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## Department of Toxic Substances Control

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January 30, 2020

VIA CERTIFIED MAIL 7014 2870 0000 7724 2218

Mr. David Carmany  
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### BKK FACILITY INSTITUTIONAL CONTROLS AND PROSPECTIVE PURCHASER AGREEMENT OBLIGATIONS ON CITY PROPERTY

Dear Mr. Carmany:

I am writing to express the Department of Toxic Substances Control's ("DTSC") concerns about the City of West Covina's ("the City's") proposed sale of real property directly adjacent to the closed Class I hazardous waste landfill ("Class I Landfill") to Singpoli BD Capital Group ("Singpoli"). As you know, DTSC carries out response actions at the Class I Landfill to protect public health and the environment from the release and/or threatened release of hazardous substances. DTSC conducts these response actions pursuant to the state Hazardous Substances Account Act ("HSAA") (Health & Saf. Code, § 25300 *et seq.*) and the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") (42 U.S.C. § 9601 *et seq.*).

DTSC has recently reviewed a number of documents related to the proposed sale, including the City's Right of Entry and Access Agreement ("Access Agreement") and its Agreement of Purchase and Sale and Joint Escrow Instructions ("Purchase Agreement"). In particular, the agreements do not address existing land use restrictions on the sale property, the City's obligations under those land use restrictions, and DTSC's role in enforcing those restrictions. Those omissions demonstrate the need for increased coordination between the City and DTSC regarding access to the BKK Facility. Accordingly, DTSC proposes a meeting to discuss the concerns outlined below.

#### **BKK Facility Background**

The property the City proposes to sell to Singpoli includes 134 acres of City-owned property on what was formerly known as Parcel 2 and Lot 5, and 85 acres of City-licensed property on what was formerly known as Parcel 3 (collectively, these properties

are hereinafter referred to as “City Property”). Former Parcels 2 and 3 are both part of the 583-acre BKK Facility, which includes a Class I Landfill, a closed Class III municipal waste landfill (“Class III Landfill”), a Leachate Treatment Plant (“LTP”), leachate and gas collection systems, flare stations, and other related landfill infrastructure. In other words, City Property is not only in close proximity to the Class I Landfill but is actually part of the BKK Facility as defined under the HSAA and CERCLA. This is significant because the entire BKK Facility is subject to extensive regulatory requirements under local, state, and federal laws. The BKK Facility has also been the subject of administrative corrective action orders issued by the U.S. EPA and a cleanup order issued by DTSC. (*Administrative Order on Consent*, U.S. EPA Docket No. RCRA 09-89-0019 (“1989 Administrative Order”); *Administrative Order on Consent*, U.S. EPA Docket No. RCRA-09-2000-0003 (“2000 Administrative Order”); *Imminent and Substantial Endangerment Determination and Order and Remedial Action Order*, DTSC Docket No. I/SE-D 04/05-004 (“ISE Order”).

DTSC is the primary state agency with jurisdiction over the Class I Landfill, which is directly adjacent to City Property. DTSC oversees the response actions conducted pursuant to two consent decrees by the BKK Working Group (“BWG”), a group of approximately 50 potentially responsible parties (“PRPs”). The BWG is also investigating existing Class I Landfill systems and the extent of groundwater contamination in and around the BKK Facility, as required by those consent decrees. These investigations are ongoing and the results of the investigations will form the basis for future removal and remedial actions at the Class I Landfill.

### **Coordination with DTSC**

Because of the proximity of City Property to the Class I Landfill and the ongoing public health threat the BKK Facility poses, it is critical for the City to coordinate with DTSC on any activities related to City Property that may impact DTSC’s response actions at the Class I Landfill. The specific coordination needed is discussed further below.

1. Prior to authorizing “Intrusive Activities,” the City must coordinate with DTSC to ensure that Singpoli’s activities do not adversely impact response actions at the Class I Landfill.

In the Access Agreement, once the City approves Singpoli’s work plan to conduct “any invasive or Phase II Inspections on City Property” (defined therein as “Intrusive Activity”), Singpoli is authorized to proceed without further notice to the City. Thereafter, Singpoli is required to coordinate only with BKK Corporation (“BKK Corp.”), the owner of the BKK Facility, in order to use the single access road along the Class I Landfill to reach City Property. Despite DTSC’s direct regulatory role at the Class I Landfill, there is no requirement in the Access Agreement for Singpoli or the City to even notify DTSC of any Intrusive Activity, let alone to coordinate with DTSC.

