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8 For Petitioners
9 WILLOWBROOK CENTER PARTNERSHIP

10 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

11 In the Matter of

12 **PETITION FOR REVIEW AND RESCISSION
13 OF REGIONAL BOARD ACTION**

14 Willowbrook Center Partnership, a
15 California partnership

16 Petitioner,

17 For the Review of Los Angeles Regional
18 Water Quality Control Board Directives
19 Issued on February 15, 2012 Pursuant to
20 California Water Code Section 13267,
21 Former Sky High Cleaners, located at
22 11700 Wilmington Avenue, Willowbrook,
23 California

24 Pursuant to Section 13320 of California Water Code and Title 23 of the California Code of
25 Regulations §§ 2050 *et seq.*, Willowbrook Center Partnership, a California partnership c/o Kimco
26 Realty Corporation ("Petitioner") hereby petitions the State Water Resources Control Board
27 ("State Board") for review and rescission of the California Regional Water Quality Control Board--
28 Los Angeles Region ("Regional Board") Order, issued under Cal. Water Code § 13267 on June 25,
2009, as amended by its February 15, 2012 letter ("Order", attached as Exhibit 1). The Order
concerns the former High Sky Dry Cleaner located in the Kenneth Hahn Plaza at 11700
Wilmington Avenue, Willowbrook, California, and names Petitioner as a responsible party. Based
on its purported authority under Water Code § 13267, the Regional Board's Order directs
Petitioner take the follow actions by May 11, 2012:

- 1 1. "[S]ubmit a **mitigation plan** to decrease to decrease concentrations of volatile
organic compounds (VOCs) to indoor air [...];
- 2 2. submit a **remedial action plan** for the cleanup of source area contamination in soil
3 and soil vapor;
- 4 3. submit a **work plan for additional indoor air sampling** to define the lateral extent
5 for vapor intrusion impact within the commercial complex where the former Sky High
Cleaners was located."

6 Exh. 1, p. 1-2 (emphasis added).

7 While the Regional Board and its counsel Jennifer Fordyce have agreed that the first two
8 directives of the Order are unenforceable (see Exhibit 2 for correspondence), and while Regional
9 Board staff has issued a ninety (90) day time extension of the deadline for the third directive of
10 the Order (see Exhibit 3 for extension authorization), it has taken no official action to stay or
11 withdraw its three directives. Petitioner makes this appeal in good faith to preserve both the
12 status quo and Petitioner's rights to object substantively if further discussions with the Regional
13 Board do not yield a mutually acceptable resolution of outstanding issues.

14 The following elements are required by the Petition process:

15 **1. Name and address of the petitioner.**

16 Willowbrook Center Partnership
17 c/o Kimco Realty Corporation
18 1621 B South Melrose Drive
19 Vista, CA 92081
Attn: Kevin Smith, Esq.

20 Jon K. Wactor, Esq.
21 Wactor & Wick LLP
22 180 Grand Avenue, Ste. 950
Oakland, CA 94612
JonWactor@ww-envlaw.com

23 **2. The specific action or inaction of the regional board which the state board is**
24 **requested to review and a copy of any order or resolution of the regional board which**
25 **is referred to in the petition.**

26 Petitioner requests that the State Board review and rescind the Regional Board's section
27 13267 Order, as amended. A copy of the Order is provided as Exhibit 1. The Order should be
28 rescinded because it demands action and information that is beyond the scope of the Regional

1 Board's jurisdiction to regulate state waters, and requires remedial action, which is not within the
2 scope of Water Code § 13267.

3 This Petition is a protective filing. Pursuant to Title 23 of the California Code § 2050.5(d),
4 Petitioner requests that the State Board hold this petition in abeyance until further notice.

