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BKK CLASS I LANDFILL (West Covina, California)

CALCULATION OF THE PER TON RATE Dated May 3, 2021

- I. INTRODUCTION

- II. ELEMENTS OF A *DE MINIMIS* PRP'S PROPOSED SETTLEMENT AMOUNT

- III. ESTIMATE OF TOTAL CLEANUP COSTS

- IV. PREMIUM JUSTIFICATION

- V. CALCULATION OF THE PER TON RATE

I. Introduction

This memorandum discusses the elements used to determine a *de minimis* party's settlement amount, including the estimate of total cleanup costs for the BKK Class I Landfill, the premium justification, and calculation of the per ton rate to be used in calculating the settlements offered to *de minimis* potentially responsible parties (PRPs) by the Department of Toxic Substances Control (DTSC) and the BKK Working Group (BWG) for the BKK Class I Landfill (Site), located in West Covina, California.

II. Elements of a *De Minimis* PRP's Proposed Settlement Amount

a. A *De Minimis* PRP's Share of Waste

For *de minimis* settlements, the *de minimis* PRP's share of liability is equal to its volumetric share of the total waste in the landfill. Each *de minimis* PRP's volumetric share is calculated by dividing the tonnage of waste that the PRP sent to the Site by the total tonnage of hazardous substances deposited there, currently estimated at 5.18 million tons.

b. Actual Costs to Date and Estimated Future Costs

The goal of DTSC and the BWG in making these *de minimis* PRP settlement offers is for each *de minimis* PRP to resolve its liability for the Site by paying its equitable share of the total response costs incurred or to be incurred at the Site. Therefore, the settlement formula calculates the PRPs' proportional share of both the actual response costs that DTSC and the BWG have incurred to date, and the present value of estimated future response costs to be incurred at the Site. These amounts are presented in Section III below.

c. Orphan Share

The settlement formula contains a factor to account for the orphan share liability, which is the liability attributable to PRPs who no longer exist (and have no successor), are insolvent, had their liability discharged in a bankruptcy, or can't be located. This share is redistributed to all of the other PRPs, including the solvent *de minimis* PRPs.

The Site accepted hazardous and municipal solid waste for disposal from approximately the late 1960s to 1984. The Site continued to accept municipal solid waste, including asbestos, until approximately June 30, 1987, when it ceased accepting waste for disposal. Because the landfill began operations almost fifty years ago and has been out of operation for over thirty years, DTSC anticipates that there will be a substantial orphan share. For instance, DTSC obtained information from the U.S. Environmental Protection Agency indicating that the orphan share in *de minimis* settlement initiatives for two other analogous hazardous waste disposal facilities operating in the same time

period was approximately 14% and 16%. Therefore, DTSC has estimated that the orphan share for the BKK Class I Landfill Site will be 15%.

d. Unallocated Share

To determine each PRP's volumetric share of waste, DTSC and the BWG used a database of shipments of waste sent to the Class I Landfill, referred to as the Industrial Waste-In or IWI Database. The IWI Database was compiled in part from copies of manifests and other shipping documents that accompanied the shipments of waste received at the Site. On some of the shipping documents, the name and/or address of the generator is illegible, missing, or incomplete. For those shipments, the waste cannot be allocated to any generator. This unallocable share makes up approximately 3% of the waste documented in the IWI Database. As with the orphan share, the unallocable share is redistributed to the other solvent and viable PRPs.

e. Premium Payment

When *de minimis* settlements occur prior to completion of the cleanup of a site, the future portion of the total cleanup costs can only be estimated. In order to protect DTSC and the remaining non-*de minimis* PRPs against the risk that the cleanup cost will exceed the estimate, or that further cleanup will be required to protect human health and/or the environment, DTSC requires a premium payment from parties entering cash-out settlements in exchange for DTSC assuming future financial and cleanup risks. Thus, the settlement offer formula for the Site includes a premium of 125% of a *de minimis* party's share of the estimated future costs, which is explained in Section IV below.

