

COMMISSION AGENDA

Item No: 9D

Meeting: 8/19/21

DATE: August 4, 2021

TO: Port Commission

FROM: Eric D. Johnson, Executive Director
Sponsor: Jason Jordan, Director, Environmental and Planning Services
Project Manager: Rob Healy, Environmental Senior Project Manager

SUBJECT: Final Settlement Agreement for work associated with the Parcel 91 (former Sound Mattress)

A. ACTION REQUESTED

Request authorization for the Executive Director or his delegate to execute a final Settlement Agreement with Wyeth for a lump-sum payment of \$7.2M for a full release and indemnity against all claims arising out of the Site.

B. SYNOPSIS

Staff has negotiated a final Settlement Agreement with Wyeth, a subsidiary of Pfizer, for an additional lump-sum payment of \$7.2M for a release and indemnity against all claims arising out of the Site.

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.

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 to mid-2018, the Port prepared and submitted a \$2M claim to the former property owner Sound Mattress and their insurance company in accordance with the purchase and sale agreement to recoup environmental liability costs associated with building demolition. Following nonpayment, the Port filed suit against Sound Mattress and Wyeth as successor to Washington Steel.

In May 2018, following mediation, the Port Commission approved a settlement of the claims. The Port settled with Sound Mattress for a lump-sum payment of \$3.4M in exchange for a full release and indemnity against environmental claims related to hazardous substances. The Port entered into a partial settlement with Wyeth, a subsidiary to Pfizer, whereby Wyeth paid the Port a lump-sum amount of \$1,500,000 and agreed to pay for 85% of future costs for Site investigation and development of a draft cleanup action plan, with those cost subject to future reallocation.

Both Settlements were executed following Commission Authorization and the litigation was stayed. Following this Port staff approached Ecology to begin Agreed Order negotiations to complete a cleanup action plan. Staff were informed that Ecology did not have the staff levels needed to enter these negotiations. In April 2020, when an Ecology project manager was finally assigned, the Port, Wyeth, and Ecology began negotiating an Agreed Order.

During the Agreed Order negotiations, it became apparent to Port staff there was room for more negotiations around the previously executed partial settlement with Wyeth. Settlement negotiations were reinitiated through the Port's outside counsel, which resulted in the attached proposed Final Settlement Agreement with Wyeth.

Negotiations with Ecology on the Agreed Order are near completion. If the Commission approves the proposed Final Settlement Agreement, Wyeth will be removed from the Agreed Order.

D. FINAL SETTLEMENT AGREEMENT SUMMARY OF TERMS

The basic terms of the agreement include the following:

- Wyeth agrees to pay the Port an additional lump-sum amount of \$7,200,000 within 45 days of the effective date of the Settlement Agreement.
- The Port agrees to release and indemnify Wyeth, Pfizer Inc., and its affiliates against all claims arising out of the Site.
- The settlement is conditioned upon the court entering an order dismissing with prejudice all claims brought in the subject lawsuit styled, *Port of Tacoma v. Sound Mattress & Felt Co., et al.*, Pierce County Superior Court Civil Cause Number 16-2-086379-9.
- Within 21 days of receipt of the full amount of the Lump-Sum Payment, the Port and Wyeth shall file a stipulated request for dismissal with prejudice of all claims brought in the Dispute.
- The Port agrees that it shall be the sole Party for any Site-related Order, Statement of Work, or other binding agreement issued by any governmental agency.

E. PROJECT DETAILS

Scope of Project:

- All tasks necessary for cost recovery litigation associated with the former Brown & Haley/ Sound Mattress Site Project.
- All tasks necessary to complete the planning phase of cleanup including additional investigation actions, a Feasibility Study and Cleanup Action Plan (future authorization – not estimable)
- Cleanup Implementation (future authorization – not estimable)

F. FINANCIAL SUMMARY

Estimated Cost of Project

The total project cost that is currently estimable is \$1,237,678 which represents the cost to complete the cost recovery litigation. The remaining unspent project cost of \$292,322 will be allocated to the planning phase of cleanup.

Future costs for implementing a data gap investigation, feasibility study and cleanup action plan will be estimated following development of the data gaps work plan.

Future costs to implement the remedy are not estimable at this time. Additional Commission authorization will be requested to implement the future stages.

Cost Details

Item	This Request	Total Previous Requests	Total Request	Total Project Cost	Cost to Date	Remaining Cost
TOTAL	\$0	\$1,530,000	\$1,530,000	\$1,530,000	\$1,162,678	\$367,322

Source of Funds

The 2021-2025 Capital Investment Plan (CIP) allocates \$730,000 for this project.

Financial Impact

The \$7.2 million settlement will have no impact on the income statement but will be held to fund the planning phase of cleanup including additional investigation actions, a Feasibility Study and Cleanup Action Plan and Cleanup Implementation.

G. 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.

H. ALTERNATIVES CONSIDERED AND THEIR IMPLICATIONS

Alternative 1) Do Nothing. Under this scenario Wyeth and the Port would jointly work toward a cleanup action plan with Ecology, then likely continue the stayed litigation to determine allocation for cleanup implementation.

Alternative 2) This request.

Alternative 2 is the recommended course.

I. ENVIRONMENTAL IMPACTS/REVIEW

Permitting: Not Applicable

Remediation: This is a remediation project

Water Quality: Not Applicable

Air Quality: Not Applicable

J. 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
May 17, 2018	Commission Authorization for Settlement Agreement with Sound Mattress and Wyeth	Not Applicable
TOTAL		\$1,530,000

K. ATTACHMENTS TO THIS REQUEST

- Computer slide presentation.

L. NEXT STEPS

- Execute the Settlement Agreement.
- Finalize the Agreed Order with Ecology and return to Commission for Authorization to execute the order.
- Return to Commission to request authorization to reprogram previously authorized funds to begin preliminary work needed to develop a cleanup action plan for the Site.