

**STATE OF CALIFORNIA
ENVIRONMENTAL PROTECTION AGENCY
DEPARTMENT OF TOXIC SUBSTANCE CONTROL**

In the Matter of:)	Case No.: PAT-FY08/09-03
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CHEMICAL WASTE MANAGEMENT, INC., BAKERSFIELD FACILITY)	CHEMICAL WASTE MANAGEMENT, INC. SUPPLEMENTAL BRIEF
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EPA ID. No. CAT000624056)	CASE NO: 05-CA-624 Division A
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INTRODUCTION

In response to the Permit Appeals Officer’s March 30, 2010 Request for Supplemental Briefing from the Parties (“Request for Supplemental Briefing”), Chemical Waste Management, Inc. (“CWM”) respectfully submits this Supplemental Brief on Appeal (“Supplemental Brief”).

BACKGROUND

Since CWM filed its Opening Brief in this matter, three important developments have occurred, the most recent of which is expected to render this appeal moot. *First*, DTSC has prepared a draft determination that Bakersfield has met the requirements of closure by removal or decontamination and thus no longer requires a Post-Closure Permit.¹ This decision is the result of the Parties’ successful collaboration to identify a clear regulatory path for CWM to demonstrate that a post-closure permit is not required for Bakersfield and that regulatory oversight may be

¹ See Draft Notice of Decision attached as Exhibit 1.

transferred to the Central Valley Regional Water Quality Control Board (“Water Board”). Following CWM’s submission of its Reply Brief in this matter, the Parties convened in Sacramento to discuss a path forward. After much discussion, DTSC advised that CWM should submit a Petition for Closure by Removal or Decontamination (“Clean Closure Petition”) pursuant to 22 Cal. Code Reg. § 66270.1 (c)(5), a procedure established in the regulations. The agency identified the specific subjects that CWM should address in its Clean Closure Petition. DTSC agreed that, under § 66270.1 (c)(5), Bakersfield’s Post-Closure Permit could be terminated if CWM’s Clean Closure Petition demonstrated that Bakersfield meets the closure by removal and decontamination standards of chapter 14, division 4.5 of the California Code of Regulations, title 22. DTSC further agreed that if Bakersfield’s Post-Closure Permit is terminated, regulatory authority would be transferred to the Water Board, subject to a Land Use Covenant that DTSC would continue to enforce. The Land Use Covenant will prohibit the use of the Site for residential or other sensitive uses and will be subject to verification by reporting and inspection.

CWM submitted its Clean Closure Petition to DTSC on October 14, 2009.² Given the dispositive effect a favorable decision from DTSC would have on the this RCRA post-closure permit appeal, CWM provided a courtesy copy of the Petition to the Permit Appeals Officer by email dated November 29, 2009.

² Under § 66270.1 (c)(5), DTSC was required to review CWM’s Petition within 90 days of its receipt. Unfortunately, DTSC failed to complete its review within the 90 day period (i.e., by January 12, 2010). Citing the State’s budget crisis and inadequate resources, DTSC offered to review CWM’s Petition on the condition that CWM reimburse DTSC for its costs to review the Petition. The Parties thereafter entered into a Reimbursement Agreement, under the terms of which CWM agreed to pay DTSC \$50,000 for its time and costs, and in exchange DTSC agreed to provide “a final determination regarding continuation or termination of the CWM Bakersfield Post-Closure Permit no later than May 15, 2010.”

DTSC has determined that CWM's Clean Closure Petition demonstrates that Bakersfield does not present specific risk to human health or the environment. The draft decision must now be put out for a 30 day public comment period. The end of the 30-day period is expected to be in late May or early June, 2010. Referring to the numerous studies that have been conducted at the Site to reach this conclusion, DTSC's draft decision states:

"The site characterization study presented the results of a data collection effort in which two hundred and thirty eight soil samples were collected and analyzed for chemical constituents potentially present in waste accepted at the facility. Laboratory analysis indicated that subsurface soil samples did not contain concentrations of chemicals that present a significant environmental or human health risk, a conclusion documented in the separate health and ecological risk assessment report. The risk assessment report adequately demonstrates that the chemical concentrations detected at the Facility were present at levels which **do not require a Post-Closure HWFP**, but rather can be managed appropriately though [sic] the implementation of a land use covenant."³