5
6 **3. The date on which the Regional Board acted or refused to act or on which the
7 regional board was requested to act.**

8 The Regional Board issued its amended Order on February 15, 2012. (Exhibit 1).

9 **4. A full and complete statement of the reasons the action or failure to act was
10 inappropriate or improper.**

11 Water Code § 13267 is of limited application – it only authorizes a Regional Board to
12 require a person named as a discharger to provide the Regional Board with information about the
13 *quality of state waters*, and that such an information request must be cost effective. Cal. Water
14 Code § 13267(b)(1) (authorizing a Regional Board to require dischargers to "furnish [...] technical
15 or monitoring program reports" as part of its "investigation" into "the quality of waters within its
16 region" but only if "the burden, including costs, of these reports [...] bear a reasonable
17 relationship to the need for the report and the benefits to be obtained from the reports"). In this
18 case, the Regional Board's February 15 letter contained three directives that exceed the limits of
19 the statutory grant of authority provided in section 13267:

- 20 • Directive #1: Provide a mitigation plan for reducing the concentrations of the
21 common dry cleaning solvent perchloethylene (PCE) in air inside a building. Because
22 the air inside a building is not a state water, section 13267 doesn't empower the
23 Regional Board to require the preparation of an indoor air mitigation plan. As support
24 for this directive, the Regional Board's Order included a finding that the concentrations
25 of PCE inside the building were unacceptable from a human health risk perspective.
26 (See Exhibit 1). That finding lacks merit on both technical and legal grounds for at
27 least two reasons: (a) there is no provision in the Water Code or its regulations that
28 creates any standard for indoor air for any chemical compound, and (b) the Water

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Code does not provide the Regional Board with any authority to regulate air inside buildings. Regional Board counsel Jennifer Fordyce has stated in correspondence that directive #1 of the Order is unenforceable (Exhibit 2), but because it has not been officially rescinded by Regional Board action, it is included in this Petition to preserve Petitioner's rights to object to this directive.

- Directive #2: Provide a remedial action plan for cleanup of soil and soil vapor that is the source of indoor air and groundwater contamination. This directive lacks merit for the same reason given above for indoor air and for groundwater, for at least two reasons: (a) it is premature, as the Petitioner is still performing, at the direction of the Regional Board, investigatory work regarding soil and groundwater that is not yet complete and (b) Section 13267 is not the appropriate vehicle for a cleanup order – that authority is found within other sections of the Water Code, and requires specific findings which were not made here. Regional Board counsel Jennifer Fordyce has stated in correspondence that directive #2 of the Order is unenforceable (Exhibit 2), but because it has not been officially rescinded by Regional Board action, it is included in this Petition to preserve Petitioner's rights to object to this directive.
- Directive #3: Provide a workplan for additional indoor air sampling in adjacent structures to "define the [indoor air] impact..." This directive shares the same infirmities as directive #1. Section 13267 does not empower the Water Board to require studies regarding indoor air quality. Section 13267 is expressly limited to information requests regarding water quality.

All three directives relate to indoor air, not waters of the state, and thus fall outside the Regional Board's existing jurisdiction under the Water Code. In addition, the Regional Water Board has not received or reviewed all of the soil, soil vapor and water investigation information collected by Petitioner to date at the Regional Board's request, making any demand for mitigation or remediation procedurally premature and defective; the Regional Board has not made any finding that would support the need for remediation of the waters of the state (or any other environmental media). Finally, even if the Regional Board made a valid finding that remediation

1 of contaminants is necessary because of impacts to water quality, section 13267 doesn't
2 authorize remediation, and moreover a feasibility study evaluating remedial alternatives would
3 precede remedy selection and preparation a remedial action plan.
4

5 **5. The manner in which the Petitioners are aggrieved.**
6

7 As stated above, the Regional Board's Order issued three directives that are not within the
8 scope of Water Code § 13267. Although the Regional Board's counsel has agreed that directives
9 #1 (preparation of an indoor air mitigation plan) and #2 (preparation of a remedial plan) are
10 outside of the scope of section 13267, the Regional Board has refused to rescind or withdraw the
11 Order. Notably, directive #3 would require Petitioner to expend thousands of dollars performing
12 unnecessary and duplicative indoor air testing (which Petitioners have already performed twice
13 on a voluntarily basis) to provide information about a subject outside of the Water Board's area
14 of jurisdiction.

