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October 27, 2011

VIA E-MAIL AND US MAIL

Ralph Lambert PG CHg, PG, CHg
San Francisco Bay Regional Water
Quality Control Board
Suite 1500
1515 Clay Street
Oakland CA 94612

**Re: Mayhew Center, LLC PCE Contamination
Your File No. 0750183(RAL)**

Dear Mr. Lambert

As you know, this office represents Walnut Creek Manor LLC (“WCM”). This letter is to update the Regional Board on progress – or more specifically, the lack thereof – in connection with the WCM/MC remediation, and to follow up on WCM’s September 22, 2011 request that the Regional Board issue a clean up and abatement order and take enforcement action Mayhew Center LLC (“MC”), as set forth in the letter attached hereto as Exhibit “A”.

A. MC Continues to Refuse to Abide By The Insurance Documentation Requirement of the Injunction Order, Which Is A Prerequisite For Commencing Remediation Work On WCM’s Property.

A review of the background facts leading up to the present standstill is in order. Following a jury verdict and separate federal court ruling that Mayhew Center was the source of all of the PCE found at the WCM property, and an award of damages, the parties settled this matter on October 27, 2010. In the settlement, MC agreed to be bound to what is now the District Court’s Injunction Order, which was approved and signed by Judge Wilken on November 23, 2010. Thus, as of that date, MC was under a court order to remediate the soil and soil vapor beneath the WCM/MC property to levels at or below the residential standards. To gain access to the WCM property, MC agreed and was required under the injunction to provide routine insurance and other documentation for any vendor who would be performing work at the WCM property. This is the same documentation that all vendors who perform work at WCM property are required to provide. MC, however, did not attempt to provide WCM with any of the

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October 27, 2011
Page 2

insurance documentation for its vendors as required by the Injunction Order until April 25, 2011 – more than five months later. At that time, many of those documents were incomplete, expired, and were missing endorsements; in short, MC did not comply with the requirements of the Injunction Order to gain access to the WCM property. Despite repeated efforts by WCM to facilitate the process, MC persists in its refusal to provide the proper insurance documentation.

MC apparently selected Vironex as its MIP boring vendor long ago. However, it was not until June 23, 2011 that MC for the first time provided any documents relevant to Vironex. But those documents were at best incomplete, and failed to include any documentation of Vironex's required workers compensation insurance. On June 24, WCM provided details regarding the missing and incomplete insurance documentation that needed to be resolved, and followed up with a July 7 letter. On July 8, the Regional Board specifically asked MC to provide details regarding the delay in beginning the required work. However, it does not appear that there was any written response to the July 8 request. On July 15, MC sent to WCM what it claimed to be evidence of Vironex's workers compensation insurance, but MC merely provided a letter stating that another company called Barrett Business Services ("BBSI") was self insured for workers compensation. Not only was this documentation inadequate, but MC still had not provided the required additional insured endorsements. On July 20, as MC still had not provided the required insurance documentation, WCM emailed MC and its counsel that the MIP boring could not go forward and again reminded MC that compliance with the terms of the access agreement was essential. Unfortunately, MC did not bother to respond. In an effort to move the process along, WCM sent a follow-up email on August 8, and again requesting that MC begin the required remediation and promptly provide the necessary insurance documents. MC again failed to provide the required insurance documentation.

Instead, on September 14, MC sent WCM a set of documents that not only failed to cure the additional insured requirement, but again provided a workers compensation document referencing BBSI – not Vironex. This time, however, MC also provided a letter from BBSI that stated that it and Vironex had a "co-employer" agreement, such that workers compensation coverage for BBSI was tantamount to coverage for Vironex. On September 20, WCM responded that this documentation did not change the analysis. Having received no substantive explanation from MC how BBSI's insurance sufficed, WCM again followed-up on September 30, and asked whether there was any regulatory or legal authority for MC's position that this so-called "co-employer" agreement was proper as to Vironex. Although WCM has been using the exact same access requirements for vendors on its property for years, it has never come across someone suggesting that self-insurance of an unrelated third party covered them. WCM was also concerned because Vironex is not listed on the state website that identifies those employers who are self-insured for purposes of Workers Compensation compliance.

