

COMMISSION AGENDA

Item No: 5B

Meeting: 5/17/18

DATE: May 2, 2018

TO: Port Commission

FROM: John Wolfe, Chief Executive Officer

Sponsor: Jason Jordan, Director, Environmental and Planning Services

Project Manager: Rob Healy, Environmental Senior Project Manager

SUBJECT: Authorization to enter into settlement agreements with Wyeth and Sound Mattress to address environmental liability at Parcel 91 (former Brown and Haley site)

A. ACTION REQUESTED

Request authorization for the CEO or his delegate to execute:

1. A settlement agreement with Sound Mattress, whereby Sound Mattress pays the Port of Tacoma a lump sum of \$3,400,000, and the Port agrees to undertake all responsibility for further environmental investigation, cleanup, and remedial action at the Site (Port property Parcel 91).
2. A partial settlement and interim cost-sharing agreement with Wyeth, whereby Wyeth pays the Port of Tacoma a lump sum of \$1,500,000, and the Port and Wyeth agree to cooperatively participate in the further environmental investigation, cleanup, and remedial action at the Site (Port property Parcel 91).

B. SYNOPSIS

The Port of Tacoma, Sound Mattress, and Wyeth conducted mediation in January 2018 regarding environmental claims leading to two settlement agreements. Commission authorization is requested for the CEO or his delegate to execute these settlement agreements.

C. BACKGROUND

In 2006, the Port of Tacoma purchased the property from Sound Mattress. Through due diligence prior to acquisition, chlorinated solvents were discovered in groundwater and soil on the property. Under the purchase and sale agreement, Sound Mattress indemnified the Port for past contamination subject to their insurance limits. Over a 12-year period Sound Mattress led the Site investigation working with Ecology under the Voluntary Cleanup Program. During that time little progress was made toward cleaning up chlorinated solvents and associated contaminants at the property.

In 2010, in preparation for demolition of the 117,000-square foot building on the property, PCB-contaminated building coatings were discovered. This included interior and exterior paints on the walls and foundation. PCBs were found to have leached into soil and groundwater surrounding the building, and were also discovered in the property stormwater system.

In late 2014 to early 2015, under EPA oversight, the building was demolished and building coatings were abated. Shallow PCB-contaminated soil surrounding the building was excavated and disposed offsite in Subtitle C and D landfills. The building foundation with embedded PCBs was removed and disposed offsite in a Subtitle D landfill. A 2.6 acre area was capped and fenced to allow Sound Mattress access for future remedial actions to address source concentration chlorinated VOCs and metals in soil and groundwater.

In 2015 a \$1.9M claim against the former property owner was submitted to Sound Mattress and their insurance company in accordance with the purchase and sale agreement to recoup environmental liability costs associated with building demolition. The claim was not paid and settlement negotiations in 2016 were unproductive. In June 2016 the Port of Tacoma filed suit against Sound Mattress and Wyeth as successor to Washington Steel in an effort to move this issue forward.

In 2017 Commission approved project authorization to pursue the cost recovery litigation in support of the suit. Litigation activities included discovery, depositions, expert witness preparation, several motions, and mediation. Mediation was successful leading to these Settlement agreements.

D. TERMS OF AGREEMENT

The basic terms of the Sound Mattress agreement include:

- Sound Mattress will pay the Port a lump-sum amount of \$3,400,000 within 45 days of entry of a claim bar order.
- The claim bar order, which bars claims by Wyeth against Sound Mattress, will be entered in the lawsuit within three weeks of the effective date of this agreement.
- The Port and Sound Mattress each fully release and discharge each other with respect to all released environmental claims.
- The Port will indemnify Sound Mattress against environmental claims related to hazardous substances from the Site.

The basic terms of the Wyeth agreement include:

- Wyeth will pay the Port a lump-sum amount of \$1,500,000 in exchange for amicable settlement of Port's past costs of \$2,955,725 incurred prior to November 28, 2017, including attorney's fees.
- Upon grant of a stay of the suit from the Court, Wyeth shall make the lump-sum payment within 45 days.

- Port shall credit \$1,000,000 to the Port's past costs and will release Wyeth from all claims related to past costs.
- For payment of future costs \$500,000 of the lump-sum payment will be credited toward Wyeth's ultimate responsibility for remedial action costs.
- Costs for additional costs for investigation and development of a DCAP will be paid 85% by Wyeth and 15% by the Port up to \$800,000. Costs in excess of \$800,000 will be paid 50% by Wyeth and 50% by the Port.
- A soil vapor extraction system or similarly effective extraction technology will be installed as an interim action while additional site studies are undertaken.

E. FINANCIAL SUMMARY

Estimated Cost of Project

The total project cost for litigation support is estimated at \$1,530,000. Costs to date are \$1,055,305.93. Future costs for developing a feasibility study, cleanup action plan, remedial design and remedial construction are not currently estimable. Additional Commission authorization will be requested to implement these future stages.

Source of Funds

The 2018-2022 Capital Investment Plan (CIP) allocates \$553,000 for this project.

Financial Impact

The settlement is reimbursement for future and past costs. Approximately \$900,000 will be recorded as income. The remaining \$4,000,000 will have no impact to the income statement.

F. ECONOMIC INVESTMENT/JOB CREATION

Future remediation will facilitate property redevelopment to a more productive use. Employment opportunities will arise during remediation, construction of future improvements, and long-term leasing of the property.

G. ALTERNATIVES CONSIDERED AND THEIR IMPLICATIONS

Alternative 1) Do Nothing.

Alternative 2) This request.

Alternative 2 is the recommended course.

H. ENVIRONMENTAL IMPACTS/REVIEW

Permitting: Not Applicable

Remediation: This is a remediation project

Water Quality: Not Applicable

Air Quality: Not Applicable

I. PREVIOUS ACTIONS OR BRIEFINGS

| <u>Date</u> | <u>Action</u> | <u>Amount</u> |
|-------------------|--------------------------|--------------------|
| January 26, 2016 | Executive Authorization | \$125,000 |
| August 3, 2016 | Executive Authorization | \$135,000 |
| February 17, 2017 | Commission Authorization | \$1,270,000 |
| TOTAL | | \$1,530,000 |

J. ATTACHMENTS TO THIS REQUEST

- Computer slide presentation.
- Sound Mattress Settlement Agreement
- Wyeth Settlement Agreement

K. NEXT STEPS

Withdraw site from Ecology's Voluntary Cleanup Program.

Negotiate an Agreed Order (AO) with Ecology to complete a Feasibility Study and Cleanup Action Plan to identify the preferred remedy.

Request Commission authorization to complete the Feasibility Study and Cleanup Action Plan.