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***VIA E-MAIL AND U.S. MAIL***

Mr. Jeff Scott  
Director  
Waste Management Division  
U.S. Environmental Protection Agency,  
Region IX  
75 Hawthorne Street  
San Francisco, California 94105

E-Mail: [jeff.scott@us.epa.gov](mailto:jeff.scott@us.epa.gov)

Re: Kettleman Hills Facility B-18/B-20 Expansion Project

Dear Mr. Scott:

I am writing on behalf of my client Chemical Waste Management, Inc. ("CWM") concerning the Kettleman Hills facility ("KHF") expansion project ("Project") in Kings County, California. On June 26, 2009, CWM submitted to EPA a permit application pursuant to the Toxic Substances Control Act ("TSCA") for the expansion of landfill B-18 operations ("Proposed Project") at the KHF. Under Section 7 of the Endangered Species Act ("ESA"), the EPA is required to consult with the U.S. Fish & Wildlife Service ("Service") to ensure that issuance of a TSCA permit for the Proposed Project would not jeopardize the continued existence of any federally listed species or result in adverse modification of critical habitat.

EPA and the Service have been in informal consultation on the Project since November of 2007. Both in the fall of 2009 and mostly recently in March of 2010, CWM anticipated that EPA's initiation of formal consultation was imminent. However, in the past two weeks, CWM has learned that EPA plans to undertake further unspecified review of the biological assessment for the Project for as yet unstated reasons and for an undetermined time.

CWM is very concerned about this further delay. CWM understands that EPA (and the public) have concerns about the Project that are separate and apart from the ESA issues. Consequently, EPA's review of the TSCA issues may necessarily be extended until the investigation into the Kettleman City issues is completed. For the reasons discussed in this letter, CWM hopes you will be able to separate those concerns from those that arise under the ESA and that you will proceed with formal Section 7 consultation without further delay.

To assist you in agreeing to move forward on initiating formal consultation, this letter discusses the results of the prior biological opinions the Service issued for KHF, the informal consultation to date and the conclusions reached in the Biological Assessment prepared during the informal consultation process. If EPA has any concerns about the measures needed to ensure compliance with the ESA, we believe they can be best addressed through the Section 7 process.

I. The Service Has Issued Three Biological Opinions for KHF.

The KHF has a long history of review and compliance with the ESA. The Service has already issued three biological opinions for the KHF to address the KHF's expansion in the early 1990s as well as the ongoing operations of the facility. Each resulted in a determination that the KHF construction and operation would neither jeopardize the continued existence of any listed species nor cause adverse modification to designated critical habitat.

These Biological Opinions established the following conservation requirements: preserve 876 acres of land owned by CWM; grant a conservation easement to the California Department of Fish & Game ("CDFG") for those lands; and acquire and convey 633 acres to the CDFG, including the establishment of a trust fund for the long-term maintenance of the 633 acres. These conservation requirements provide a 3:1 mitigation ratio for impacts to the habitat of the San Joaquin Kit Fox and the Blunt-nosed leopard lizard. Service Biological Opinion File No. 1-1-89-F-11, *Formal Endangered Species Consultation Concerning Proposed Construction on the Chemical Waste Management, Inc., Kettleman Hills Hazardous Waste Facility, Kings County, February 3, 1989*, (Covered the proposed construction of two hazardous waste management units and the grading of existing roads and firebreaks); Service Biological Opinion File No. 1-1-90-F-18, *Formal Endangered Species Consultation on the Chemical Waste Management, Inc., Kettleman Hills Hazardous Waste Facilities Operations, Kings County, California, May 2, 1991* ("May 1991 Biological Opinion") (Covering the B-18 Landfill); and Service Biological Opinion File No. 1-1-90-F-18(R), *Reinitiation of Formal Section 7 Consultation on the Operation of Chemical Waste Management's Hazardous Waste Facility in Kettleman Hills, Kings County, California, for a Water Pipeline and Firebreaks, November 22, 1991* ("November 1991 Biological Opinion"). These Biological Opinions remain in effect.

