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FEDERAL EXPRESS & ELECTRONIC MAIL

CITY OF HENDERSON
DEPARTMENT OF UTILITY SERVICES
240 Water Street
Post Office Box 95050
Henderson, Nevada 89009-5050
Attention: Matt Thomas
Pretreatment Supervisor MSC No. 814
Matt.Thomas@cityofhenderson.com

Re: **HENDERSON MUNICIPAL CODE 14.09**
REPEAL AND REPLACEMENT OF PRETREATMENT REGULATIONS
Comments of Tronox, LLC

Dear Mr. Thomas:

We represent Tronox, LLC ("**Tronox**" or the "**Company**"). On October 13, 2017, the City of Henderson (the "**City**"), published notice of and requested comment on or before November 13, 2017, from interested persons on a proposed ordinance to repeal and replace Chapter 14.09 (the "**Proposed Ordinance**"), of the Henderson Municipal Code ("**HMC**"), and a related Enforcement Response Plan (the "**ERP**"). By this letter (the "**Comment**"), Tronox submits comments to the Proposed Ordinance and ERP, as well as requests that the City conduct a public hearing to adopt the revisions to the Proposed Ordinance and ERP requested by the Company in this Comment. The Company's Comment is based on certain relevant facts that are particular to Tronox and other similarly situated business entities that operate industrial facilities within the Black Mountain Industrial Complex (the "**BMI Complex**").

SUMMARY OF RELEVANT FACTS

Tronox operates a facility within the BMI Complex located at 560 West Lake Mead Parkway in Henderson, Nevada (the "**Facility**"). The Facility is dedicated to the production of electrolytic manganese dioxide, used in the manufacture of alkaline batteries; elemental boron, a component of automotive safety igniters and military flares; and, boron trichloride, used in the pharmaceutical and semiconductor industries and in the manufacture of high-strength

boron fibers for products including sporting equipment and aircraft parts.[1] The Company neither generates nor discharges industrial process wastewater.

Basic Management, Inc. ("**BMI**"), owns the "sewage disposal system, located at or used in connection with the operation of the Basic Magnesium Project [in] Henderson, Nevada" (the "**System**").[2] BMI's legal obligations for the System are set forth with particularity in several integrated instruments documenting the agreements, rights and obligations among a number of parties, including the City and Tronox.[3] The System Operation Contract, Facility Acquisition Agreement, Permit and Addendum read together provide that BMI is the obligor under the Permit and is the "person" authorized to discharge to the City's public sanitary sewer system through the facilities BMI owns and operates.

BMI is required for the current term expiring in 2043 to operate, maintain and monitor the System, to perform various obligations in compliance with the Permit and relative to relationships with the City on behalf of Tronox and others, including to avoid prejudice to the parties to the System Operation Contract by impairing the service Tronox receives from the City through BMI using the System. BMI's operation of the System currently is subject to an administrative order dated January 29, 2015, directed to BMI by the City (the "**Administrative Order**").

Under the Facilities Acquisition Agreement, the City acquired from BMI for $1.00 a sewage treatment plant and over thirty acres of real estate. The City agreed, among other things, that as "a material consideration" for transfer of the sewer treatment plant and related land, as well as the sale of certain other real property and payment of certain formulaic monthly

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[1] *See* http://www.tronox.com/our-company/global-operations/henderson-nevada-u-s/.

[2] *See* Deed and Indenture by and between Nevada Colorado River Comm'n and Basic Management, Inc., Document No. 387352, Clark County, Nev., Recorder, Book No. 67, Page 68 (dated June 1, 1952)(the "**Deed**").

[3] *See* Agreement Regarding Permit to Discharge by and among Basic Management, Inc., Pioneer Chlor Alkali Company, Inc., Kerr-McGee Corporation, Titanium Metals Corporation and Chemstar Lime Company dated July 15, 1993 (the "System Operation Contract"); City of Henderson, Nev., Permit to Discharge No. COH-0017-08 (dated July 1, 2010)(the "Permit"); Agreement by and between Basic Management, Inc. and the City of Henderson, Nevada, dated June 14, 1972 (the "Facility Acquisition Agreement"); 1993 Addendum to 1972 Basic Management, Inc. Agreement by and between the City of Henderson, Nevada, and Basic Management, Inc. (the "Addendum").

fees "to treat the domestic sewage discharged from the BMI industrial plant complex so long as any of the plants in the BMI industrial plant complex shall be in operation . . .."[4]

