

FILED

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

2003 MAY 23 PM 12: 29

U.S. EPA, REGION IX
REGIONAL HEARING CLERK

IN THE MATTER OF: THE BKK)
LANDFILL, WEST COVINA,)
CALIFORNIA)
)
UNDER THE AUTHORITY OF THE)
COMPREHENSIVE ENVIRONMENTAL)
RESPONSE, COMPENSATION, AND)
LIABILITY ACT OF 1980, 42 U.S.C.)
§ 9601, et seq., as amended, AND THE)
SOLID WASTE DISPOSAL ACT,)
COMMONLY REFERRED TO AS THE)
RESOURCE CONSERVATION AND)
RECOVERY ACT OF 1976, 42 U.S.C.)
§ 6901, et seq., as amended.)
_____)

U.S. EPA Docket No.:
RCRA-9-2003-0005; CERCLA-9-2003-07

AGREEMENT AND COVENANT
NOT TO SUE THE CITY OF WEST
COVINA, CALIFORNIA

I. INTRODUCTION

This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and between the United States on behalf of the Environmental Protection Agency ("EPA") and the City of West Covina, a municipal corporation, (collectively, the "Parties").

This Agreement is entered into pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9601, et seq. and the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984, ("RCRA"), 42 U.S.C. § 6901, et seq. and the authority of the Attorney General of the United States to compromise and settle claims of the United States.

The City of West Covina, a municipal corporation, ("Settling Respondent") is a duly authorized municipal corporation. The BKK Corporation ("BKK") is the owner and operator of the BKK hazardous waste landfill, which is located at 2210 South Azusa Avenue, West Covina,

California, 91792, wholly within the boundaries of the City of West Covina, California. Settling Respondent has certain land use authority over the Site, as defined herein, as well as certain Local Enforcement Authority over a portion of the Site. The Site is part of a redevelopment project area duly established by the Redevelopment Agency of the City of West Covina (the "Agency"). The Agency desires to purchase Parcels 1 and 2 of the Site (the "Property") from BKK and plans to develop a portion of Parcel 1 of the Property for sports park activities, plans to sell or license another portion of Parcel 1 of the Property for commercial development and plans to develop Parcel 2 of the Property (along with Lot 5 and a portion of Parcel 3) as a municipal golf course. A certain portion of Parcel 1 may also be set aside as habitat for the threatened California gnatcatcher. The Agency also desires to purchase Lot 5, which is not part of the Site, from BKK and desires to enter into a licensing agreement with BKK in order to use a portion of Parcel 3, which is part of the Site, for the golf course.

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained in Sections VIII, IX, X, and XI, the potential liability of the Settling Respondent for the Existing Contamination at the Property which would otherwise result from Settling Respondent becoming the owner of the Property.

The Parties agree that the Settling Respondent's entry into this Agreement, and the actions undertaken by the Settling Respondent in accordance with the Agreement, do not constitute an admission of any liability by the Settling Respondent.

The resolution of this potential liability, in exchange for provision by the Settling Respondent to EPA of a substantial benefit, is in the public interest.

II. DEFINITIONS

Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or RCRA, or in regulations promulgated under CERCLA or RCRA, shall have the meaning assigned to them in CERCLA, RCRA or in such regulations, including any amendments thereto.

1. "Agency" shall mean the Redevelopment Agency of the City of West Covina, California.
2. "BKK" shall mean the BKK Corporation.
3. "Documents" shall mean papers, information, memoranda, letters, studies, reports, handwritten or typed notes, facsimile compilations, electronic mail, recordings, tapes and all other types of records.
4. "DTSC" shall mean the California Department of Toxic Substances Control and any successor departments or agencies of the State of California.
5. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.
6. "Existing Contamination" shall mean the following:
 - a. any hazardous wastes within the meaning of RCRA § 3008(h), hazardous substances, pollutants or contaminants present or existing on or under the Property as of the effective date of this Agreement;
 - b. any hazardous wastes within the meaning of RCRA § 3008(h), hazardous substances, pollutants or contaminants that migrated from the Property prior to the effective date of this Agreement; and
 - c. any hazardous wastes within the meaning of RCRA § 3008(h), hazardous

substances, pollutants or contaminants presently at the Site that migrate onto or under or from the Property after the effective date of this Agreement.

For the purposes of this definition, the term "existing contamination" excludes any hazardous wastes within the meaning of RCRA § 3008(h), hazardous substances, pollutants or contaminants for which the Settling Respondent is liable, other than as an "owner" of the Property as the term "owner" is used under CERCLA Section 107(a), 42 U.S.C. §9607(a), or RCRA Section 3008(a), 42 U.S.C. §6928(a), and/or defined in 40 C.F.R. § 260.10.

