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March 9, 2018

Honorable Robert Renny Cushing
Honorable Mindi Messmer
Honorable Philip Bean
Honorable Michael Edgar
State House
Concord, NH 03301

Re: Coakley Landfill Group

Dear Representatives:

This letter responds to yours of February 19 and March 5, 2018 concerning the Coakley Landfill Group and addressed to Attorney General Gordon J. MacDonald and me. Thank you for providing us with extensive materials to assist in our review. The following is the response of the Office of the Attorney General to the issues raised in your correspondence.

FACTUAL BACKGROUND

Some background concerning the Coakley Landfill is needed in order to provide better context for this letter.

Coakley Landfill – EPA Enforcement

According to the Site Profile appearing on the website of the United States Environmental Protection Agency (EPA), the Coakley Landfill was a privately owned and operated 27 acre facility located at 480 Breakfast Hill Road in North Hampton. It accepted municipal and industrial wastes from 1972 through 1985. Due to contamination emanating from the site, EPA began enforcement activity pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601 et seq. The Coakley Landfill was added to the National Priorities List of Superfund Sites on June 10, 1986. The site has been administered by EPA's Boston office since that time, with assistance provided by the New Hampshire Department of Environmental Services (DES).

On June 28, 1990, EPA issued its Record of Decision (ROD) which encompassed the remedial action plan deemed necessary for the cleanup of the Coakley Landfill. The plan

included a requirement to pump and treat contaminated groundwater. The ROD became the basis for a consent decree with the potentially responsible parties (PRPs). The decree required them to administer and pay for the cleanup of the site, subject to EPA oversight. The consent decree was executed by all parties and approved by United States District Judge Shane Devine on May 4, 1992 (United States District Court for the District of New Hampshire No. 92-123-D). The cleanup activities pursuant to that decree became known as Operable Unit One.

After several years of cleanup under Operable Unit One, the same parties entered into a consent decree, which became known as Operable Unit Two. That consent decree did not require a pump and treat remedy, but rather a less costly cap and monitor remedy, whereby the Coakley Landfill would be capped and the parties would thereafter use monitoring wells to test for the level and migration of pollutants. The second consent decree was executed by all parties and approved by Judge Shane Devine on January 11, 1999 (United States District Court for the District of New Hampshire No. 98-cv-00600-D).

Coakley Landfill Group – Participation Agreements

Under the consent decrees, the settling PRPs each became jointly and severally liable for the entire performance of the cleanup activities at the Coakley Landfill and for the payment of those costs. The consent decrees did not allocate among the PRPs the responsibility for operations and for payment. The parties among themselves agreed to apportion their responsibility through a separate Coakley Landfill Group Participation Agreement dated September 27, 1991 (Participation Agreement). The signatories of the Participation Agreement became Members of what they labeled the Coakley Landfill Group. They allocated percentage payment responsibility for Shared Costs of cleanup and administration and divided the group into classes: Municipal Members, [Waste] Generator Members and Transporters.

Under the Participation Agreement, one representative from each class was chosen to serve on the Executive Committee. The Executive Committee was then delegated the authority to enter into contracts on behalf of the Group for remediation-related activities, to retain a project manager, to retain common legal counsel and consultants, to negotiate with EPA and others, and to enforce each Member's proportional obligation for payment of Shared Costs.

Under Attachment 3 of the Participation Agreement, the Municipal Members were assigned 63.077% responsibility among the PRPs. That allocation was divided among the City of Portsmouth (53.553%), Town of North Hampton (4.062%) and Town of Newington (5.462%).

The PRPs later entered into the Coakley Landfill Group OU-2 Participation Agreement (OU-2 Participation Agreement). The OU-2 Participation Agreement contained terms similar to the Participation Agreement and governed the allocation of the Members' cleanup activities under Operable Unit Two.

