

CITY OF EPHRATA



Privileged and Confidential Settlement Communication

April 29, 2024

Via Certified Mail and E-Mail

Mr. Nick Acklam
VCP Unit Manager
Department of Ecology
Toxics Cleanup Program, Southwest Regional Office
PO Box 47775
Olympia, WA 98504-7775
Nick.acklam@ecy.wa.gov

RE: Grant County Ephrata Landfill No. 1 (Washington)

Dear Nick,

I am writing on behalf of the City of Ephrata ("City") regarding your April 16, 2024 letter request to the City to enter into a third amendment to the Agreed Order for the Grant County Ephrata Landfill No. 1 ("Landfill").

First, I would like to thank you for the very productive conversations we have had since receiving your letter. In those conversations, Ecology has expressed a willingness to consider a de minimis settlement of the City's liability. You indicated that you would discuss this with the Attorney General's Office, and we have discussed it with our attorneys and with our Mayor. All of us at the City agree that we have an opportunity at this time to complete the City's participation in further cleanup in return for bringing fresh, non-public resources to the table to defray the public resources that we collectively have relied on for over 15 years to clean up pollution contributed to the Landfill wholly by private parties.

The City has provided three separate letters to Ecology summarizing the credible evidence of disposal at the Landfill by private parties. We developed this information after extensive interviews with individuals having personal knowledge of the facts, as well as through painstaking document review over many months. We specifically identified the multiple parties whom the evidence shows arranged for the disposal of approximately 2350 drums of hazardous wastes at the Landfill in 1975 with the approval of Grant County. Our consultants have concluded that leaks from these drums are responsible for at least 99% of the hazardous substances present at the Landfill, including in the groundwater beneath it. We appreciate Ecology's commitment to moving forward with the evaluation of the credible evidence the City has provided of. Your effort

is critical to achieving Ecology's stated goal of making polluters pay for the contamination they caused.

The City also appreciates the opportunity it has afforded Grant County to apply for public funding for the next bi-ennium. It is our understanding that Grant County has done so, and that Ecology will be reviewing its application.

The funds for the work required to complete the cleanup therefore appear to be in place without additional funding from the City. Nonetheless, the City is prepared to contribute additional funding to the cleanup through a de minimis settlement with Ecology. That is the path the City requests Ecology proceed on. The purpose of this letter to explain the basis for that request.

The City cannot sign another amendment to the Agreed Order for three reasons. First, Ephrata is a small, revenue-challenged community and cannot commit funds it does not have in place. The contribution of other parties to the cost of performing the Work Plan is still uncertain, as Ecology has not yet named additional PLPs beyond the County. The contribution of state funds through a grant has similarly not been finalized. That leaves the sole financial burden for any future work on the County and the City, in an amount that remains uncertain. The City is not in a legal nor financial position to commit its taxpayers to an open-ended liability to remediate contamination it neither caused nor allowed. However, it is in a position to enter into negotiations for a settlement with its insurers which, if successful, will provide additional funding for the cleanup of the Landfill.

The second reason the City cannot sign a third amendment to the Agreed Order is that there is good cause to conclude that the City is not a PLP within the meaning of the Model Toxics Control Act. There is speculation, but no evidence, that the City arranged for the disposal of hazardous substances at the Landfill. By contrast the evidence is incontrovertible that the County arranged to have Resource Recovery dispose of hundreds of hazardous waste drums at the Landfill in exchange for a payment for each drum. The County agreed in 1975 to accept and dispose of approximately 2350 drums of hazardous waste from Resource Recovery for a fee. The City did not control the manner in which the County operated the Landfill at the time of the drum disposal, and was not paid for the drums disposed of. The arrangement for the disposal of the hazardous substances disposed of at the Landfill was between the County, Resource Recovery and the owners of the hazardous wastes.