7. "Final Settlement Costs" shall mean those closing costs and prorations to be paid by or charged against BKK under the Purchase Agreement, including, without limitation, escrow fees, title insurance premiums, recording fees, documentary transfer taxes, prorations of taxes and expenses and any and all other costs and expenses to be paid by BKK at closing, all pursuant to Section 6 of the Purchase Agreement.

8. "Final Workplan" means the Final Workplan described in Section III of the First Consent Order Modification (Submittal of Monitoring Plan for Development), which will implement the Environmental Monitoring Protocol attached to and defined in the First Consent Order Modification.

9. "First Consent Order Modification" shall mean the First Modification to Administrative Order on Consent (U.S. EPA Docket No. RCRA-9-2000-0003) entered into between BKK and EPA, effective January 22, 2002.

10. "Institutional Controls" shall mean the Environmental Restrictions recorded with the Recorder's Office of Los Angeles County, California on May 29, 2001 applicable to the Property, and any modifications thereto, copies of which are attached hereto as Exhibit 1 of this

Agreement.

11. "Lot 5" shall mean the real property located adjacent to the Site, encompassing approximately 73.1 acres, which is described in Exhibit 2 of this Agreement.
12. "Monitoring Protocol Funds" shall mean the four hundred and twenty-thousand dollars (\$420,000.00) of the net proceeds of the sale of the Property and Lot 5 pursuant to the Purchase Agreement, plus any interest earned on said four hundred and twenty-thousand dollars (\$420,000.00), to be used for the purpose of implementing, and/or purchasing financial assurance for the implementation of, the Final Workplan in accordance with First Consent Order Modification, all in accordance with the Site Funds Escrow Agreement.
13. "Parcel 1" shall mean that portion of the Site, encompassing approximately 101.198 acres, which is described in Exhibit 3 of this Agreement.
14. "Parcel 2" shall mean that portion of the Site, encompassing approximately 56.84 acres, which is described in Exhibit 4 of this Agreement.
15. "Parcel 3" shall mean that portion of the Site, encompassing approximately 425.172 acres, which is described in Exhibit 5 of this Agreement.
16. "Parties" shall mean the United States on behalf of EPA and the Settling Respondent.
17. "Property" shall mean that portion of the 583-acre Site encompassing both Parcel 1 and Parcel 2.
18. "Purchase Agreement" shall mean that certain Agreement of Purchase and Sale and Joint Escrow Instructions, dated as of June 27, 2002, by and between the Agency as Purchaser and BKK as seller, and any and all amendments thereto, which agreement and its amendments are all attached hereto as Exhibit 6.

19. "Release" shall have the meaning given it under both CERCLA Section 101(22), 42 U.S.C. § 9601(22), and RCRA Section 3008(h), 42 U.S.C. § 6928(h).

20. "Remaining Funds" shall mean the funds deposited into the Site Funds Escrow, excluding the Monitoring Protocol Funds, plus any interest earned on such funds.

21. "Sale Escrow Holder" shall mean First American Title Company, which is the Escrow Holder as defined in the Purchase Agreement.

22. "Second Consent Order Modification" shall mean the Second Modification to Administrative Order on Consent (U.S. EPA Docket No. RCRA-9-2000-0003) to be entered into between BKK and EPA.

23. "Security Agreements" shall mean the security agreements to be entered into by and between EPA and BKK and DTSC and BKK, respectively, in substantially the same form as the documents attached hereto as Exhibit 11 and Exhibit 12, respectively.

24. "Settling Respondent" shall mean the City of West Covina, California, a municipal corporation, including without limitation the Agency.

25. "Site" shall mean the BKK Landfill RCRA facility encompassing approximately 583 acres, located at 2210 South Azusa Avenue, in West Covina, Los Angeles County, California, and depicted generally on the map attached as Exhibit 7. The Site shall include the contiguous 583 acres of real property which, at the time it was split into three separate legal parcels (Parcels 1, 2 and 3) by the recording of a final parcel map on May 29, 2001 with the Recorder's Office of Los Angeles County, California, was owned by BKK. The Site includes: the closed hazardous waste landfill ("Class I landfill"), consisting of approximately 190 acres, where hazardous wastes were disposed of up until December 1, 1984; the adjacent inactive municipal solid waste landfill ("Class III landfill"), consisting of approximately 170 acres, which

was operated from 1987 to 1996; a leachate treatment plant; and gas combustion and energy recovery facilities. The Site also includes the Property, and all areas to which hazardous wastes within the meaning of RCRA § 3008(h), hazardous substances and/or pollutants or contaminants, have come to be located.