The Participation Agreements were entered into solely by the PRPs. Neither EPA nor the State of New Hampshire is a party. The Participation Agreements do not appear among the Site Documents included in the EPA's site profile for the Coakley Landfill.

Coakley Landfill Group - Trust Agreements

Article 7 of the Participation Agreement contemplated the establishment of a separate Coakley Landfill Superfund Site Trust Agreement (Trust Agreement). All Member payments pursuant to the consent decrees would then become payable to the Trustee.

As of February 7, 1991, the Members of the Group entered into the Trust Agreement. The Trustee was Fleet Bank-NH and the Grantors of the Trust Agreement were the PRPs that had entered into the Participation Agreement. Under the terms of the Trust Agreement, each Member was responsible to make payments to the Trustee as called for by the Participation Agreement. The Executive Committee of the Group then directed the Trustee concerning distributions to be made with respect to the activities of the Group. Upon the termination of the consent decree, any remaining funds held by the Trustee would be returned to the Members in proportion to their relative share.

In the consent decree for Operable Unit One, the PRPs agreed to undertake cleanup activities that exposed them to unspecified financial liability. Certain federal agencies also contributed waste to Coakley Landfill, but were not included among the PRPs. Instead, the United States government agreed to make a lump sum payment on their behalf of $5.25 million, payable to the Trustee. The consent decree provided that up to $2.75 million of that amount was refundable to the United States depending on the amount that the Group paid for a groundwater treatment or containment system.

As of October 6, 1998, the Members entered into the Coakley Landfill Superfund Site OU-2 Trust Agreement (OU-2 Trust Agreement). The OU-2 Trust Agreement contained terms similar to the Trust Agreement and governed the payments by Members to the Trustee and the distributions by the Trustee in furtherance of the activities of the Group. The Trustee was Piscataqua Savings Bank.

The Trust Agreements were entered into solely by the PRPs. Neither EPA nor the State of New Hampshire is a party. The Trust Agreements do not appear among the Site Documents included in the EPA's site profile for the Coakley Landfill.

Recent Activity

Groundwater monitoring at the Coakley Landfill has identified the presence of additional contaminants, including PFOA, PFOS, and 1,4-dioxane. Residents in area communities are concerned whether additional monitoring or treatment should be required at the site.

ISSUES RAISED

Your letters and related communications raise several issues that deserve careful consideration.

Charitable Trust

Your letters suggest that the Coakley Landfill Group is a charitable trust, and therefore is required to register with and report to the Director of Charitable Trusts pursuant to RSA 7:28, I and II. Entities that meet the definition of charitable trusts and charitable organizations have that responsibility. The reports include a financial statement, a list of directors and a disclosure of any conflict of interest transactions.

To determine whether the Coakley Landfill Group meets the definition of a charitable trust, some discussion is in order regarding the nature of charitable trusts. RSA 7:21, II(a) defines "charitable trust" to be a fiduciary relationship relating to assets "for any charitable, nonprofit, educational or community purpose." RSA 7:21, II(b) defines "charitable organization" to include any Internal Revenue Code §501(c)(3) organization; any entity holding itself out as having a "benevolent, philanthropic, patriotic, educational, humane, scientific, public health, environmental conservation, civic or other charitable purpose"; and any charitable appeal for solicitation of funds.

The statutory definitions leave room for interpretation. In considering whether a particular group is charitable, the CTU is guided by court decisions, treatises and Internal Revenue Service materials. There are several factors that the CTU considers in making determinations about whether or not an entity is charitable:

- The stated purpose falls within those of traditional charities or is a reasonable extension thereof;
- The charity benefits an indefinite class, and not identified members;
- The charity does not convey a private benefit to individuals;
- The charity's assets are not distributed to private persons upon dissolution.

In this case, the Coakley Landfill Group was established to facilitate the management of and payment for the cleanup of the site. The Coakley Landfill is a Superfund Site and is therefore among the most polluted hazardous waste sites in the United States. Its remediation is a public good, and potentially could fall within the "environmental conservation" purpose enumerated in RSA 7:21, II(b).