The draft decision further explains that the Site will be regulated by the Water Board:

"Upon developing and recording of a land use covenant, the CWM Bakersfield Facility **will no longer be required to continue post-closure care under the DTSC Post-Closure HWFP dated April 30, 1991**. Future oversight of the Facility's closure cover, drainage structures, and monitoring system, shall be provided through the Central Valley Regional Water Quality Control Board. Compliance with the requirements of the land use covenant will be provided by DTSC during annual inspections."⁴

It is obvious that a final decision to terminate the post-closure permit at Bakersfield will render this appeal of that same permit entirely moot. Once that decision becomes final, CWM will withdraw this appeal. For that reason, it is appropriate for the Permit Appeals Officer to defer making any decision in this administrative proceeding. For this tribunal to act weeks or days before DTSC terminates the permit that is the subject of the appeal would essentially produce an

³ See Notice of Decision attached as Exhibit 1 (emphasis added).

⁴ *Id.*

advisory opinion. As a prudential matter, and for the same reasons that federal courts are prohibited under the U.S. Constitution from issuing such advisory opinions, this tribunal should decline to rule on an issue that may very soon no longer be relevant to the moving party in the case.⁵ It is not the role of a Permit Appeals Officer to issue an advisory opinion on what DTSC ‘*might*’ be able to do if, in fact, the agency has already decided and published a determination that no post-closure permit is required any longer at Bakersfield.

The *second* pertinent development since the Parties submitted their initial briefs on appeal occurred when DTSC issued a new draft financial assurance regulation that, if adopted, would allow it to impose rolling 30-year post-closure periods when permits are renewed.⁶ As CWM explained in its May 21, 2009 Reply Brief, the draft regulation is an open admission by DTSC that without the new regulation, it lacks authority to impose the additional 30-year post-closure care period it sought in the contested Bakersfield final permit. DTSC is now going through the public notice-and-comment rulemaking proceeding to receive public input, as it must, before making a major change in policy on the post-closure care regulations.

CWM, along with a number of other parties from the regulated community, filed public comments opposing certain aspects of the draft regulation. The public comment period closed on May 26, 2009 and there has been no action taken to date to adopt the draft regulations. Even if passed now, however, this regulation would not apply to Bakersfield because: (i) DTSC has

⁵ The United States Supreme Court has determined that the ‘case or controversy’ requirement found in Article Three of the United States Constitution prohibits federal courts from issuing advisory opinions.

⁶ DTSC Proposed Financial Assurance Regulations, DTSC Ref. No. R-2007-06; OAK Ref. No. Z-2009-0326-01.

decided that Bakersfield no longer requires a Post-Closure Permit, and (ii) serious due process concerns would counsel against retroactive application of the new regulation.

The *third* relevant development is DTSC's withdrawal of permit conditions that would have required CWM to reconstruct or install a new \$30 million landfill cover. In its April 26, 2009 technical memorandum, DTSC technical staff provided a detailed analysis of Site conditions and the closure cover, concluding that the existing cover meets all applicable regulatory requirements.⁷ DTSC's April 26, 2009 memorandum contained important conclusions that now supersede the technical findings presented in the 2007 draft permit.

In sum, significant issues have been resolved by the Parties during the pendency of this appeal. There now remains one *theoretical* question for which the Parties have different views: whether DTSC possesses the legal authority to impose additional 30-year post-closure periods upon permit renewal, in the absence of specific findings required under title 22 that such further extensions are necessary to protect human health and the environment. That question, however, does not need to be -- and should not be -- answered in this appeal given DTSC's draft determination that Bakersfield no longer requires a Post-Closure Permit, a decision which is slated to become final very shortly.

DISCUSSION

On March 30, 2010, the Permit Appeals Officer issued to CWM and DTSC a Request for Supplemental Briefing in this matter. Specifically, the Request for Supplemental Briefing instructed the Parties to submit supplemental briefs responsive to the following questions:

1. "Does the final permit impose a new 30 year post-closure care period for the facility? Please specify the text in the final permit, including the Part B application

⁷ See DTSC Brief on Appeal at p. 6-7; DTSC Staff Memorandum dated April 21, 2009, attached as Exhibit 1 to DTSC Brief on Appeal.

incorporated by reference, that requires or does not require a new 30 year post closure care period.”