26. "Site Funds Escrow" shall mean the escrow accounts subject to the Site Funds Escrow Agreement.

27. "Site Funds Escrow Agreement" shall mean the agreement to be entered into by and between BKK, Settling Respondent and Wells Fargo Bank in substantially the same form as the document attached hereto as Exhibit 8.

28. "Supplemental Escrow Instructions" shall mean the Third Amendment to Agreement of Purchase and Sale and Joint Escrow Instructions to be delivered to the Sale Escrow Holder in accordance with the provisions of this Agreement, a true and correct copy of which is attached hereto as part of Exhibit 6.

29. "United States" shall mean the United States of America, its departments, agencies, and instrumentalities.

III. STATEMENT OF FACTS

30. On May 29, 2001, the RCRA facility was divided by BKK into three separate legal parcels (commonly known as Parcels 1, 2, and 3) by the recording of a final parcel map with the Recorder's Office of Los Angeles County, California.

31. Also on May 29, 2001, the Institutional Controls, which were signed by DTSC, Settling Respondent and BKK, were recorded with the Recorder's Office of Los Angeles County, California on the Property.

32. The Settling Respondent contemplates a development of a sports park on a

portion of Parcel 1 of the Property, contemplates selling or licensing another portion of Parcel 1 of the Property for commercial development, and contemplates development of a municipal golf course on Parcel 2 of the Property, Lot 5 and the portion of Parcel 3 subject to the licensing agreement between BKK and the Settling Respondent.

33. The Settling Respondent represents, and for the purposes of this Agreement EPA relies on those representations, that Settling Respondent's involvement with the Property and the Site has been limited to the following: landfill related actions at the Site pursuant to its land use authority under the California Government Code; landfill related inspection and enforcement actions at the Site pursuant to its Local Enforcement Agency designation under the California Public Resources Code; and other landfill related actions at the Site pursuant to and in its capacity as a municipal corporation.

IV. PAYMENT

34. In consideration of and in exchange for the United States' Covenant Not to Sue in Section IX herein, Settling Respondent agrees to execute and deliver, and shall use its best efforts to cause BKK to execute and deliver, valid supplemental escrow instructions to the Sale Escrow Holder instructing the Sale Escrow Holder at close of Escrow (as defined in the Purchase Agreement) to:

(A) Pay in full: (i) all amounts due and payable under that certain Promissory Note, dated October 22, 2001, in the original principal amount of three million dollars (\$3,000,000.00), executed by BKK to the order of South Bay Bank, NA as secured by that certain Deed of Trust dated October 22, 2001, executed by BKK for the benefit of South Bay Bank, NA, filed of record in the Official Records of Los Angeles County, California on October 30, 2001, as Instrument No. 2001-2067839, and (ii) all amounts then due and payable under that

certain Non-Negotiable Promissory Note, dated April 15, 1996, in the original principal amount of three million, five-hundred thousand dollars (\$3,500,000.00), executed by BKK to the order of the City;

(B) Pay all Final Settlement Costs; and

(C) Deposit the remainder of the Purchase Price (as that term is defined in the Purchase Agreement) into the Site Funds Escrow on the Closing Date (as that term is defined in the Purchase Agreement). The funds distributed from the Site Funds Escrow are to be used as follows: (i) the Monitoring Protocol Funds are to be used by BKK or the Settling Respondent to perform the monitoring described in, and required of BKK pursuant to, the First Consent Order Modification or to purchase financial assurances to implement said monitoring or are to be deposited into a Superfund Special Account managed by EPA; and (ii) the Remaining Funds are to be used by BKK strictly in accordance with the requirements of Section 10(d)(ii) of the Purchase Agreement and the provisions of the Site Funds Escrow Agreement or are to be deposited into the Removal and Remediation Activity Account managed by DTSC, all in accordance with the Site Funds Escrow Agreement.

35. In accordance with the Site Funds Escrow Agreement, EPA agrees that it shall provide the written concurrence or written explanation as to no concurrence on any written proposal regarding any addition or modification to the Site Funds Escrow Agreement no later than five (5) business days following the receipt of a such written proposal. Such written concurrence or written explanation as to no concurrence on any such written proposal shall be signed by an Associate Director of EPA's Waste Management Division, which shall not be unreasonably withheld.