MC responded on October 3 to WCM's request for documentation and support of the claim of the "co-employer" relationship between Vironex and BBSI by simply forwarding an email from Vironex's insurance broker. That email stated that the documentation that had been

provided to WCM was sufficient, and that it refused to provide any further explanation or even allow WCM to review the purported co-employment contract between BBSI and Vironex to determine if there was proper insurance protection. On October 3, however, MC did provide the required additional insured endorsement for Vironex.

On October 4, MC reiterated that it would provide nothing further as proof of the required workers compensation documentation, nor would it provide any legal or regulatory authority for its position that Vironex's workers compensation documentation was sufficient, and demanded access despite this. Growing extremely concerned with the lack of any movement by MC, WCM emailed back less than 3 hours later agreeing to allow the requested access to WCM by Vironex on October 6, on a one-time only basis despite MC's noncompliance. WCM also informed MC that after the October 6 MIP work, no future exceptions could be made to the clear insurance requirements and all vendors must have the proper documentation. Regrettably, more than 24 hours later, MC simply informed WCM that Vironex was not available to do the work on October 6.

MC has since provided no indication when it will commence the necessary remediation work—which should have begun long ago. The insurance documentation is basic, and clearly spelled out in the access agreement that is part of the Court's Injunction Order. There is simply no excuse for MC's consistent lack of compliance.

B. MC Apparently Has Also Failed to Commence Work On *Its Own* Property.

Independent from MC's problems in complying with the Access Agreement's insurance documentation requirements, MC appears also to have failed to start any work in investigating or remediating its own property, as required by the Regional Board's order and its Notice of Violation. Obviously, there are no insurance documentation requirements for MC's vendors with respect to remediation work on the MC property. There are no procedural hurdles that MC can hide behind in connection with this important and necessary work. And if MC has done nothing on its own property, as we believe to be the case, it is apparent that the access issues are simply a pretext to delay.

This is a huge problem. As you know, the pollution on the MC property has been determined in the *WCM v. MC* litigation in the federal district court to be the sole source of the contamination. This source area on MC to this day continues to impact the WCM property. Each day that goes by is another day that the pollution gets worse.

The Regional Board must take immediate action.

**C. The Timely Remediation of the WCM/MC Properties Will Not Occur But-
For A Cleanup And Abatement Order From the Regional Board.**

MC's most recent refusal to comply with the Access Agreement and its apparent failure to even begin the ordered work on its own property demonstrates that MC is not going to remediate the PCE contamination problem for which it is legally responsible without a Regional Board directive under Water Code, § 13304. Over a year has passed since MC stipulated to conduct the cleanup and remediation of the WCM/MC properties. MC has done nothing.

Accordingly, WCM hereby reiterates its demand (see Exhibit "A") that the Regional Board commence enforcement action on the Notice of Violation and to issue a Clean Up and Abatement Order against Mayhew Center and Dean Dunivan to compel a cleanup and abatement of the WCM property consistent with the goals set forth in the Injunction Order, and conditioned upon finalization of all paperwork required under the District Court's Injunction Order.

Very truly yours,

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Brian A. Kelly

Cc: Dean Dunivan (via email)
Elizabeth Weaver, Esq. (via email)
Milt Eberle (via email)

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EXHIBIT A

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September 22, 2011

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Re: **Mayhew Center, LLC PCE Contamination**
Your File No. 0750183(RAL)

Dear Mr. Lambert

This office represents Walnut Creek Manor LLC ("WCM") and expressly requests that the Regional Board issue a Cleanup and Abatement Order and take enforcement action against Mayhew Center LLP ("MC") and Mr. Dean Dunivan ("Dunivan"). On July 27, 2011, the Regional Board issued a Notice of Violation ("NOV") in the above-referenced matter for MC's failure to comply with an April 4, 2011 Order of the Regional Board. This is not the first NOV issued to MC, and there is a long pattern of delay dating to 2003. It is time for action. In addition, the current NOV noted that despite a request by the Regional Board to confirm that MC and Dunivan had complied with the terms of a Access Agreement, no response to our knowledge has been provided. To date, there has been no compliance with the Access Agreement and only sporadic efforts to communicate with us on the status. Unfortunately, WCM still has not been provided with the required documentation, despite repeated requests to counsel for MC and Dunivan.