2. “Why was the first paragraph of Part V Special Conditions included in the draft permit [footnote omitted] and what is the effect, if any, of the deletion of that paragraph from the final permit.”

The following sections respond to each question in turn.

I. “Does the Final Permit Impose a New 30 Year Post-Closure Care Period for the Facility?”

The answer to this question is ‘yes’. The contested final permit for Bakersfield requires an additional 30 years of post-closure care. That requirement is established in (i) permit condition V.3.a., which would require CWM to provide financial assurance for post-closure activity to be performed 30 years in the future; (ii) the comments exchanged by the Parties during the permit renewal process; and (iii) DTSC’s Brief on Appeal, reiterating the 30-year requirement.

A. Permit Condition V.3.a. Establishes 30 Additional Years of Post-Closure Care

Condition V.3.a. would require CWM to provide financial assurance for an additional 30 years of post-closure care. Specifically, the condition would require CWM to complete the following:

“Submit revised financial assurance equal to a **30-year cost estimate** approved by DTSC **for all elements of post-closure care**. Attachment 7 provides a DTSC derived 30-year cost estimate. Should CWM not provide an alternate cost estimate which is deemed adequate by DTSC, CWM shall use the cost estimate included in Attachment 7. Revised financial assurance based on a DTSC approved 30-year cost estimate for all elements of post-closure care shall be submitted within 60 days from the effective date of the permit.”⁸

Attachment 7 to the final permit provides DTSC’s 30-year cost estimate, which CWM would be required to use to determine the amount of financial assurances it must provide, if an alternative

⁸ See Final Contested Permit at p. 10 (emphasis added).

cost estimate is not approved by DTSC.⁹ The cost estimate that appears in Attachment 7 to the final permit is unambiguously based on an additional 30 years of post-closure activity. This is most evident in the column entitled, the “Total number of events.” This column estimates, for example:

- 60 semiannual groundwater monitoring events;
- 60 semiannual groundwater monitoring reports;
- 30 annual groundwater monitoring reports;
- 60 semiannual groundwater analyses;
- 360 monthly leachate monitoring events;
- 30 payments of an annual hazardous waste facility fee; and
- 30 payments of the annual property tax assessment.

DTSC’s cost estimates are all *projected future* costs based on activities occurring over a 30 year period. None of DTSC’s estimates take into account, or otherwise reflect, the 19 years that Bakersfield has already been in post-closure.¹⁰ If it were the case that DTSC had *not* intended to require an additional 30 years of post-closure care under the final permit, among other things, Attachment 7 would be based on post-closure activity for 11 additional years and not an additional 30 years. In other words, DTSC’s financial assurance cost estimates for the renewal permit would be based on the years then

⁹ *Id.*

¹⁰ DHS issued a RCRA Post-Closure Permit for the Facility on April 30, 1991. The Original Post-Closure Permit established a 30-year post-closure care period beginning in 1988 and ending in 2018.

remaining in the original 30-year post closure period.¹¹

B. DTSC Reiterated its Requirement for an Additional 30 Years of Post-Closure Care in Response to Comments on the Permit

The correspondence exchanged between DTSC and CWM during the permit renewal underscores that the permit would necessarily impose an additional 30-year post-closure period. DTSC presented its legal arguments on its authority to impose a “rolling renewal of the 30-year period” in a letter to CWM:

“DTSC has interpreted these sections, which are intentionally more stringent than the federal regulations, to mean that **the post-closure care period for a surface impoundment or landfill is at least 100 years** and that **adequate financial assurance must be maintained throughout the post-closure care period**. While it is true that Health and Safety Code section 25245(a)(2) and California Code of Regulations, section 66264.117 set an initial 30 year benchmark post-closure period, this benchmark is a minimum standard to be applied to all post-closure facilities in the absence of a more specific standard. **In the case of surface impoundments or landfills, the more specific 100 year regulatory standard applies.**”¹²