15 The Regional Board's actions have aggrieved Petitioner because the Order's directives are
16 arbitrary, capricious, substantively and procedurally defective, costly and duplicative, and
17 otherwise unsupported by the facts or law. Petitioner will incur significant costs in complying
18 with the improper directives, and suffer economic damages and other consequential damages
19 unless the directive is rescinded.
20

21 **6. The specific action by the State or Regional Board which petitioners request.**
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23 As mentioned above, Petitioner requests that this matter be held in abeyance. If it
24 becomes necessary for Petitioner to pursue this appeal, Petitioner will request that the State
25 Board rescind the Regional Board's Order based on a determination that the directives are
26 arbitrary and capricious or otherwise without factual or legal basis.
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1 **7. A statement of points and authorities in support of legal issues raised in the**
2 **petition.**

3 For the purposes of this protective filing, this Statement of Points and Authorities
4 incorporates by reference the facts and positions included elsewhere in this Petition. Petitioner
5 reserves the right to file a Supplemental Statement of Points and Authorities, including references
6 to the complete administrative record and additional evidence, if it becomes necessary to pursue
7 this appeal. Petitioner also reserves the right to supplement its request for hearing to consider
8 testimony, other evidence, and argument.

9 **A. The Regional Board Has Exceeded Its Legislative Grant of Authority**
10 **Under Water Code section 13267.**

11 As an administrative agency, the Regional Board's authority is limited by the powers
12 conferred to it by the Legislature:

13
14 Administrative agencies have only the powers conferred on them, either expressly or
15 impliedly, by the Constitution or by statute, and administrative actions exceeding those
16 powers are void. To be valid, administrative action must be within the scope of authority
17 conferred by the enabling statutes. We recognize that the courts usually give great weight
18 to the interpretation of an enabling statute by officials charged with its administration,
19 including their interpretation of the authority vested in them to implement and carry out
20 its provisions. But regardless of the force of administrative construction, final
21 responsibility for interpretation of the law rests with courts. If the court determines that a
22 challenged administrative action was not authorized by or is inconsistent with acts of the
23 Legislature, that action is void. These principles apply to the rulemaking power of an
24 administrative agency, which is limited by the substantive provisions of the law governing
25 that agency. To be valid, an administrative regulation must be within the scope of the
26 authority conferred by the enabling statute or statutes. No matter how altruistic its
27 motives, an administrative agency has no discretion to promulgate a regulation that is
28 inconsistent with the governing statutes.

29 *Terhune v. Superior Court*, 65 Cal. App. 4th 864, 872-73 (1998) (internal citations omitted)

30 As stated in section 4 of this Petition, the Regional Board's grant of authority under Water
31 Code § 13267 is limited to requiring dischargers to provide the Regional Board with investigatory
32 information about the *quality of state waters*.¹ Section 13627 does not provide the authority to

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38 ¹ "Waters of the state" means "any surface water or groundwater, including saline waters,
within the boundaries of the state." Cal. Water Code § 13050(e). "Quality of the water" refers to

1 compel remediation nor does it provide any jurisdiction over indoor air quality. In fact, other
2 state agencies, such as Cal OSHA, are specifically empowered by the Legislature to regulate
3 worker safety in a workplace – this subject is not within the purview of the Regional Board. The
4 role of Cal OSHA and the purpose of California Occupational Safety and Health Act of 1973 are
5 for “assuring safe and healthful work conditions for all California working men and women.” Cal.
6 Labor Code § 6300. Moreover, Cal OSHA has established permissible exposure limits (PELs), and
7 other standards, for regulating worker exposure to airborne contaminants. 8 CCR § 5155. In
8 contrast, the Water Board has “primary responsibility for the coordination and control of water
9 quality.” Cal. Water Code § 13001. Thus, the Regional Board’s directives in the Order exceed its
10 grant of authority provided by Water Code § 13267.