In 1993, the City reconfirmed the municipality's obligation "to treat all domestic sewage generated upon or by the BMI Complex" and received from BMI agreement to the assessment of new fees and charges by the City.[5] Notably, the City gave an unconditional covenant to promptly issue to BMI a permit to discharge domestic sewage" under the HMC as "amended from time to time" in accordance with applicable state and federal water pollution control laws.[6] The City explicitly acknowledged that the plants at the BMI Complex, such as Tronox, are third party beneficiaries of the municipality's contract with BMI.[7] The City's obligation extends until 2043, and only at that time may the City adjust its contractual duties because of intervening change of environmental laws for domestic sewage disposal.[8] In the interim, the City is only excused from performing by certain events of *force majeure* or should an event of "pass through, or upset" as defined by the HMC attributable to the BMI Group or certain other identified entities.[9]

SYNOPSIS OF APPLICABLE LAW

Both the United States and Nevada Constitutions limit the ability of state and local governments to impair contractual obligations.[10] In *United States Trust v. New Jersey*,[11] the Supreme Court explained "[c]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid," and thus "[t]he States remain free to abrogate such rights upon payment of just compensation."[12]

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4 *See* Facilities Acquisition Agreement ¶ 3, at 2.

5 *See* Addendum ¶ 1.1, at 1.

6 *See* Addendum ¶ 1.2, at 2.

7 *See* Addendum ¶ 1.3, at 2.

8 *See* Addendum ¶ 6.3, at 4.

9 *See* Addendum ¶ 1.4, at 2.

10 *See* U.S. Const. art. I, § 10 ("No State shall ... pass any ... law impairing the Obligation of Contracts") and Nev. Const. art. 1, § 15 (collectively, the "Contract Clause"); *see also St. Paul Gaslight Co. v. City of St. Paul*, 181 U.S. 142, 148 (1901) (Contract Clause applies to municipal ordinances as well as state legislation).

11 431 U.S. 1 (1978).

12 431 U.S. 1, 19 n.16, 29 n. 27.

The purpose of the Contract Clause is to protect the legitimate expectations that arise from contractual relationships from unreasonable legislative interference.[13] Although this prohibition on impairment must be balanced against the power of governmental authorities to regulate matters of public concern, courts have recognized that "a higher level of scrutiny is required" when the legislative interference touches on the government's own contractual obligations.[14]

Where legislation *substantially impairs* a contract right, it may violate the Commerce Clause.[15] Legislation may rise to the level of a "substantial impairment," even absent total destruction of the contract. With respect to public contracts involving the governmental entity, impairment is substantial if it "deprives a private party of an important right, thwarts performance of an essential term, defeats the expectations of the parties, or alters a financial term."[16] Moreover, the fact that an ordinance relates to areas that are frequently the subject of municipal supervision does not immunize it from the Contract Clause.[17] Notably, courts have determined that a contract is "impaired" in violation of the Contract Clause where the government uses its legislative authority "not merely to breach its contractual obligations, but to create a defense to the breach that purports to prevent the recovery of damages."[18]

An ordinance that substantially impairs a public contract cannot survive unless the impairment is "both reasonable and necessary to fulfill an important public purpose."[19] The requirement of a legitimate public purpose "guarantees that the state is exercising its police

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[13] *See S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 890 (9th Cir. 2003); *see also Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978) ("Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.").

[14] *Univ. of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999).

[15] *Allied Structural*, 438 U.S. at 244.

[16] *S. California Gas*, 336 F.3d at 890 (internal citations omitted).

[17] *Id.* at 887-88.

[18] *Crosby v. City of Gastonia*, 635 F.3d 634, 642 n.7 (4th Cir. 2011) ("If the offended party retains the right to recover damages for the breach, the Contracts Clause is not implicated; if, on the other hand, the repudiation goes so far as to extinguish the state's duty to pay damages, it may be said to have impaired the obligation of contract."); *Pure Wafer Inc. v. City of Prescott*, 845 F.3d 943, 948 (9th Cir. 2017); *see also Cayetano* 183 F.3d at 1102.

[19] *See Seltzer v. Cochrane*, 104 F.3d 234, 236 (9th Cir. 1996).

power, rather than providing a benefit to special interests."[20] Where the government has impaired its own contract it bears the burden of establishing that each aspect of the ordinance is reasonable and necessary to fulfill an important public purpose and the municipality is not entitled to deference "because the government's self-interest is at stake."[21] As the court observed in the *Cayetano* decision, "[i]mpairment is *not reasonable* if the problem sought to be resolved by an impairment of the contract existed at the time the contractual obligation was incurred."[22] Changed circumstances and important government goals do not make an impairment reasonable if the changed circumstances are "of degree and not kind."[23]

COMMENT ON PROPOSED ORDINANCE

Tronox understands that the City may be required to revise the municipality's pretreatment program regulations to comply with dictates from the United States Environmental Protection Agency (the "**USEPA**"). In accomplishing this objective, however, the City may not, without consequences, breach an agreement, change the terms of its contracts (the "**City's Contracts**"), or impair the contracts of private parties made in connection with or reliance upon the City's Contracts. Of course, the City can both comply with dictates from the USEPA and honor the City's Contracts by acknowledging and accepting the related financial ramifications.