36. In accordance with Section X (Reservation of Rights) of this Agreement, it is

understood and agreed by the parties that, should the fully executed Supplemental Escrow Instructions fail to be delivered to the Sale Escrow Holder in accordance with paragraph 34 of this Agreement, or should the monies fail to be deposited into the Site Funds Escrow in accordance with the Supplemental Escrow Instructions or should the monies deposited into the Site Funds Escrow fail to be used in accordance with the requirements of Section 10(d)(ii) of the Purchase Agreement, the Site Funds Escrow Agreement and paragraph 34 of this Agreement, the covenant not to sue set forth in Section IX (United States' Covenant Not to Sue) of this Agreement shall be null and void and the United States reserves all rights it may have.

V. WORK TO BE PERFORMED

37. Settling Respondent agrees that, should BKK fail to submit and/or fully implement the Final Workplan in accordance with and as required by the First Consent Order Modification, Settling Respondent shall submit and/or fully implement the Final Workplan in accordance with the First Consent Order Modification for so long as and to the extent funds are available to Settling Respondent for this purpose under: (i) the Site Funds Escrow (with respect to the Monitoring Protocol Funds); (ii) any financial assurance mechanism purchased with the Monitoring Protocol Funds; or (iii) any financial assurance mechanism established for the purpose of ensuring the implementation of the Final Workplan in accordance with the Second Consent Order Modification. Settling Respondent agrees to obtain all necessary approvals from EPA and abide by all approved schedules relating to submittal and implementation of the Final Workplan that BKK would have otherwise have been obligated to abide by or obtain. Settling Respondent intends to perform the work required under this Section V (Work to be Performed) through duly retained environmental consultants. It is understood and agreed by the parties that, in the event no funds described in this paragraph are available to Settling Respondent to submit

or fully implement the Final Workplan, Settling Respondent shall have no further obligations under this Section V with respect to fully implementing the Final Workplan.

38. The Site Funds Escrow Agreement requires that, if an "Event of Default" occurs under either of the Security Agreements prior to disbursement of all funds from the Site Funds Escrow, the Agency, DTSC and/or EPA shall direct the escrow holder for the Site Funds Escrow in writing to: (1) disburse any portion of the Monitoring Protocol Funds remaining in the Site Funds Escrow to a Superfund Special Account to be established by EPA pursuant to the provisions of CERCLA; and (2) disburse the remainder of the funds in the Site Funds Escrow to the Removal and Remediation Activity Account managed by DTSC to fund activities at the Site. In such an event, and notwithstanding paragraph 34(C) of this Agreement, EPA shall use any funds deposited into a Superfund Special Account consistent with the list of "Permitted Disbursements" attached as Exhibit "A" to the Site Funds Escrow Agreement. It is understood and agreed by the Parties that, upon the deposit of any such funds into a Superfund Special Account, Settling Respondent shall have no further obligations under this Section V (Work to be Performed) with respect to the Monitoring Protocol Funds.

VI. ACCESS/NOTICE TO SUCCESSORS IN INTEREST

39. Commencing upon the date that it acquires title to the Property, Settling Respondent agrees to provide to EPA and DTSC, their authorized officers, employees, representatives, and all other persons, including but not limited to BKK, performing response actions, remedial activities, or any other activity taken pursuant to, or authorized by, CERCLA or RCRA under EPA or State oversight, an irrevocable right of access at all reasonable times to the Property, Lot 5 and to any other property to which access is required for the implementation of such activities at the Site, to the extent access to such other property is controlled by the

Settling Respondent, for the purposes of performing and overseeing such activities at the Site under Federal or State law. EPA agrees to provide reasonable notice to the Settling Respondent of the timing of such response actions, remedial activities, or any other activity taken pursuant to, or authorized by, CERCLA or RCRA to be undertaken at the Property, Lot 5 or such other property subject to this provision. EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with Settling Respondent's use of the Property, Lot 5 or such other property subject to this provision by such entry and activities. Notwithstanding any provision of this Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulation, including any amendments thereto.

40. The Settling Respondent shall ensure that assignees, successors in interest, lessees, and sublessees of the Property shall provide the same access and cooperation and shall comply with the Institutional Controls. The Settling Respondent shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property are consistent with this Section, Section V (Work to be Performed), and Section XII (Parties Bound/Transfer of Covenant) of the Agreement.