The third reason the City cannot sign an amendment to the Agreed Order is that doing so could decrease the amount of insurance coverage available to the City. The City's insurers are providing a defense to Ecology's claims under a reservation of rights. The insurers' obligation to defend is important to the City because defense costs are paid in addition to the applicable coverage limits under the policies. If the City enters into the Agreed Order proposed, its insurers may argue that the Work Plan tasks set forth in the Order no longer fall within their obligation to defend the City, but instead count against the City's total available coverage limits. This argument would be based on the decision in *Travelers Indem. Co. v. City of Richland*, 2018

WL 4760526 (E.D. Wash. May 30, 2018). While the City does not agree with the holding in that decision, it cannot put its taxpayers at risk of diminishing its insurance coverage by entering into an Agreed Order without a change in Washington coverage law.

Setting aside the reasons the City cannot sign an Agreed Order, there is every reason for Ecology to secure City funding for the cleanup in a different way – by negotiating a de minimis settlement, as expressly allowed under MTCA.

De minimis settlements are governed by RCW § 70A.305.040(4) and in Ecology guidance documents.¹ There is recent precedent for Ecology to enter into a de minimis settlement in circumstances very similar to our circumstances.

On February 20, 2020, Ecology entered a de minimis consent decree with the Union Pacific Railroad Company (“UPRC”) at the Pacific Wood Treating Site (“PWTS Site”).² UPRC was the former owner of part of the PWTS Site and leased the property to the Pacific Wood Treating Corp. (“PWT Corp.”) for approximately 30 years. During those 30 years, PWT Corp. operated at the PWTS Site pressure treating wood products, operations which contributed to significant releases of hazardous substances. UPRC’s lease agreements with PWT Corp. did not allow UPRC to control the way PWT Corp. performed its day-to-day operations at the PWTS Site.

Ecology ultimately determined that “[t]he amount and toxicity of hazardous substances ‘contributed’ by PWT [Corp.] operations at the [PWTS Site], or otherwise attributable to [UPRC], is insignificant compared to the hazardous substances released elsewhere at the [PWTS Site] during PWT [Corp’s] operations.” This determination was made partly because of “[t]he small size of and limited extent of operations on the [UPRC] property compared to other areas and operations at the [PWTS Site]” and “the lack of involvement by [UPRC] in [PWT Corp’s] wood treating operations...” Ecology also determined that UPRC’s contribution at the PWTS Site was “minimal in amount and toxicity.” Based on these facts, Ecology entered a de minimis consent decree with UPRC which was later upheld by a court.

Like UPRC, the City’s lease agreement with the County did not allow the City to control the manner in which the County operated the Landfill. The “amount and toxicity of hazardous substances” contributed by the City, if any, has not been established and, even if any contribution of hazardous substances by the City could be established, as compared to the drums accepted by the County, the City’s contribution to contamination identified at the site would be “insignificant compared to the hazardous substances” released by others.

The City recognizes that additional support is required to substantiate the City’s application to Ecology and the Attorney General’s Office to enter into de minimis settlement negotiations and is

¹ Washington Department of Ecology, *Policy 520C: De Minimis Consent Decrees* (Dec. 30, 2016), <https://apps.ecology.wa.gov/publications/documents/1609068.pdf>;

Washington Department of Ecology, *Policy 520A: Consent Decrees* (Dec. 30, 2016), <https://apps.ecology.wa.gov/publications/documents/1609067.pdf>.

² <https://apps.ecology.wa.gov/cleanupsearch/site/3020>.

prepared to provide that support.³ Having reviewed the UPRC de minimis settlement, the general terms set out in that settlement appear to be acceptable to the City, subject to the approval of its insurers and to the Ephrata City Council. The City is meeting with its insurers this week to obtain their consent to enter into de minimis consent decree negotiations with Ecology. The City Council is meeting shortly thereafter to consider its options, including the status of settlement discussions with its insurance carriers, if allowed to proceed. Accepting that the negotiating period for an Agreed Order amendment terminates on April 30, 2024, we write to ask you to indicate by May 3, 2024 whether Ecology and the Attorney General's office will consider entering into negotiations for a de minimis settlement with the City so that it may consider that option in discussions with its insurers and its political leadership.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ray Towry".

Ray Towry
City Administrator

Cc: Victoria Banks, Assistant Attorney General
Kristin Beck, Site Manager
Mayor Bruce Reim
City Council
Bradley M. Marten, Marten Law

³ *Supra* note 1, at 3-4.