III. Estimate of Total Cleanup Costs

a. Past Costs

DTSC incurred \$94,610,864.00 in response costs from October 2004 through June 2020. In that same time frame, DTSC received reimbursements from other PRPs in the sum of \$22,243,784.00, leaving \$72,367,080.00 in outstanding past response costs. The reimbursements from other PRPs include, but are not limited to, payments from the BWG for DTSC's oversight costs, settlements with other PRPs, including JPMorgan, N.A. ("JPMorgan"), discussed below, and bankruptcy settlements.

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The BWG incurred CERCLA-recoverable response costs from November 2004 through December¹ 2020 totaling \$188,984,283.70². As of December 2020, the BWG received reimbursements in the sum of \$41,805,732.43, leaving \$147,178,551.27 in outstanding past response costs. These reimbursements include payments from the BKK Corporation's post-closure insurance policy with Steadfast Insurance Company, the 2016 PRP Settlement Escrow Account for work performed at the Site, and payments made by former BWG members.

Therefore, DTSC and the BWG's total combined outstanding past response costs are \$219,545,631.27.

b. Estimated Future Costs

DTSC estimates that the present value of future response costs to be incurred at the Site is \$869,286,436.

Class I Landfill Executive Summary of the Cost Estimate Table*	
Item	Present Value Total*
Pre-Remediation	\$57,148,990
Remediation	\$283,555,027
Pre-Remediation and Remediation	\$340,704,017
8-Year O&M of the Existing System	\$53,754,418
100-Year O&M of the New System	\$319,156,970
Periodic Capital Improvement	\$155,671,031
O&M and Capital Improvement	\$528,582,419
GRAND TOTAL	\$869,286,436

* The costs represent their respective present values using a 2.53% discount rate.

In 2017, DTSC entered a settlement with JPMorgan and related entities, as the successors to the original owners of the Site. As part of the settlement, JPMorgan paid \$85 million toward future costs at the Site. Pursuant to the Disbursement Amendment

¹ The BWG's past costs incurred related to the Second and Third Consent Decrees are as of June 30, 2020. All other BWG past costs are as of December 31, 2020. The BWG asserts that these past costs are subject to updates and were prepared solely for the purpose of the Third-Party Initiative and are not applicable in any other circumstances.

² DTSC makes no representations concerning the BWG's costs. The BWG has provided a declaration certifying its costs as CERCLA-recoverable response costs.

to the Third Partial Consent Decree,³ \$5,140,640.92 of the JPMorgan settlement funds have been conveyed to the BWG as partial reimbursement of its CERCLA-recoverable response costs at the Site and is accounted for in the BWG's outstanding past costs total discussed above. The remainder of the JPMorgan settlement funds in the sum of \$79,859,359.08 has been credited toward the Site's estimated future response costs.

As of June 30, 2020, DTSC has also recovered \$4,483,439.93 from bankruptcy and other settlements, including the accrued interest on those settlement funds. These recovered funds have been allocated toward estimated future costs at the Site. When combined with the JPMorgan settlement funds, the adjusted total of estimated future costs is \$784,943,636.99.

c. Total Estimated Cleanup Costs

The total estimated cleanup costs for the Site, including DTSC and the BWG's combined past costs of \$219,545,631.27 and outstanding estimated future costs of \$784,943,636.99 is \$1,004,489,268.26.

IV. Premium Justification

The "premium payment" is a risk apportionment device that allows *de minimis* PRPs to settle their liability early when cleanup costs are uncertain, while protecting DTSC and the Site's remaining PRPs against the risk that the total cleanup costs will be greater than the estimated costs. Through this *de minimis* settlement proposal with DTSC and the BWG, a *de minimis* PRP will pay a settlement amount in exchange for an agreement from DTSC and the BWG that neither will sue the *de minimis* PRP for the cleanup costs as provided in the Administrative Consent Order and Settlement Agreement ("Consent Order/Settlement Agreement").

Guidance from the U.S. Environmental Protection Agency⁴ on *de minimis* settlements recommends a premium of 100% if the settlement offers a covenant not to sue without a remedy cost reopener, unless site-specific circumstances (i.e., a high level of uncertainty regarding remedy costs and/or relative uncertainty in waste allocation or waste toxicity) justifies adjusting the premium.