The Proposed Ordinance contains various provisions through which the City is impermissibly attempting to terminate or adjust the municipality's contractual obligations to BMI, Tronox, and other similarly situated business entities that operate industrial facilities within the BMI Complex. Likewise, the Proposed Ordinance includes other provisions that improperly obstruct the ability of BMI to perform its contractual obligations to operate the System to provide Tronox unimpaired domestic wastewater service from the City. Additionally, the Proposed Ordinance contains provisions inconsistent with Nevada state law,[24]

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[20] *Energy Reserves Group*, 459 U.S. at 412.

[21] *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1978); *see also Cayetano*, 183 F.3d at 1107; *S. California Gas*, 336 F.3d 894.

[22] *Cayetano*, 183 F.3d at 1107.

[23] *United States Trust*, 431 U.S. at 32.

[24] *Compare* NEV. REV. STAT. § 445A.400 (defining "pollutant" as based on waste characteristics) *with* Proposed Ordinance § 14.09.020(G), at 15 (defining "pollutant" to also include "excess flow"); *compare* NEV. ADMIN. CODE § 445A.104 ("pretreatment standard" defined) *with* Proposed Ordinance § 14.09.010, at 10 ("pretreatment standard" defined).

and is proceeding to hearing without protections of a business impact analysis comparable to those required under Nevada statute.[25]

The City contractually agreed to provide domestic wastewater services that would not be adversely impacted by any change in local, state or federal environmental law until 2043. The City, therefore, accepted the sole burden that a change of law "in degree and not kind" might impose on BMI and Tronox, a responsibility the municipality now tries to shift through the Proposed Ordinance. The City has already attempted to accomplish a similar result through the Administrative Order issued to BMI.

A few examples will suffice to demonstrate the impropriety of the City's Proposed Ordinance as applied to Tronox. The Proposed Ordinance requires that Tronox apply for and receive a permit.[26] The City previously agreed by contract that Tronox did not need a permit and that the permit would be held by BMI. The City also agreed to accept and process ***any*** quantity of domestic wastewater generated by Tronox, and now attempts by the Proposed Ordinance to define "excess flow" of domestic wastewater as a pollutant or an "industrial waste discharge" that can be further regulated or prohibited by the City.[27] Further, having agreed to permit and regulate BMI, the City purports to extend permitting and compliance obligations on Tronox and the Company's landlord, the Nevada Environmental Response Trust ("**NERT**"), without regard to the terms of the court approved lease agreement between NERT and Tronox.[28]

The Proposed Ordinance includes several other provisions pursuant to which the City similarly endeavors to modify its contractual obligations by imposing various mandates directly on Tronox or indirectly to burden or control the Company through BMI, including, for instance, wastewater discharge controls,[29] construction of auxiliary and flow-control facilities,[30] pretreatment system installation,[31] and employment of certain types of certified employees.[32] Moreover, under the Proposed Ordinance, the City requires Tronox to install monitoring

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25 *See, e.g.*, NEV. REV. STAT. § 233B.0608.

26 *See* Proposed Ordinance § 14.09.020(C) & (G), at 15.

27 *See* Proposed Ordinance § 14.09.020(G), at 15.

28 *See* Proposed Ordinance § 14.09.020(D), at 15.

29 *See* Proposed Ordinance § 14.09.050(E), at 26.

30 *See* Proposed Ordinance § 14.09.050(B) & (F), at 26-27.

31 *See* Proposed Ordinance § 14.09.050(A), at 25-26.

32 *See* Proposed Ordinance § 14.09.050(D), at 26.

equipment,[33] imposes recordkeeping,[34] and reporting obligations on the Company,[35] all of which must reside with BMI under the contractual arrangements among BMI, the City and Tronox.

The City makes no effort to ameliorate the anticipatory breach of its agreements by including in the Proposed Ordinance provisions that allow continuance of the nonconforming operating circumstances of BMI's System where multiple industrial users share common wastewater collection and transportation infrastructure. This the City must accommodate and can do so through an additional regulation. In this regard, Tronox requests the following provisions be included in the Proposed Ordinance:

14.09.020 Applicability, Objectives and Responsibility of the City.

A. Applicability. Except as provided in Section 14.09.220, T[t]his chapter sets forth uniform requirements for all industrial users that discharge into the POTW and enables the city to comply with all applicable state laws and federal laws under the act and General Pretreatment Regulations for Existing and New Sources of Pollution (40 CFR part 403).