11
12 **B. Even if Water Code section 13267 Provided the Regional Board with**
13 **Jurisdiction Over Indoor Air Quality, the Regional Board’s Directives**
14 **Are Presumptively Invalid Because They Are Based on Underground**
15 **Regulations.**

16 Assuming arguendo that the Regional Board is authorized to require indoor air studies and
17 mitigation under Water Code § 13627, when exercising this authority, the Regional Board must
18 follow the procedures set forth in the California Administrative Procedure Act (“APA”),
19 Government Code 11340 *et. seq.* Pursuant to the APA:

20 No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion,
21 bulletin, manual, instruction, order, standard of general application, or other rule, which is
22 a regulation as defined in Section 11342.600 [of the APA], unless the guideline, criterion,
23 bulletin, manual, instruction, order, standard of general application, or other rule has
24 been adopted as a regulation and filed with the Secretary of State pursuant to this
25 chapter [of the APA].

26 Gov. Code § 11340.5(a).²

27 “chemical, physical, biological, bacteriological, radiological, and other properties and
28 characteristics of water which affect its use.” Cal. Water Code § 13050(g).

² See also *Savient Pharmaceuticals, Inc. v. Department of Health Services* (2007) 53
Cal.Rptr.3d 689 (A regulation subject to the APA has two principal identifying characteristics:
first, the agency must intend its rule to apply generally, rather than in a specific case, but the
rule need not apply universally; second, the rule must implement, interpret, or make specific the

1 The Regional Board's regulations contain no standards for assessment or mitigation of
2 indoor issues. Thus, mandates by the Regional Board requiring or providing standards for such
3 activities are "underground regulations" that are presumptively invalid. *People v. Taylor* (2009)
4 94 Cal.Rptr.3d 756 (The term "underground regulation" refers to statutorily mandated protocols
5 that have not been formally adopted).

6 The courts have routinely held that administrative agencies charged with environmental
7 protection are subject to the APA even if their mandates are reasonable. See e.g., *Morning Star*
8 *Company v. State Board of Equalization* (2006) 38 Cal. 4th 324 (Though DTSC's determination
9 that that all corporations with 50 or more employees invariably engaged in activities related to
10 hazardous materials was "reasonable," it needed to comply with the APA to regulate these
11 entities); *State Water Resources Control Board v. Office of Administrative Law* (1993) 12
12 Cal.App.4th 697 (Court upheld a nonprofit's challenge to amendments to water quality control
13 plan holding "that regulatory matters contained in water quality control plans are in fact
14 regulations and that such regulations are neither expressly nor impliedly exempt from the
15 provisions of the APA."); see also *Baxter Healthcare Corp. v. Denton* (2004, Cal App 3d Dist) 120
16 Cal App 4th 333 (Manufacturer was entitled to a declaration of its rights and obligations under
17 CCP § 1060 and HSC § 25249.10 because it was compelled either to provide a stigmatizing
18 warning regarding its products, where it could show that the chemical, categorized by OEHHHA as
19 cancerous, did not cause cancer in humans, or risk being subjected to an enforcement action and
20 costly civil penalty if its theory was rejected in an enforcement action).

21
22 **C. The Regional Board's Order Should Be Rescinded As A Matter of Law.**

23 The Regional Board's Order should be rescinded or withdrawn because its directives
24 exceed the limits of its authority under Water Code § 13267, constitute underground regulation
25 of indoor air, are arbitrary and capricious, and otherwise without factual or legal basis.