II. Informal Consultation on the Project Has Been Extensive.

The prior Biological Opinions do not address the B-18/B-20 Project that EPA is now considering. They do, however provide a lens through which to view the potential effects of the Project. CWM engaged EPA and the Service in discussions of the Section 7 process for this Project as soon as it was practicable. It did so with the goal of simplifying and expediting the Section 7 consultation by seeking to follow the process that had been used previously and by providing the same degree of protection for the potentially affected species that the Service had approved in the three prior Biological Opinions. The discussion which follows shows that the informal consultation has been extensive, that EPA has fully participated in the process, and that

the results of the studies conducted show that the effects of the Project on listed species will be minimal. EPA has information that exceeds the informational requirements of the ESA.

On July 10, 2007, after meeting on several occasions with USFWS staff about the B-18/B-20 Project, CWM representatives contacted EPA and requested a meeting to discuss the EPA's role in permitting the proposed expansion of Landfill B-18 and new construction of Landfill B-20 at KHF. EPA had previously authorized KHF to operate the chemical waste landfills and a storage unit for TSCA-regulated PCBs. KHF representatives specifically requested that EPA consider initiating Section 7 consultation with the Service, to the extent any impacts to listed species were anticipated.

EPA accommodated that request. On July 17, 2007, CWM representatives participated in a conference call with EPA and briefed EPA on prior PCB permitting at KHF, as well as KHF expansion plans and the status of the coordinated approval. CWM also informed EPA of the ongoing species protection issues being addressed with Service and CDFG under the 1991 Biological Opinions, and asked EPA what additional information EPA would need in order to initiate Section 7 consultation with the Service.

On August 13, 2007, CWM representatives provided a background memorandum and additional materials regarding the Proposed Project to EPA, at EPA's request.

On August 21, 2007, EPA participated in a conference call with CWM representatives, the Service and the CDFG. Ongoing species protection issues under the 1991 Biological Opinions and the Proposed Project were discussed, in order to educate EPA on species protection issues at KHF and to help EPA determine its role in permitting the Proposed Project at KHF.

On October 23, 2007, CWM representatives sent a follow-up letter to EPA providing additional background information including copies of correspondence with Service and CDFG on species protection issues, as requested, and asking EPA what next steps CWM representatives should take in order to facilitate Section 7 consultation.

On November 8, 2007, CWM representatives received a letter from EPA in which EPA agreed to pursue Section 7 consultation with the Service and clarified that the TSCA permitting process for PCBs would be "functionally equivalent" to the NEPA review process.

On January 3, 2008, CWM representatives provided draft correspondence to EPA to assist EPA with initiating Section 7 consultation. This draft correspondence was discussed in follow-up conversations between EPA and CWM representatives.

On January 15, 2008, EPA sent a letter to Service (with a copy to CDFG) requesting a meeting to informally discuss EPA's intention to undertake ESA Section 7 consultation for anticipated species effects and potential conservation to offset effects

associated with the Proposed Project in conjunction with CWM's application for a modified TSCA PCB approval for the Proposed Project. EPA also requested a list of species that may occur in the Kings County, California area in accordance with 50 CFR § 402.12(c). Under 50 CFR 402.12(h)(1), EPA is supposed to initiate Section 7 consultation within 180 days after it receives the list. The list was received in June of 2008.

On March 21, 2008, the Kings County Planning Agency issued the environmental document, *Draft Subsequent Environmental Impact Report: B-18/B-20 Hazardous Waste Disposal Project, Kettleman Hills Facility* (State Clearinghouse No. 2005041064), Volumes I and II (CH2M HILL, March 2008) ("Draft SEIR"), for public and agency review. The Draft SEIR evaluated impacts to biological resources including endangered and threatened species and required a 3:1 mitigation ratio consistent with the prior biological opinions. A supplemental document was later issued and recirculated for an additional 45-day public review and comment period to address refinements to the Proposed Project that resulted from more detailed engineering and design plans. No changes were made to the analysis of biological resource impacts or the required 3:1 mitigation. The Final SEIR incorporated changes from USFWS in response to comments received on the Draft SEIR. USFWS did not submit any additional comments during the CEQA process.