VII. DUE CARE/COOPERATION

41. The Settling Respondent shall exercise due care at the Site with respect to the Existing Contamination and shall comply with the requirements of the Institutional Controls and all applicable local, State, and Federal laws and regulations. The Settling Respondent recognizes that the implementation of response actions, remedial activities, or any other activity taken

pursuant to, or authorized by, CERCLA or RCRA at the Site may interfere with the Settling Respondent's use of the Property and/or Lot 5, and may require closure of its operations or a part thereof. The Settling Respondent agrees to cooperate fully with EPA in the implementation of response actions, remedial activities, or any other activity taken pursuant to, or authorized by, CERCLA or RCRA at the Site and further agrees not to interfere with such activities. EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with the Settling Respondent's use of the Property by such entry and activities. In the event the Settling Respondent becomes aware of any action or occurrence which causes or threatens a Release of hazardous wastes within the meaning of RCRA § 3008(h), hazardous substances, pollutants or contaminants at, under or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Respondent shall immediately take all appropriate action to prevent, abate, or minimize such Release or threat of Release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. §9603, or any other law, immediately notify EPA of such Release or threatened Release. Settling Respondent also agrees to cooperate fully in being named as an additional insured, or additional payee, or otherwise being identified as an entity to whom the funds for the preparation and/or implementation of the Final Workplan will be made available in accordance with this Agreement and the Second Consent Order Modification.

VIII. CERTIFICATION

42. By entering into this Agreement, the Settling Respondent certifies that to the best of its knowledge and belief it has never owned Parcel 1 or Parcel 2 prior to the effective date of this Agreement. If the United States determines that information provided by Settling

Respondent is not materially accurate and complete, the Agreement, within the sole discretion of the United States, shall be null and void and the United States reserves all rights it may have.

IX. UNITED STATES' COVENANT NOT TO SUE

43. Subject to the Reservation of Rights in Section X of this Agreement, upon payment of the amount specified in Section IV (Payment) of this Agreement and contingent upon satisfactory compliance with the terms of this Agreement, on and subsequent to the effective date of this Agreement, the United States covenants not to sue or take any other civil or administrative action against Settling Respondent for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a), or Sections 3008(h) of RCRA, 42 U.S.C. § 6928, with respect to the Existing Contamination.

44. Consistent with the definition of "Existing Contamination" set forth herein, this covenant not to sue is intended to extend only to any liability Settling Respondent may have for Existing Contamination under either RCRA or CERCLA as an owner of Parcel 1 and as an owner of Parcel 2. It is not intended to extend to any other possible liability Settling Respondent may have with respect to the Site.

X. RESERVATION OF RIGHTS

45. The covenant not to sue set forth in Section IX above does not pertain to any matters other than those expressly specified in Section IX (United States' Covenant Not to Sue). The United States reserves and the Agreement is without prejudice to all rights against Settling Respondent with respect to all other matters, including but not limited to, the following:

- (a) claims based on a failure by Settling Respondent to meet a requirement of this Agreement, including but not limited to Section IV (Payment), Section V (Work

to be Performed), Section VI (Access/Notice to Successors in Interest), Section VII (Due Care/Cooperation), and Section XV (Payment of Costs);

- (b) any liability resulting from past or future Releases of hazardous wastes within the meaning of RCRA § 3008(h), hazardous substances, pollutants or contaminants, at or from the Site caused or contributed to by Settling Respondent, its successors, assignees, lessees or sublessees;
- (c) any liability resulting from exacerbation by Settling Respondent, its successors, assignees, lessees or sublessees, of Existing Contamination;
- (d) any liability resulting from the Release or threat of Release of hazardous wastes within the meaning of RCRA § 3008(h), hazardous substances, pollutants or contaminants, at the Site after the effective date of this Agreement, not within the definition of Existing Contamination;
- (e) criminal liability;
- (f) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by Federal agencies other than EPA;
- (g) liability for violations of local, State or Federal law or regulations;
- (h) liability for the Institutional Controls attached hereto as Exhibit 1; and
- (i) any claims in the event of either the fully executed Supplemental Escrow Instructions failing to be delivered to the Sale Escrow Holder in accordance with Section IV (Payment) or the monies deposited into the Sale Escrow failing to be used in accordance with the requirements of Section 10(d)(ii) of the Purchase Agreement and the Site Funds Escrow Agreement.

46. With respect to any claim or cause of action asserted by the United States, the Settling Respondent shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

47. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a party to this Agreement.

48. Nothing in this Agreement is intended to limit the right of EPA to undertake future response actions, remedial activities, or any other activity taken pursuant to, or authorized by, CERCLA or RCRA at the Site or to seek to compel parties other than the Settling Respondent to perform or pay for such activities at the Site. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions, remedial activities, or any other activity taken pursuant to, or authorized by, CERCLA or RCRA which may be taken or be required by EPA in exercising its authority under Federal law. Settling Respondent acknowledges that it is purchasing Property where response actions, remedial activities, or other activities taken pursuant to, or authorized by, CERCLA or RCRA may be required. EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with Settling Respondent's use of the Property by such activities.