Following this exchange, CWM filed comments on the draft permit, explaining that while it agreed with certain aspects of the draft permit, there was no technical basis for extending the post-closure period for a minimum of thirty years from 2006.¹³ In response, DTSC deleted from the draft permit language stating that “it finds it necessary to extend the post-closure period...for a minimum of thirty years from 2006.”¹⁴ DTSC declined, however, to remove its requirement for

¹¹ DHS issued a RCRA Post-Closure Permit (“Original Post-Closure Permit”) for the Facility on April 30, 1991. The Original Post-Closure Permit established a 30-year post-closure care period beginning in 1988 and ending in 2018.

¹² Letter from Wade Cornwall (DTSC) to Christopher Cullison (CWM), April 14, 2004, attached as Tab 4 to CWM’s Opening Brief.

¹³ Letter from Phil Perley (CWM) to Scott Ward (DTSC), August 31, 2006, attached as Tab 6 to CWM’s Opening Brief.

¹⁴ DTSC Response to Comments, June 19, 2007 at p.19, attached as Tab 7 to CWM’s Opening Brief.

financial assurance to cover the cost of 30 years of post-closure activity, thus imposing an additional 30-year post closure period in the final permit.

C. DTSC’s Brief on Appeal Confirms that the Final Permit Would Impose an Additional 30 Years of Post-Closure Care

In its Brief on Appeal, DTSC argued that it has the authority to impose a new 30-year post-closure period each time a permit is renewed.¹⁵ DTSC argued that whereas it might be required to make findings under § 66264.117 during a permit modification, no findings are required to impose an additional 30-year period during a permit renewal.¹⁶ DTSC’s Brief was explicit about requiring 30 additional years of post-closure care in the final Bakersfield’s renewal permit:

“When DTSC established the permit conditions [on renewal] for this Facility, it determined that the 30-year post-closure period was appropriate. DTSC further provided its basis for the 30-year period in The Response to Comments for the proposed Permit Decision.”¹⁷

DTSC’s Brief then goes on to describe the draft financial assurance regulation it recently put out for public comment that would allow it to impose additional periods of post-closure care, without any requirement to make specific findings of fact and necessity.¹⁸

In sum, there is no doubt that the final contested permit would impose an additional 30-year post-closure period. DTSC wrote the requirement into the text of condition V.3.b. and

¹⁵ *Id* at p. 3-4 (“CWM argues that DTSC is required to make findings based on evidence that indicates an extension of the 30-year post-closure period is necessary to protect human health and the environment. However, CWM is relying on the permit modification regulations which require such a finding during the term of the permit, not upon renewal when DTSC establishes permit conditions necessary to protect public health and the environment, including the term for financial assurance.”).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

assumed an additional 30 years of post-closure activity in its cost estimates for financial assurance. Since then, it has argued that it possesses the authority to impose an additional 30 years, in the absence of findings required under title 22, in its correspondence with CWM and its brief on appeal. Finally, DTSC issued a draft regulation seeking to establish (and not clarify) its authority to impose a rolling 30-year post-closure care periods at sites across the State.

II. “Why was the first paragraph of Part V Special Conditions included in the draft permit and what is the effect, if any, of the deletion of that paragraph from the final permit?”

DTSC’s Response to Comments for the proposed Permit Decision does not contain a clear explanation of why this paragraph was deleted. DTSC, therefore, will need to explain its own actions. CWM can only present its views on why the first paragraph of Part V Special Conditions may have been deleted. That paragraph read:

“The Department of Toxic Substances Control finds it is necessary to extend the post-closure period for the CWM Bakersfield Facility a minimum of thirty years from 2006. This finding is made to ensure isolation of wastes to minimize the risk posed by these wastes to either humans or environmental receptors for an indefinite and possibly perpetual period. A separate report entitled *Chemical Waste Management Bakersfield Facility Post-Closure Care Findings and Determination* (DTSC, 2006) documents these findings. This report additionally includes document review, analysis, and field observations which show that the existing closure cover is not effective in preventing rainfall from entering the waste or sustaining damage from weathering and animal activity. Extension of the post-closure period and replacing or conducting extensive repairs to the existing closure cover is required.”