Nonetheless, such coordination with DTSC is required by the land use restrictions that the City accepted when it entered into the Environmental Restriction Covenant and Agreement to Restrict Use of Property (Parcel 2) and the Environmental Restriction Covenant and Agreement to Restrict Use of Property (Parcel 3) with DTSC.<sup>1</sup> These covenants (collectively, "Institutional Controls") were recorded on May 29, 2001, pursuant to the 2000 Administrative Order.<sup>2</sup> Specifically, Section 3.1(d) of each of the Institutional Controls prohibits uses that would "disturb the integrity or interfere with the operation of the closed Class I Landfill final cover, liner(s), or other components of any hazardous waste containment system . . . or interfere with any other [c]orrective action or post-closure requirement[.]" Unless Singpoli and the City coordinate with DTSC, they cannot ensure that their Intrusive Activities will not interfere with regulatory activities at the Class I Landfill. For example, invasive inspections by Singpoli, as authorized by the City, could potentially impact daily operation and maintenance activities at the Class I Landfill conducted by the BWG,<sup>3</sup> the investigations of existing landfill systems, and DTSC's ongoing oversight of such work. Further, essential daily maintenance activities at the Class I Landfill include moving personnel and heavy equipment on the only access road. Yet, Singpoli's invasive inspections may require the use of heavy machinery and movement along that same road. Thus, in order to eliminate potential access issues that may interfere with response actions at the Class I Landfill, the City should coordinate with DTSC prior to allowing any invasive inspections. At a minimum, the City and Singpoli should provide DTSC with Singpoli's Intrusive Activity work plan, highlighting any planned activities on City Property that could potentially impact response actions at the Class I Landfill.

Furthermore, in Section 4 of the Access Agreement, the City and Singpoli acknowledge that hazardous or toxic materials could be discovered on City Property during Singpoli's inspections. Pursuant to the HSAA, DTSC is authorized to respond to the release or threatened release of hazardous substances that may impact the environment or public health. (Health & Saf. Code, § 25300 *et seq.*) As such, any inspection that leads to the discovery of hazardous substances and its potential release<sup>4</sup> into the environment should include immediate notification to DTSC, as required in the HSAA.

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<sup>1</sup> The U.S. EPA is a third-party beneficiary of the Institutional Controls and has the ability to enforce the restrictions on land use.

<sup>2</sup> Lot 5 is not a part of the Institutional Controls discussed in this letter. However, Lot 5 is covered by an Environmental Restriction and Covenant to Restrict Use of Real Property as required by the U.S. Fish and Wildlife Service's Biological Opinion for the BKK Facility.

<sup>3</sup> These essential landfill activities are conducted by the BWG in accordance with state and federal law and applicable provisions of DTSC's final post-closure permit for the BKK Facility.

<sup>4</sup> CERCLA defines "release" broadly to include "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment[.]" 42 U.S.C. § 9601(22). The HSAA incorporates this definition in section 25320 of the Health and Safety Code.

2. The City has an obligation to provide DTSC access to implement response actions.

Likewise, in order to comply with its obligations under the Agreement and Covenant Not to Sue the City of West Covina, Docket No. HAS-A 02/03-174 (May 23, 2003) (“Prospective Purchaser Agreement” or “PPA”), the City must notify DTSC before allowing invasive inspections to occur.<sup>5</sup> The Prospective Purchaser Agreement obligates the City to “cooperate fully with DTSC in the implementation of response actions” and to not “interfere with implementation of such response actions.”

Specifically, Section 9.1 of the PPA requires the City to provide DTSC with “an irrevocable right of access at all reasonable times to [City Property] . . . for the purposes of performing and overseeing activities” taken pursuant to CERCLA, RCRA, or the HSAA. The City must also extend the right of access to parties, like the BWG, who are performing response actions pursuant to federal and/or state law. Furthermore, DTSC has the authority to “enter and move freely about [City Property] at all reasonable times for purposes including, but not limited to . . . sampling and analytic data . . . and conducting such tests as DTSC may deem necessary[.]” Right now, that right of access is impaired by a lock barring entry into a fenced portion of City Property. As such, DTSC and the BWG are currently unable to access seven gas monitoring wells located on City Property.<sup>6</sup>

Denying DTSC and the BWG access to those wells could interfere with groundwater protection at the Class I Landfill. The wells are sampled by the BWG in accordance with the *Sampling and Analysis Plan, Groundwater Monitoring Program, BKK Landfill* (July 31, 2017).<sup>7</sup> Sampling results are used in the ongoing investigation of groundwater contamination. BKK Corp. also reports the sampling results to the Los Angeles Regional Water Quality Control Board. Sampling occurs quarterly and every five years for certain chemical constituents.<sup>8</sup>

The next groundwater sampling event for the wells on City Property is scheduled for the first quarter of 2020. DTSC reached out via e-mail to you on October 22, 2019 regarding the locked gate and our plan to add a new lock that would allow both the City and DTSC access. The City is obligated to provide access and should meet with DTSC to discuss the additional lock.