XI. SETTLING RESPONDENT'S COVENANT NOT TO SUE

49. In consideration of the United States' Covenant Not To Sue in Section IX of this Agreement, the Settling Respondent hereby covenants not to sue and not to assert any claims or causes of action against the United States, its authorized officers, employees, or representatives with respect to the Site or this Agreement, including but not limited to, any direct or indirect

claims for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other provision of law, any claim against the United States, including any department, agency or instrumentality of the United States, under CERCLA Sections 107 or 113 related to the Site, any claims arising out of response actions, remedial activities, or any other activity taken pursuant to, or authorized by, CERCLA or RCRA at the Site, including claims based on EPA's oversight of such activities or approval of plans for such activities, or any claims for just compensation against the United States, including any department, agency or instrumentality of the United States, or the State of California, including any department, agency or instrumentality of the State of California for "taking" property based on the Fifth Amendment to the United States Constitution or based on Article I, Section 19 of the California Constitution.

50. The Settling Respondent reserves, and this Agreement is without prejudice to, actions against the United States based on negligent actions taken directly by the United States, not including oversight or approval of the Settling Respondent's plans or activities, that are brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

XII. PARTIES BOUND/TRANSFER OF COVENANT

51. ~~This Agreement shall apply to and be binding upon the United States, and shall~~ apply to and be binding upon the Settling Respondent, its officers, directors, appointed and elected officials, and employees. The United States' Covenant Not to Sue in Section IX and Contribution Protection in Section XIX shall apply to Settling Respondent's officers, directors,

appointed and elected officials, or employees to the extent that the alleged liability of the officer, director, appointed and elected official, or employee is based on its status and in its capacity as an officer, director, appointed and elected official, or employee of Settling Respondent, and not to the extent that the alleged liability arose independently of the alleged liability of the Settling Respondent. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

52. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Settling Respondent under this Agreement may be assigned or transferred to any person with the prior written consent of EPA in its sole discretion.

53. The Settling Respondent agrees to pay the reasonable costs incurred by EPA to review any subsequent requests for consent to assign or transfer the benefits conferred by this Agreement.

54. In the event of an assignment or transfer of the Property or an assignment or transfer of an interest in the Property, the assignor or transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as EPA and the assignor or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to any assignment or transfer of the Property, the assignee or transferee must consent in writing to be bound by the terms of this Agreement including but not limited to the certification requirement in Section VIII of this Agreement in order for the Covenant Not to Sue in Section IX to be available to that party. The Covenant Not To Sue in Section IX shall not be effective with respect to any assignees or transferees who fail to provide such written consent to EPA. However, notwithstanding anything to the contrary contained herein, it is understood and

agreed by the parties that Settling Respondent shall remain responsible for performance of the work to be performed in accordance with Section IV, Section V and Exhibit 8 of this Agreement and that no subsequent assignee, transferee, lessee or sublessee shall be obligated or bound by the terms of this Agreement with respect to the responsibility to implement such work or shall be required to demonstrate that it is financially capable of performing such work in order to obtain EPA's prior written consent to the assignment, transfer, lease or sublease in accordance with paragraphs 55 or 56 herein.

55. Any person desiring to obtain the prior written consent of EPA with respect to the assignment or transfer of all or any portion of the rights, benefits and obligations conferred upon Settling Respondent under this Agreement shall submit a Certification of Compliance with Agreement and Covenant Not to Sue (Transferee) in the form of the model certification attached hereto as Exhibit 9. No transferee or assignee of all or any portion of the Property shall have any right hereunder (including any right under the Covenant Not to Sue set forth in Section IX) unless: (1) at least 30 days before such assignment or transfer, the transferee submits a Certification of Compliance with Agreement and Covenant Not to Sue (Transferee) in the form of the model certification attached hereto as Exhibit 9; (2) the transferee shall be financially capable of performing all the obligations referenced in such Certification; (3) the transferee is not liable under CERCLA or any other law for the Existing Contamination; (4) the transferee's use of the Property will not result in a release or threat of release of any hazardous substance; (5) the transferee's use of the Property will not cause or contribute to the migration or release of any Existing Contamination or to any threat to human health caused by any such release or threat of release; (6) at least 30 days before such assignment or transfer, the transferee submits an affidavit and supporting documentation demonstrating to EPA's reasonable satisfaction the truth

of the preceding clauses (2) through (5) in this paragraph 55; (7) Settling Respondent shall have fully performed its obligations under paragraph 34 of this Agreement; and (8) EPA shall not have objected to the transferee's certification, affidavit and supporting documentation. In the event that EPA has not so objected within thirty (30) days of its receipt of written notice from the transferee, such assignment or transfer shall be deemed approved. If at any time EPA determines that a transferee's certification, affidavit or supporting documentation is materially inaccurate or incomplete, the Agreement and Covenant Not to Sue shall be null and void with respect to such transferee, and the United States reserves all rights it may have against such transferee.