14.09.220 Exceptions Applicable to Black Mountain Industrial Complex.

A. Except as provided in Paragraph C and Paragraph D of this Section 14.09.220, this chapter does not apply to the BMI Complex to the extent inconsistent with the terms and conditions of the 1972 Agreement, the 1993 Agreement and the Addendum.

B. Notwithstanding any other provision of this chapter, until on or after July 15, 2043, the city will:

1. Impose no requirement on any member of the BMI Group to apply for, be granted or maintain a permit otherwise required by this chapter.

2. Terminate, modify or amend the BMI Complex Permit issued pursuant to the Addendum allowing BMI to operate the Legacy System.

3. Place no limitations or restrictions on the quantity of domestic sewage that the BMI Group may deliver and discharge to the city's POTW for treatment and disposition by the city.

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33 *See* Proposed Ordinance § 14.09.050(G), at 27.

34 *See* Proposed Ordinance § 14.09.110, at 37.

35 *See* Proposed Ordinance § 14.09.150, at 41-50.

C. *Prior to July 15, 2043, the city may require BMI and members of the BMI Group to comply with this chapter provided:*

1. *The city delivers to BMI and the members of the BMI Group a written directive of the EPA identifying the specific provisions of this chapter that the EPA mandates must be applied to and enforced upon any or all of BMI, the BMI Group, the BMI Complex and Legacy System as a condition precedent of EPA approval of the city's pretreatment program; and*

2. *The city accepts and pays all direct and indirect costs, expenses and financial obligations incurred by BMI and the BMI Group in connection with or arising from the city's application and enforcement of this chapter against BMI, the BMI Complex, the BMI Group and the Legacy System, including without limitation any disruption in the city's obligations to serve under the 1972 Agreement and the Addendum.*

D. *The exemptions set forth in Paragraph A and Paragraph B of this Section 14.09.220 do not prevent the city from requiring BMI, or its successors and assigns, at its sole cost and expense:*

1. *To install and maintain devices and equipment to monitor and record the pH of the domestic wastewater collected and transported in the Legacy System or whether such domestic wastewater contains any pollutant exceeding the limits as set forth in Subparagraph 1 of Paragraph C of Section 14.09.030; provided, however, as used in this subparagraph pollutant does not include excess flow of domestic wastewater; and*

2. *Report the results of the monitoring and recordkeeping completed under Subparagraph 1 of this Paragraph D, no more frequently than monthly.*

E. *As used in this Section 14.09.220:*

1. *"1993 Agreement" means that certain Agreement Regarding Permit to Discharge by and among Basic Management, Inc., Pioneer Chlor Alkali Company, Inc., Kerr-McGee Corporation, Titanium Metals Corporation and Chemstar Lime Company dated July 15, 1993.*

2. *"1972 Agreement" means that certain Agreement by and between Basic Management, Inc. and the City of Henderson, Nevada, dated June 14, 1972.*

3. *"Addendum" means that certain contract entitled 1993 Addendum to 1972 Basic Management, Inc. Agreement by and between the City of Henderson, Nevada, and Basic Management, Inc.*

4. *"BMI" means Basic Management, Inc. or its successors or assigns.*

5. *"BMI Complex" has the meaning ascribed to that term by the Addendum.*
6. *"BMI Group" has the meaning ascribed to that term by the Addendum.*
7. *"BMI Complex Permit" means City of Henderson, Nev., Permit to Discharge No. COH-0017-08 (dated July 1, 2010).*
8. *"Legacy System" means the system of pipe, connectors, other works and related facilities located within the BMI Complex existent on July 29, 2015, and used by BMI for the collection, transportation and discharge of domestic wastewater generated by the BMI Group at the point of interconnection with the city's POTW.*

CONCLUSION

Tronox acknowledges that the USEPA may require the City to revise the municipality's pretreatment program regulations. In complying with this mandate, the City may not, without consequences, violate its contractual obligations to Tronox and BMI. The City should make certain that the Proposed Ordinance is consistent with and no more stringent than Nevada state law under Chapter 445A of the Nevada Revised Statutes and Nevada Administrative Code, and that a business impact analysis should be performed to accurately inform the public of the costs associated with promulgation of the Proposed Ordinance.

The Company has proposed revisions to the Proposed Ordinance that balances the objective of the City to comply with the demands of the USEPA with the City's duties under the Facility Acquisition Agreement and Addendum and without interfering with the agreement among the parties to the System Operation Contract. Tronox asks for the adoption of the requested changes to the Proposed Ordinance and that a public hearing be conducted for that purpose.

Sincerely,

Dan R. Reaser

Dan R. Reaser

cc: Rick Stater