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<sup>5</sup> The City entered a parallel Prospective Purchaser Agreement with the U.S. EPA in 2003, which echoes the terms of its agreement with DTSC.

<sup>6</sup> The specific wells are MWB1, MWB2, MWB3, MWB4, MWB4R, MWB5, and MWB6.

<sup>7</sup> The Sampling and Analysis Plan can be found on the Envirostor page for the BKK Facility at [https://www.envirostor.dtsc.ca.gov/public/deliverable\\_documents/8284274041/SAP%20-%20Revised%20-%202017-07-31.pdf](https://www.envirostor.dtsc.ca.gov/public/deliverable_documents/8284274041/SAP%20-%20Revised%20-%202017-07-31.pdf).

<sup>8</sup> The chemical constituents requiring sampling every 5 years are listed in Appendix II, Title 40, Code of Federal Regulations, Part 258.

3. The transfer of Prospective Purchaser Agreement protections to subsequent owners requires notification to DTSC.

Finally, it appears the City is not in compliance with its specific notice requirements. The existing land use restrictions and the PPA not only restrict certain developments near the Class I Landfill, but also require the City to notify DTSC when the City transfers or sells its property and to notify subsequent owners of the land use restrictions. For example, Section 3.2 in each of the Institutional Controls requires the City to include specific language regarding the restrictions in real property agreements, like deeds and purchase agreements. However, the City's Purchase Agreement with Singpoli does not include that specific language and it's unclear whether it was provided in an exhibit.

The Purchase Agreement also does not address the City's notification requirements in the PPA. The Purchase Agreement only states that the PPA "shall, among other things, provide certain assurances to the City and [Singpoli] in connection with the purchase and intended use of [City Property.]" While it is true that the PPA provides the City with certain assurances—a covenant not to sue and contribution protection—as party to the agreement, it does not provide *any* assurances to a prospective buyer of City Property. The covenants not to sue in the PPA are not automatically transferred from the City to a subsequent owner. Pursuant to Section 9.25 of the PPA, any transfer of those assurances requires the prior written consent of DTSC in its sole discretion. Moreover, prior to the transfer of property, the subsequent owner must consent in writing to be bound by the terms of the agreement, including ongoing obligations meant to prevent any action that would exacerbate the potential public health threat from the BKK Facility.

In exchange for the liability protection in the PPA, the City's obligations include maintaining the Institutional Controls (Section 7), cooperating with DTSC in the implementation of response actions even if doing so may interfere with the City's use of City Property (Section 7), providing access to DTSC to perform response actions and routine daily operations and maintenance (Section 9), and other actions as set forth therein.

The assurances in the PPA remain in place only so long as the City continues to meet its ongoing obligations. Furthermore, even in the event of a sale or other property transfer, the City would continue to be bound by the terms of the PPA, except as otherwise mutually agreed by DTSC and the City.

**Consideration of DTSC Response Actions**

An essential purpose of the Institutional Controls and PPA is to ensure access to, and eliminate any potential interferences with, the post-closure care, corrective action, and/or implementation of response actions at the BKK Facility, which encompass both the Class I Landfill and much of City Property. The City's coordination with DTSC, as

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outlined in this letter, is necessary to ensure that DTSC's response actions at the BKK Facility are unimpeded and public health and the environment are protected.

Since DTSC assumed emergency response actions in 2004 (when BKK Corp. announced that it could no longer conduct post-closure care of the Class I Landfill), DTSC has maintained a good working relationship with the City. In light of the recent activity related to the potential sale and development of City Property, DTSC would like to meet with you as soon as practicable to discuss Singpoli's inspection schedule and other access issues. Please contact me so that technical staff from the City and DTSC can set up a mutually acceptable meeting date.

If you have any questions, contact me at [Dan.Ziarkowski@dtsc.ca.gov](mailto:Dan.Ziarkowski@dtsc.ca.gov) or (916) 255-6580 or contact DTSC counsel, Susan Ma, at [susan.ma@dtsc.ca.gov](mailto:susan.ma@dtsc.ca.gov) or (916) 445-2124.

Regards,



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