56. Settling Respondent may lease the Property or any portion thereof to tenants who, in turn may lease to sub-tenants. Any prospective tenants or sub-tenants desiring to obtain the prior written consent of EPA with respect to acquiring rights, benefits and obligations conferred upon Settling Respondent under this Agreement shall submit a Certification of Compliance with Agreement and Covenant Not to Sue (Tenant) in the form of the model certification attached hereto as Exhibit 10. No tenant or sub-tenant shall have any right hereunder (including any right under the Covenant Not to Sue set forth in Section IX) unless: (1) at least 30 days before the inception of such tenancy or sub-tenancy, the tenant or sub-tenant submits a Certification of Compliance with Agreement and Covenant Not to Sue (Tenant) in the form of the model certification attached hereto as Exhibit 10; (2) the tenant or sub-tenant shall be financially capable of performing all the obligations referenced in such Certification; (3) the tenant or sub-tenant's use of the Property will not result in a release or threat of release of any hazardous substance; (4) the tenant or sub-tenant is not liable under CERCLA or any other law for the Existing Contamination; (5) the tenant or sub-tenant's use of the Property will not cause

or contribute to the migration or release of any Existing Contamination or to any threat to human health caused by any such release or threat of release; (6) at least 30 days before the inception of such tenancy, the tenant or sub-tenant submits an affidavit and supporting documentation demonstrating to EPA's reasonable satisfaction the truth of the preceding clauses (2) through (5) in this paragraph 56; (7) Settling Respondent shall have fully performed its obligations under paragraph 34 of this Agreement; and (8) EPA shall not have objected to the tenant or sub-tenant's certification, affidavit and supporting documentation. In the event that EPA has not so objected within thirty (30) days of its receipt of written notice from the tenant or sub-tenant, such tenant or sub-tenant shall have the benefit of the Covenant Not to Sue and Contribution Protection with respect to the leased property from the inception of such tenancy. If at any time EPA determines that a tenant or sub-tenant's certification, affidavit or supporting documentation is materially inaccurate or incomplete, the Agreement and Covenant Not to Sue shall be null and void with respect to such tenant or sub-tenant, and the United States reserves all rights it may have against such tenant or sub-tenant.

XIII. DISCLAIMER

57. This Agreement in no way constitutes a finding by EPA as to the risks to human health and the environment which may be posed by contamination at the Property or the Site nor constitutes any representation by EPA that the Property or the Site is fit for any particular purpose.

XIV. DOCUMENT RETENTION

58. The Settling Respondent agrees to retain and make available to EPA all Documents relating to hazardous wastes within the meaning of RCRA § 3008(h), hazardous substances, pollutants or contaminants at the Site, and all Documents pertaining in any way to

the work required to be performed under Section V (Work To Be Performed), to the extent Settling Respondent has custody of or control over the aforementioned documents, for at least ten years following the effective date of this Agreement or until completion of the work to the satisfaction of EPA, whichever is longer, unless otherwise agreed to in writing by the Parties. At the end of such period, the Settling Respondent shall notify EPA of the location of such Documents and shall provide EPA with an opportunity to copy any Documents at the expense of EPA.

XV. PAYMENT OF COSTS

59. If the Settling Respondent fails to comply with the terms of this Agreement, including, but not limited to, the provisions of Section IV (Payment) or Section V (Work to be Performed) of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by the United States to enforce this Agreement or otherwise obtain compliance.

XVI. NOTICES AND SUBMISSIONS

60. All notices to Settling Respondent shall be sent to:

Steven L. Samaniego
Environmental Management Director
City of West Covina
1444 W. Garvey Avenue
West Covina, California 91793

with a copy to:

Colin Lennard, Esq.
Fulbright & Jaworski L.L.P.
865 South Figueroa Street
29th Floor
Los Angeles, California 90017

All notices to the United States should be sent to:

Carmen D. Santos, WST-5
RCRA Project Manager
U.S. EPA
75 Hawthorne Street
San Francisco, CA 94105

with a copy to:

Mimi Newton, ORC-3
Assistant Regional Counsel
U.S. EPA
75 Hawthorne Street
San Francisco, CA 94105

XVII. EFFECTIVE DATE

61. The effective date of this Agreement shall be the date upon which EPA issues written notice to the Settling Respondent that EPA has fully executed the Agreement after review of and response to any public comments received.