26 law enforced or administered by the agency, or govern the agency's procedure); *Naturist Action*
27 *Committee v. California State Dept. of Parks & Recreation* (2009) 96 Cal.Rptr.3d 620 (A
28 regulation as defined under APA and falling within the relevant two-pronged test is not valid if it
does not adhere to APA requirements for adoption).

1 **8. A list of persons, if any, other than the Petitioners and discharger, if not the**
2 **Petitioners, known by the Regional Board to have an interest in the subject matter of**
3 **the petition. Such list shall be obtained from the regional board.**

4 Petitioners are unaware of another person known by the Regional Board to have an
5 interest in the subject matter of the petition.

6
7 **9. A statement that the petition has been sent to the appropriate Regional Board**
8 **and the discharger, if not the Petitioner.**

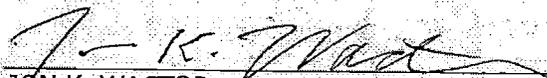
9 A copy of this Petition is being sent to the Los Angeles Regional Board, to the attention of
10 Samuel Unger, Executive Officer.

11
12
13 Dated: March 16, 2012

14 Respectfully submitted,

15 WACTOR & WICK LLP

16
17 By:



18 JON K. WACTOR
19 Attorneys for Petitioner
20 WILLOWBROOK CENTER PARTNERSHIP

21 Enclosures

Exhibit 1



California Regional Water Quality Control Board Los Angeles Region



Matthew Rodriguez
Secretary for
Environmental Protection

320 W. 4th Street, Suite 200, Los Angeles, California 90013
(213) 576-6600 • FAX (213) 576-6640
<http://www.waterboards.ca.gov/losangeles>

Edmund G. Brown Jr.
Governor

February 15, 2012

Mr. Kevin J. Smith
KIMCO Realty Corporation
1621 B South Melrose Drive
Vista, CA 92081

Certified Mail
Return Receipt Requested
Claim No. 7010 0290 0002 1866 1014

SUBJECT: REQUIREMENTS FOR ADDITIONAL INDOOR AIR SAMPLING PLAN, AND MITIGATION AND REMEDIAL ACTION PLANS, PURSUANT TO CALIFORNIA WATER CODE SECTION 13267 ORDER

CASE/SITE: KENNETH HAHN PLAZA, 11700 WILMINGTON AVENUE, LOS ANGELES, CALIFORNIA (SCP NO. 1040, SITE ID NO. 204FW00)

Dear Mr. Smith:

Los Angeles Regional Water Quality Control Board (Regional Board) staff reviewed the document *Indoor Air Sampling Report and Limited Human Health Risk Assessment (Report)* dated October 13, 2011, prepared and submitted by your consultant, Environmental Navigation Services, Incorporated (ENSI), for the referenced site. The Report details sampling procedures and analytical data from sampling indoor air at the site of the former High Sky Cleaners and from the adjoining business suite to the east. The site has completed two indoor air sampling events to date. The two events were completed during wet and dry periods of the year to evaluate if seasonal variation has an effect on indoor air quality.

The Report indicates that based on the concentrations of tetrachloroethene (PCE) detected in the indoor air samples collected at the site, a risk value of 4.4×10^{-6} was calculated for a commercial/industrial land use scenario. The California Office of Environmental Health Hazard Assessment (OEHHA) provided comments to the Regional Board in a memorandum dated November 17, 2011 (enclosed), following their review of the Report. OEHHA indicated that they were able to replicate and verify the health risk estimates provided in the Report for the site (approximately 4.4×10^{-6}) and the adjacent business suite (approximately 3×10^{-6}). OEHHA indicated that additional indoor air sampling in other business suites within the strip mall complex would help define the potential inhalation risks in those areas.