On April 10, 2008, CWM representatives met with Service, EPA and CDFG to begin informal discussion of the Section 7 consultation process and next steps for CWM. At this meeting, CWM representatives presented background on the Proposed Project (a summary background memorandum was provided at the meeting). The TSCA permitting application process and the status of CEQA environmental review, including the DSEIR, were also discussed (copies of the DSEIR were provided at the meeting). A memorandum summarizing this meeting was provided to attendees on May 6, 2008.

On June 26, 2008, CWM representatives participated in a conference call during which informal discussion of the Section 7 consultation process and next steps for CWM continued. KHF representatives provided an update on current operations and ongoing species protection at KHF, as well as an update on the CEQA review process and on the TSCA permitting status. A memorandum summarizing this conference call meeting was provided to call participants on August 19, 2008.

On June 26, 2009, CWM submitted to EPA a permit application pursuant to the TSCA for the Project at KHF. Soon thereafter, on July 9, 2009, CWM submitted a draft biological assessment to EPA IX. The document reviewed the available information on the potential impacts to the San Joaquin kit fox and blunt-nosed leopard lizard. It included as part of the project description the 3:1 mitigation and minimization measures required under the prior biological opinions and included in the DSEIR. It followed the suggested Biological Assessment template provided by the Service's Sacramento Field Office:  
<http://www.fws.gov/sacramento/es/consultations.htm>.

On September 18, 2009, EPA IX commented on the biological assessment and stated that the BA must include an Ecological Risk Assessment for Endangered Species using the PCB congener data ("PCB Congener study") that EPA was gathering during the KHF Congener Study. CWM objected to delaying initiation of consultation for this additional requirement, noting that the Section 7 process was to be based on available information and that if the Congener Study revealed new information relevant to endangered species, the consultation could be reopened to consider that information. EPA did not agree and delayed the Section 7 process pending completion of the PCB Congener study.

On September 21, 2009, CWM received verbal comments from EPA IX on the biological assessment and proceeded to incorporate those comments in the draft biological assessment. On October 27, 2009, EPA suggested revising scope of BA and consultation to address Phase I impacts only. These impacts are limited to moving the existing fence to enclose an additional 81 acres of habitat. The biological assessment was revised to separate the impacts by phase.

On October 28, 2009, EPA-IX received a draft ERA/Congener Study and on November 12, 2009, WM and EPA began biweekly progress meetings to discuss ERA/Congener Study.

On March 12, 2010, CWM submitted to EPA a revised draft Biological Assessment that addressed comments received from EPA. We understand that EPA may have coordinated these comments with the Service. The March 2010 revisions include the following changes:

- Added a discussion of San Joaquin woolly threads in the introduction, with explanation as to why this species would not be affected by the project;
- Added a description of how the project and the off-site conservation will be phased;
- Changed "mitigation measures" to "conservation measures";
- Revised the on-site conservation measures to match language in the FSEIR;
- Added language specifying that any personnel conducting activities on the Coalinga site must first attend the listed species educational program;
- Added a map of the Coalinga site showing the location for Phase I mitigation;
- Added a map showing fencing locations for B-18 and B-20; and
- Updated the species list for Attachment I.

On March 17, 2010, EPA said that other than two questions about the PCB Congener study, they were happy with both the PCB Congener study and the draft Biological Assessment. For the PCB Congener study, EPA said that there were a couple of "typos", but that

that EPA will just ask for those to be corrected in the final, and that they will not hold up the release of the Biological Assessment to the Service.

At that time, CWM understood that initiation of formal consultation was imminent. However, in early April, CWM learned that EPA was further delaying the initiation of formal consultation to allow further unspecified peer review. The sole basis given for yet another review of the Biological Assessment is that the Project is controversial.