XVIII. TERMINATION

62. If any Party believes that any or all of the obligations under Section VI (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

XIX. CONTRIBUTION PROTECTION

63. With regard to claims for contribution against Settling Respondent, the Parties hereto agree that the Settling Respondent is entitled to protection from contribution actions or

claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for CERCLA matters addressed in this Agreement. The CERCLA matters addressed in this Agreement are all response actions taken or to be taken and response costs incurred or to be incurred by the United States or any other person for the Site with respect to the Existing Contamination.

64. The Settling Respondent agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement it will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

65. The Settling Respondent also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify in writing the United States within 10 days of service of the complaint on them.

XX. EXHIBITS

66. Exhibit 1 shall mean the Institutional Controls recorded with the Recorder's Office of Los Angeles County, California on May 29, 2001 applicable to the Property (*i.e.*, Parcels 1 and 2).

67. Exhibit 2 shall mean the description of Lot 5.

68. Exhibit 3 shall mean the description of Parcel 1 of the Property.

69. Exhibit 4 shall mean the description of Parcel 2 of the Property.

70. Exhibit 5 shall mean the description of Parcel 3.

71. Exhibit 6 shall mean the Purchase Agreement and all its amendments, including the Supplemental Escrow Instructions.

72. Exhibit 7 shall mean the map depicting the Site.

73. Exhibit 8 shall mean the form of the Site Funds Escrow Agreement to be entered into by and between BKK, Settling Respondent and Wells Fargo Bank.

74. Exhibit 9 shall mean the Certification of Compliance with Agreement and Covenant Not to Sue (Transferee).

75. Exhibit 10 shall mean the Certification of Compliance with Agreement and Covenant Not to Sue (Tenant).

76. Exhibit 11 shall mean the form of the Security Agreement to be entered into between EPA and BKK.

77. Exhibit 12 shall mean the form of the Security Agreement to be entered into between DTSC and BKK.

XXI. REMOVAL OF LIEN

78. Subject to the Reservation of Rights in Section X of this Agreement, upon payment of the amount specified in Section IV (Payment) of this Agreement and contingent upon satisfactory compliance with the terms of this Agreement, on and subsequent to the effective date of this Agreement, EPA agrees to remove any lien it may have on the Property under Sections 107(l) and 107(r) of CERCLA, 42 U.S.C. §§ 9607(l) and 9607(r), as a result of response action conducted by EPA at the Property.

XXII. PUBLIC COMMENT

79. This Agreement shall be subject to a thirty-day public comment period, after which EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.


IT IS SO AGREED:

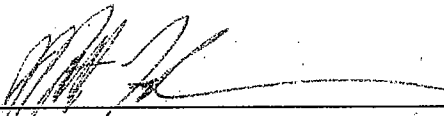
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY: Jeff Scott 5/21/03
Date
Jeff Scott
Director, Waste Management Division
Region IX

BY: Keith Takata 5-16-03
Date
Keith Takata
Director, Superfund Division
Region IX

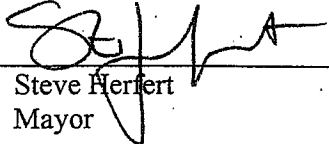
IT IS SO AGREED:
UNITED STATES DEPARTMENT OF JUSTICE

BY:  5/12/03
Date
Bruce S. Gelber
Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

BY:  5/12/03
Date
Matthew A. Fogelson
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice


IT IS SO AGREED:

THE CITY OF WEST COVINA, A MUNICIPAL CORPORATION

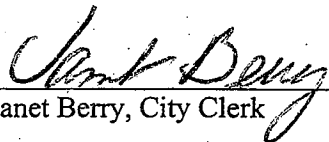
BY:  5/7/03
Steve Herrert Date
Mayor

APPROVED AS TO FORM:

FULBRIGHT & JAWORSKI L.L.P., Special Counsel

BY:  5/6/03
Colin Lennard, Esq. Date

ATTEST:


Janet Berry, City Clerk

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY: Susan E Bromm 5/22/2003
Susan E. Bromm Date
Director, Office of Site Remediation Enforcement
Office of Enforcement and Compliance Assurance