However, the Group was created to benefit a specific class: the municipalities, generators, and transporters responsible for the pollution at the Coakley Landfill. They were named as defendants and found legally liable for the cleanup of the landfill, as required by CERCLA. The Group has no choice but to clean up the site; they risk contempt of court orders for failing to do so. Therefore, the Group is unlike conservation groups in New Hampshire, such as Southeast Land Trust or the Society for the Protection of New Hampshire Forests. Those organizations are comprised of people and resources that come together voluntarily to promote a cleaner environment. There is nothing voluntary about the origins of the Coakley Landfill Group. It is a solution crafted to facilitate the performance of a legal obligation.

The Coakley Landfill Group was also created to provide private benefits to its members. By pooling resources, the Members can most economically satisfy their legal obligations. And the Group's members stand to benefit should any funds remain upon completion of the cleanup. The Trust Agreements provide that any funds held by the Trustee at the termination of the consent decrees will be returned to the Members in proportion to their relative share.

While not dispositive for the CTU, the Coakley Landfill Group also would not be eligible for treatment as a public charity under §501(c)(3). The federal limitations prohibit private inurement to those operating the organization and limit the amount of private benefit to designated persons. And the federal limitations require distribution of assets on dissolution solely to another §501(c)(3) organization.

The CTU therefore does not find that the Coakley Landfill Group meets the definition of a charitable trust, and it would decline to register the Group should it ever apply for such a status. Because the Coakley Landfill Group is not a charitable trust, the CTU has no authority to conduct an investigation into its activities.

If the Coakley Landfill Group is not a charitable trust, then what is it? The answer is twofold. The Participation Agreements create what could be called a joint venture, i.e. a contract among the Members to perform a designated set of tasks. The Trust Agreements create private trust relationships between the Members as the Grantors of the Trusts supplying the funds and the Trustee holding and paying out the funds in accordance with the Trust Agreements.

Right-to-Know

Your letter also touches on the fact that three of the Members of the Coakley Landfill Group are municipalities. As such, they are subject to New Hampshire's Right-to-Know Law, RSA Chapter 91-A. You submitted a letter request to the City of Portsmouth on January 31, 2018 for records relating to the Coakley Landfill Group. Portsmouth City Attorney Robert P. Sullivan wrote you on February 7, 2018 that the responsive records may fill 100 bankers boxes. We understand that the City's production of records is forthcoming.

The Office of the Attorney General does not provide legal advice either to municipalities or to members of the public with respect to Right-to-Know Law issues. While the Office issues a Right-to-Know Memorandum for the benefit of the public, the statute does not appoint the Attorney General as the counsel to members of the public seeking records from a government agency. Instead, RSA 91-A:7 and A:8 create procedures whereby those requesting public records can seek relief directly on their own behalf.

Cleanup Spending

Finally, your letter asks about funds advanced to the Group by the state and federal governments. You inquire whether any of the funds need to be repaid because the Group has not conducted a pump and treat remedy. That is a question best posed either to EPA or DES directly.

CONCLUSION

We appreciate your diligence in representing constituents concerned about the effects of groundwater contamination from the Coakley Landfill. To get the answers you seek, we first recommend you review the records produced by the City of Portsmouth. Much of the information relevant to your question, including information on loan amounts, repayment, and project performance, also appears to be publicly available at the relevant agencies and on public websites. You may consider engaging with staff at EPA and DES familiar with the site. We understand that Michael Wimsatt, Waste Division Director at DES is best able to provide you with the appropriate contacts for information held by DES. He can be reached at 29 Hazen Drive, Concord, 603-271-2925. They are most familiar with the contamination and related technical issues.

Very truly yours,

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TJD/d
cc: Attorney General Gordon J. MacDonald
Hon. John T. O'Connor