CWM’s view is that DTSC deleted this paragraph because it could not substantiate, with objective evidence, the claims that the wastes at Bakersfield pose significant risks and that the existing cover was defective. In CWM’s view, when DTSC decided that these ‘facts’ were not true, the effect *should* have been to withdraw the demand that a new 30-year post-closure care period be added (and apparently roll endlessly into the future). In fact, what *did* happen, is that DTSC continued to require CWM to provide financial assurances for an additional 30 years of post-closure care.

DTSC's inclusion of this paragraph shows that the agency understood that it was required to make findings under § 66264.117(b)(2)(B) in order to extend the post-closure period. The administrative record indicates that DTSC deleted the paragraph in response to CWM's Comments 16 and 35 for the draft permit.¹⁹ In Comments 16 and 35, CWM described site-specific data demonstrating that there are no hazardous waste constituents in the leachate or groundwater at the Site and that the Site presents no threat to human health or the environment. CWM also noted that the evidentiary standard in § 66264.117(b)(2)(B) had not been met. DTSC has since concurred with these conclusions in two important ways: (i) The April 21, 2009 memorandum prepared by agency technical staff, provided a careful and detailed analysis of the Site data, and confirmed that the existing cover is in good condition, and (ii) The April 2010 draft decision to discontinue the Facility's post-closure permit obligation and transfer oversight of the site to the Water Board shows that the 30-year period need not roll forward and in fact the post-closure care permit can be terminated (with a protective land use covenant).

Responding to the charge that it had failed to make site-specific findings necessary under § 66264.117(b)(2)(B) to extend Bakersfield's post-closure period, DTSC disclaimed the need to make *any* findings, stating:

“[R]estarting the thirty year post-closure period is based on the DTSC's analysis that without proper operation and maintenance of the existing closure structures, significant impacts to human health and the environment will occur. DTSC does not have to document an existing significant impact.”²⁰

Consistent with its new position that no findings of any type were needed, DTSC deleted from the permit the references to its findings, and other conclusions found in its Finding and Determinations

¹⁹ See Draft Post-Closure Permit Comments and Responses, June 19, 2007 at p. 12, 30, attached as Tab 7 to CWM's Opening Brief.

²⁰ *Id.*

document, that were contained in the draft permit. This was a change in position from the earlier permit which acknowledged the need to make factual findings to extend post-closure care and financial assurances another 30 years.

In the same Response to Comments document, DTSC also offered the following analysis in response to CWM's Comment 16 that is worth noting:

“[T]he assumption that because there is no significant exposure at this time there never will be one in the future, **regardless of the condition of the landfill**, is considerable error. If there are no financial assurances or party to ensure the condition of the landfill cover system, the cover system will degrade and the future exposure will change.”²¹

This analysis confirms that DTSC was indeed seeking to impose an additional 30 years of post-closure care in the final permit notwithstanding that site conditions did not warrant such action. This passage also expresses the view that financial assurances should be required on a rolling basis, irrespective of the actual condition and risk profile of the site. Followed to its logical conclusion, this would mean that financial assurances could be required in perpetuity at any site, at DTSC's unfettered discretion. While this may seem like a far-reaching and unintended consequence of such a perspective, this may indeed embody the policy objective motivating DTSC's apparent desire for an advisory opinion in this case. Whatever the case may be, the question of whether DTSC should be allowed to implement such a policy is not one that should be resolved in this case, given DTSC's draft determination that Bakersfield no longer requires a Post-Closure Permit. DTSC may address this question through its financial assurance rulemaking.

²¹ *Id* at 14.

CONCLUSION

For the foregoing reasons, CWM respectfully requests a stay of all action in this matter, pending final agency action under § 66270.1(c)(5)&(6) on DTSC's decision to terminate Bakersfield's Post-Closure Permit.

Respectfully submitted,

//original signed by//

Karen J. Nardi
Arnold & Porter LLP
275 Battery Street
Suite 2700
San Francisco, CA 94111
(415) 356-3010
**Attorney for CHEMICAL WASTE
MANAGEMENT, INC.**

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