. Also, local governments may not forward all conditional use permits to their LEAs for review, so some operations may remain unknown to the LEAs.

We recommended that to ensure the enforcement community is aware of excluded operations that could potentially grow into a public health, safety, or environmental concern, the board should require, pursuant to the Public Resources Code, Section 43209(c), LEAs to compile and track information on operations in the excluded tier. To track this information, each LEA should work with its related cities and counties to develop a system to communicate information to the LEA about existing and proposed operations in the excluded tier with the potential to grow and cause problems for public health, safety, and the environment. For example, cities and counties might forward to LEAs information about requests for conditional use permits, revisions to current conditional use permits, or requests for new business licenses. We are not suggesting that the LEA track all operations in the excluded tier—for example, backyard composting or disposal bins located at construction sites. In addition, the board should require LEAs to periodically monitor operations in the excluded tier to ensure that they still meet the requirements for this tier. Finally, in its triennial assessments of each LEA, the board should review the LEA's compliance with these requirements regarding excluded sites.

Board Action: Pending.

The board stated that it engaged in discussions regarding this recommendation with entities such as the Enforcement Advisory Council and the California Conference of Directors of Environmental Health. The board also stated that while it has the authority to request information it deems necessary to evaluate LEAs, it does not have the authority to require the implementation of a tracking system. Nevertheless, the board stated that LEAs are still responsible for being aware of changes in activities located in their jurisdiction. However, the board has stated that it began discussions with LEAs about the idea of developing, in concert with other local regulatory entities, a mechanism for identifying and tracking activities that may trigger additional regulatory requirements. In addition, the board stated that on September 10, 2004, the governor signed Assembly Bill 2159 into law. The bill requires LEAs to maintain a record of, and take any action that the LEA is authorized to take regarding a complaint, referral, or inspection relating to the operation of a solid waste facility or other activity within the LEA's jurisdiction. The new requirement became effective January 1, 2005.

Finding #5: Board evaluations are substantially appropriate in scope, but do not meet the three-year mandate.

Our review of five LEA evaluations the board completed found that the established scope of the evaluation is appropriate and that the board complied with that scope. The evaluation covers all six specific areas of interest identified in regulations and further ensures that the LEAs continue to comply with certification requirements. However, the board is not timely with its LEA evaluations, beginning or scheduling evaluations to begin on average about 11 months after the end of the mandated three-year cycle. However, the board's definition of what represents a three-year cycle increases the problem. The board defines the three-year cycle as beginning at the conclusion of the LEA's last evaluation and ending at the date the next evaluation is initiated. Our interpretation of the statutory requirement, however, is that LEA performance evaluations should be completed every three years or more frequently. Thus, if an evaluation is completed on February 1, 2001, the next should be completed no later than February 1, 2004. The board's approach, when combined with the time required to actually conduct an evaluation and develop a workplan, if necessary, may delay the discovery and resolution of potential performance shortcomings in an LEA.

We recommended that to comply with existing law, the board should complete evaluations of LEAs within the three-year cycle. If that is not feasible, the board should propose a change in law that would allow a prioritization system to ensure that it at least evaluates LEAs with a history of problems every three years.

Board Action: Partial corrective action taken.

The board stated that staff indicated that it should be able to accomplish the evaluation cycle within the three-year timeframe, in part by examining internal practices in order to streamline the evaluation process and establishing firmer deadlines for internal fact-finding and report review. Further, if these methods are not adequate, staff will examine, as needed, alternative approaches to the current statutory scheme for LEA evaluation, such as establishment of a prioritization system, and/or examine other evaluation models to identify if the board needs to modify its current system. The board stated that the third cycle of evaluations began in April 2003 and staff had completed 33 evaluations with an additional

10 scheduled for completion within six months. Given the rate of completion, the board stated that staff expects to complete all evaluations within the three-year timeframe.

Finding #6: Legal challenges can significantly delay correction of identified problems at noncomplying solid waste sites.

Even if all regulations were in place, all monitoring occurred promptly, and enforcement actions were initiated promptly, identified problems would not necessarily be corrected immediately. The process to correct violations can be lengthy, and it may involve hearings and legal proceedings, including appeals of decisions in each. The Waste Act contains a comprehensive enforcement scheme for solid waste facilities, designed to allow LEAs to bring various enforcement actions against owners and operators for violations of the Waste Act. Under certain circumstances, the board may take enforcement actions itself. This enforcement scheme includes the ability to issue a corrective action order or a cease and desist order, to administratively impose civil penalties, and to suspend or revoke a permit under certain conditions. However, this enforcement scheme allows a person who is the subject of any of these enforcement actions to request a hearing before a local hearing panel, which must be established pursuant to the requirements and procedures delineated in Public Resources Code, and then before the board. If a hearing is requested, the enforcement order is “stayed,” or rendered inoperative, until all appeals to the local hearing panel and the board have been exhausted or the time for filing an appeal has expired, unless the LEA can make a finding that the activity constitutes an imminent threat to the public health and safety or environment. Consequently, a person who is the subject of an LEA enforcement order can continue the activity that is the subject of the order until all appeals have been exhausted.

We recommended that the Legislature may wish to consider amending the current provisions of the Waste Act that allow a stay of an enforcement order upon the request for a hearing, and to streamline or otherwise modify the appeal process to make it more effective and timely and enhance the ability to enforce the Waste Act.

Legislative Action: Partial legislation passed.

The Legislature introduced and amended Assembly Bill 2159, which provides that a request for a hearing would not stay a cease and desist order, under specified conditions, and revised the procedures for appealing hearing panel or hearing officer decisions to the board. It also requires an enforcement agency to maintain a record of, and take any action that the enforcement agency is authorized to take regarding a complaint, referral, or inspection relating to the operation of a solid waste facility or other activity within the jurisdiction of the enforcement agency that is an excluded operation, as specified.

Board Action: Pending.

The board stated that its staff agrees that this issue warrants further consideration.