Because DTSC's Consent Order/Settlement Agreement is a cash-out settlement with no remedy cost reopener and because of the site-specific circumstances discussed below, the *de minimis* settlements include a premium of 125%. The response cost estimate for the Site is based on presently known and reasonably knowable information, and uncertainties remain. DTSC considered the following site-specific factors in selecting the premium:

³ *California Department of Toxic Substances Control, et al. v. American Honda Motor Co., Inc. et al.*, No. CV-2:15-cv-00729-DDP-AJW (C.D. Cal. Jan. 25, 2017).

⁴ "Standardizing the De Minimis Premium," US EPA Guidance issued July 7, 1995.

1. A catastrophic earthquake could require unanticipated costs that are not already included in the estimated operation and maintenance costs. Seismic hazard analysis is a constantly evolving field, which may mean that current earthquake design standards may be found inadequate in the future. Additionally, an earthquake larger than the severe earthquake scenario used in the cost estimate could result in greater capital infrastructure costs than projected.
2. The cost estimate is based in part on BKK Corporation's Corrective Measures Implementation Plan (CMIP) for groundwater remediation at the Class I Landfill, submitted to the U.S. Environmental Protection Agency in 2003. The CMIP, however, does not fully address the extent of contaminant migration from the waste prism to groundwater. DTSC is currently overseeing the Remedial Investigation/Feasibility Study (RI/FS) at the Site, which will provide greater certainty on the extent of contaminant migration; but the RI/FS is still in the early stages.
3. There are uncertainties associated with leachate disposal options, leachate treatment costs that may be affected by water reuse initiatives, and the possible presence of Per- and Poly-Fluoroalkyl Substances (PFAS) and 1,4-Dioxane in the leachate that may require additional treatments. Additionally, there may be other emerging compounds that may require treatment in the future.
4. Potential future emerging compounds in groundwater are unknown. It is not possible to predict the impact that potential future emerging compounds would have on groundwater collection and treatment systems.
5. The potential presence of dense non-aqueous phase liquid (DNAPL) contamination at the Site may require further investigation and adds uncertainty to the future remedy.
6. The close proximity of existing residences and the possibility of new nearby residential or commercial development may require additional gas management methodologies, which may increase long term operation and maintenance costs. For example, the City of West Covina is interested in selling City-owned property adjacent to the northwestern and northern perimeters of the Site for private development. The City has considered development plans that cover a wide range of potential uses, including luxury hotels. The impact of these potential uses on long term operation and maintenance costs is an added uncertainty.
7. Significant changes to environmental standards or landfill design standards are difficult to predict. Such changes could have substantial impacts to long term capital improvement and operation and maintenance costs.

V. Calculation of the Per Ton Rate

The per ton rate of past and estimated future costs includes the 15% orphan and 3% non-allocable shares. The 125% premium is applied to estimated future costs. Together, these sums represent the one-ton rate of hazardous substances sent to the Site.

Calculation of Per Ton Rate of Past Costs:

The total tonnage of hazardous substances deposited in the Class I Landfill is 5,180,786 tons. Due to the orphan and non-allocable shares (18% total), the adjusted tonnage due to non-viable recovery is 82% of 5,180,786 tons which totals 4,248,245 tons. The one-ton percentage share for viable recovery is $1/(4,248,245)$ which equals 0.0000235391%.

- Combined DTSC and BWG Past Cost \$219,545,631.27
- One-ton share is $\$219,545,631.27 \times 0.0000235391\%$ \$51.68

Calculation of Per Ton Rate of Future Estimated Costs:

- Outstanding Estimated Future Costs \$784,943,636.99
- One-ton share is $\$784,943,636.99 \times 0.0000235391\%$ \$184.77

Calculation of Per Ton Rate of the Early Cash Out Settlement Premium:

- One-ton share future estimated costs $\$184.77 \times (1 + 125\%)$ \$415.73

Total Per Ton Rate

- Combine past and future cost shares and the premium
 $\$51.68 + \$415.73 =$ **\$467.41**