WCM submits that without a Cleanup and Abatement Order and enforcement action, MC and Dunivan will continue to thwart its legal obligation to perform remediation. This pattern and practice of delay and refusal to perform any reasonable work to remediate the problem originating from its property is well documented since at least May 2003. Such recalcitrance is particularly outrageous following a June 2009 federal jury verdict that MC is the source of the PCE contamination, an October 2009 Order of the federal court finding that MC is the source of all of the PCE found at the WCM property, and an October 2010 Injunction Order issued by the federal district court in the *WCM v. MC* litigation finding that MC and Dunivan are jointly and

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severally liable and obligated to remediate the PCE contamination to levels at or below residential standards. Absent regulatory action, the PCE contamination for which MC and Dunivan are responsible will continue to languish. Accordingly, WCM demands that the Regional Board begin enforcement proceedings regarding the NOV and employ all available regulatory tools, including the issuance of Cleanup and Abatement Order under Water Code § 13304, to assure that the PCE is promptly remediated. Without forceful action by the Regional Board, MC will continue its nearly decade-long pattern of avoiding its cleanup obligations.

1. The Regional Board Should Enforce Its Notice of Violation Issued to MC.

On April 4, 2011, pursuant to Water Code § 13267, the Regional Board approved MC's March 15, 2011, revised *Site Investigation Work Plan* and ordered that MC submit technical reports presenting the results of the subsurface investigations. That order also required MC to submit its first summary report, presenting its findings from the MIP investigation and any recommendations, to the Regional Board by May 13, 2011.

This date came and passed without any action by MC. And as a result, your office issued a Notice of Violation on July 27, 2011. The NOV stated that the Regional Board "recognize[d] that [MC has] not yet been granted access to work on WCM property, nonetheless, Mayhew Center can perform the investigation work on its' own property." Of course, MC has not been granted access because it has not bothered to complete the necessary paperwork required for access under the Court's Injunction Order. Not only did MC negotiate the specific terms for access that are part of the Injunction Order, it had no problem complying with these same terms for access when it was granted access to the WCM property in 2008. Of course, at that time, MC was seeking access in connection with the federal lawsuit in an effort to develop evidence that might show MC was not the source of the PCE contamination. In other words, it can comply with the access conditions when it serves its own interests. There is a long history of delay and inaction. For example, although MC had not complied with the defined access requirements, WCM agreed to allow MC access to the WCM property for utility marking on July 25 so that it would have time to get the paperwork together. But MC didn't even respond and never appeared to perform the utility marking. WCM continues to wait for basic documentation that was agreed long ago. With respect to the site investigation work that MC has proposed, there is relatively basic information and documentation mandated by the Injunction Order that MC still has not provided to WCM, despite repeated requests. This documentation is straight-forward and should not present time consuming or burdensome issues. The insurance documentation required is the same documentation required of all vendors who perform work at the WCM property. MC will be granted access to WCM's property when it provides the required insurance and other documentation.

WCM believes that MC's pattern of conduct will continue without the Regional Board's action pursuant to the NOV consistent with its enforcement powers under California Water Code Section 13268, which allows the Regional Water Board to impose administrative civil liability of up to \$1,000 per violation day for failure to submit required technical reports.

II. MC and Dunivan Have Taken No Steps to Remediate the PCE Contamination, and the Environmental Contamination Continues to Worsen. The Regional Board Must Issue Its Own Order under Water Code Section 13304 to Demand Cleanup and Abatement.