### III. The Project Will Not Cause Jeopardy or Take of Protected Species.

The conclusions of the revised Biological Assessment are similar to the conclusions the Service reached in the prior Biological Opinions. The key conclusion is that the development of the Phase I project can likely be accomplished without causing any take of either the kit fox or blunt nosed leopard lizard. The overall conclusions are as follows:

#### *1.1 San Joaquin Kit Fox*

The Proposed Project is not expected to appreciably reduce the numbers, reproduction, or distribution of this species, and is not likely to appreciably reduce the likelihood of the species' survival and recovery in the wild. This conclusion has been reached because:

1. On-site conservation measures proposed as part of the project description will minimize impacts to the San Joaquin kit fox during construction, and operation activity is not likely to kill or harm any San Joaquin kit fox.
2. Only approximately 0.04 percent of the potential habitat within the satellite population would be impacted, and large, unfragmented blocks of kit fox habitat would remain on the 1,600 acre KHF site outside of the fence, as well as on surrounding lands. Furthermore, the proposed conservation measures provide preservation and management of relatively large, unfragmented blocks of suitable kit fox habitat in perpetuity, at a ratio of up to 3:1, which will offset any adverse impacts from the Proposed Project.
3. The Action Area is not within any pinch points for kit fox habitat connectivity.
4. The Proposed Project will not preclude the implementation of any measures outlined in the Recovery Plan as necessary for the recovery of this species.

The Proposed Project will not adversely modify critical habitat for the San Joaquin kit fox because critical habitat has not been formally designated for this species.

## ***1.2 Blunt-Nosed Leopard Lizard***

The Proposed Project is not likely to adversely affect the blunt-nosed leopard lizard. This conclusion has been reached because surveys indicate the Action Area is not occupied by the blunt-nosed leopard lizard and the habitat is not currently suitable.

This conclusion has been reached because:

1. To avoid any take of the species through harm or harassment if the on-site habitat were to become suitable and occupied, the Proposed Project will implement the conservation measures described in section 3.3 designed to discourage establishment of the species in the potential impact area, including fencing with exclusionary flashing.
2. Preserving in perpetuity habitat for the San Joaquin kit fox, an umbrella species as described in the Recovery Plan, will offset any adverse impacts to the blunt-nosed leopard lizard from the Proposed Project.
3. The Proposed Project will not preclude the implementation of any measures outlined in the Recovery Plan as necessary for the recovery of this species.

The Proposed Project will not adversely modify critical habitat for the blunt-nosed leopard lizard because critical habitat has not been formally designated for this species.

## ***1.3 Proposed Project Consistency with Recovery Plan***

The Proposed Project is consistent with the Recovery Plan.

The Proposed Project would not preclude habitat connectivity or exceed the preservation threshold for the Kettleman Hills satellite population. Furthermore, dedication of private land in the Pleasant Valley San Joaquin kit fox satellite population that provides habitat values for the kit fox, through easement or equivalent mechanism to be approved by the USFWS, is the first element of the "Ecosystem-Level Strategy" outlined in the Recovery Plan.

## **IV. Formal Section 7 Consultation Is the Appropriate Process for Evaluating Project Impacts on Protected Species.**

As described above, the Project has a long history of review under the ESA. CWM, the Service, CDFG and EPA have spent many years in informal consultation. CWM complied with EPA's requests for more information associated with the Congener study. It has revised the Biological Assessment as EPA requested in the fall of 2009. CWM believes that the information that is now available on impacts to listed species is robust and exceeds all


requirements. It clearly appears that moving the fence to allow B-18 landfill construction can proceed without causing take.

The ESA and its implementing regulations provide a process for the Service to thoroughly assess the potential impact of the proposed Project on endangered or threatened species. The Service is the appropriate body to analyze and evaluate these impacts. To the extent there are any unresolved ESA issues, the formal consultation process using the expertise of the Service is the proper avenue to resolve those issues. There is no need or basis to delay initiating consultation with the Service.

V. Requested Action

We hope this information is helpful. We ask that you proceed with initiation of formal consultation without further delay. At a minimum, CWM requests the EPA provide a written explanation of what EPA is doing to process its request and inform CWM of when EPA will initiate consultation and submit the Biological Assessment to the Service. Thank you for consideration of this request. We appreciate your assistance on this matter.

Very truly yours,

  
Robert J. Uram

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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