As we note above, the Regional Board should take action to enforce the NOV. But the Regional Board must also look at the bigger picture. It has now been *over two years* since a federal jury in the *WCM v. MC* litigation and Judge Claudia Wilken found after weighing all the evidence that Mayhew Center is the source of the PCE contamination present at the WCM property. And nearly *ten months* have passed since Judge Wilken signed the Injunction mandating that Mayhew Center and Dean Dunivan are “jointly and severally obligated to perform and to pay all costs necessary to remediate, cleanup and abate the PCE contamination present in soil vapor, soil and groundwater at or beneath [the WCM property].”

MC, however, literally has done nothing in response. It shocks the conscience that after the extensive struggle to hold MC accountable as the source of the contamination, MC continues the pattern of delay that required WCM to file the lawsuit in the first place. Obviously, the responsibility for the contamination is not subject to dispute and has been decided by a unanimous federal jury, stipulated to by MC and confirmed by a federal judge in an order following a court trial and in an Injunction Order; MC is the sole source and is solely responsible. Neither is there any dispute regarding harmful impacts to WCM’s property; that, too, has been decided. Neither is there any dispute that MC, despite these findings, has done nothing to remedy the problem.

Accordingly, the time is now for the Regional Board to make the order that it should have issued a long time ago – a Cleanup and Abatement Order to MC under Water Code section 13304. The Regional Board has the clear authority and, WCM submits, the obligation to issue a Cleanup and Abatement Order to a person who has caused or permitted, causes or permits, or threatens to cause or permit waste to be discharged or deposited where it is, or probably will be, discharged into California waters and where it creates, or threatens to create, a condition of pollution or nuisance. Water Code, § 13304(a). A hearing is not required before issuance. *Machado v. State Water Resources Control Bd.*, 90 Cal. App. 4th 720 (2001). If a person fails to comply with a cleanup and abatement order, the regional board may request that the Attorney General petition the superior court for the appropriate county for an injunction seeking compliance with the order. Water Code, § 13304(a).

All requisite findings for the Regional Board to issue such an order have been fully decided in the federal district court lawsuit between WCM and MC. The lawsuit concluded with a binding judicial declaration that MC was the sole source of the contamination at the MC/WCM property line, and an Injunction Order was issued by the same Federal Court compelling both MC and Dunivan to remedy the source area and any related impacts.

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September 22, 2011
Page 4

Duane Morris

Crucially, the litigation in the District Court does not vitiate the Regional Board's jurisdiction in this matter. Nor does the District Court involvement *excuse* the Regional Board from the necessary and proper exercise of its jurisdiction. California law is clear that the Regional Board must act to protect the health and safety of the state's waters. The law is also clear that the Regional Board's power to order cleanup and abatement is not mutually exclusive with a private party's remedy in the courts to sue for damages due to contamination. See Water Code § 13002(e); see also, *People v. Kinder Morgan Energy Partners*, 569 F.Supp.2d 1073, 1079 (S.D. Cal. 2008) (plaintiffs as a matter of law entitled to pursue recovery of state law tort damages despite the fact that the Water Board had already issued a regulatory "Cleanup and Abatement Order" to defendants).

Here, WCM requests that the Regional Board act consistent with its obligations and issue a Cleanup and Abatement Order to MC. MC has done nothing to effectuate remediation at the WCM/MC property. In the meantime, the contamination spreads. WCM is concerned that without forceful action by the Regional Board, MC will continue to delay this process – as it has done for the last 8 years.

Accordingly, WCM hereby demands that the Regional Board commence enforcement action on the Notice of Violation and to issue a Clean Up and Abatement Order against Mayhew Center and Dean Dunivan to compel a cleanup and abatement of the WCM property consistent with the goals set forth in the Injunction Order, and conditioned upon finalization of all paperwork required under the District Court's Injunction Order.

Very truly yours,

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Cc: Dean Dunivan (via email)
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