Based on the investigation results presented in the Report, the Regional Board has the following requirements:

1. The estimated risk values for the site fall within the risk management decision range of the Regional Board. Regional Board staff have considered the soil vapor and indoor air sampling results, OEHHA's comments, and the nature and extent of source area contamination, and determined that the potential risk of impacted indoor air to workers at the site is unacceptable. Therefore, you are required to submit a mitigation plan to decrease concentrations of volatile organic compounds (VOCs) in indoor air, thereby lowering worker risk levels from exposure to PCE in indoor air. This plan must be submitted/uploaded to GeoTracker by **May 11, 2012**.

California Environmental Protection Agency

Mr. Kevin J. Smith
Kenneth Hahn Plaza
SCP No. 1040

- 2 -

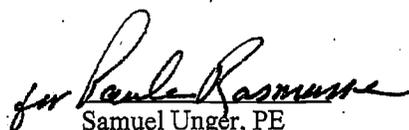
February 15, 2012

2. The VOCs impacted soil and soil vapor beneath the site continues to act as a source of indoor air and groundwater contamination. Therefore, you are required to submit a remedial action plan for the cleanup of source area contamination in soil and soil vapor. This remedial action plan must be submitted/uploaded to GeoTracker by **May 11, 2012**, and may be combined with the plan for mitigation of VOCs in indoor air, referenced above.
3. Based on the concentrations of VOCs detected in indoor air samples from the adjacent business suite to the east of the former Sky High Cleaners, and the OEHHA's comments to the Regional Board, you are required to submit a work plan for additional indoor air sampling to define the lateral extent of vapor intrusion impact within the commercial complex where the former Sky High Cleaners was located. This work plan must be submitted/uploaded to GeoTracker by **May 11, 2012**.

The due date to submit the technical report specified in item 3 (above) is an amendment to requirement 1 of the existing California Water Code (CWC) section 13267 Order dated June 25, 2009. Pursuant to section 13268 of the CWC, failure to submit the required technical report by the specified due date may result in civil liability administratively imposed by the Regional Board in an amount up to one thousand dollars (\$1,000) for every day the report is not received. These civil liabilities may be assessed by the Regional Board for failure to comply, beginning with the date that the violations first occurred, and without further warning.

If you have any questions, please contact project manager Mr. David Young at (213) 576-6733 (dyoung@waterboards.ca.gov).

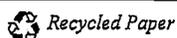
Sincerely,


Samuel Unger, PE
Executive Officer

Enclosure: Memorandum from OEHHA dated November 17, 2011

cc: Ms. Megan Moloughney, Kimco Realty Corporation
Mr. Peter Ton, Wactor & Wick, LLP
Mr. Jay Jones, ENSI

California Environmental Protection Agency



Office of Environmental Health Hazard Assessment



Matthew Rodriguez
Secretary for
Environmental Protection

George Alexeeff, Ph.D., D.A.B.T. Acting Director
Headquarters • 1001 I Street • Sacramento, California 95814
Mailing Address: P.O. Box 4010 • Sacramento, California 95812-4010
Oakland Office • Mailing Address: 1515 Clay Street, 16th Floor • Oakland, California 9



Edmund G. Brown Jr.
Governor

MEMORANDUM

TO: David Young
California Regional Water Quality Control Board, Los Angeles Region
320 West 4th Street, Suite 200 1st Floor
Los Angeles, California 90013

FROM: James C. Carlisle, D.V.M., M.Sc. *J.C.*
Staff Toxicologist
Integrated Risk Assessment Branch

DATE: November 17, 2011

SUBJECT: INDOOR AIR SAMPLING REPORT AND LIMITED HUMAN HEALTH
RISK ASSESSMENT, FORMER HIGH SKY DRY CLEANERS,
WILLOWBROOK, CALIFORNIA, (R4-11-40; OEHA #880278-01)

Documents reviewed

- Indoor Air Sampling Report and Limited Human Health Risk Assessment Former High Sky Dry Cleaners, Kenneth Hahn Shopping Plaza, 11712 S. Wilmington Avenue, Willowbrook, CA, dated October 13, 2011

Site Characterization

Accurate estimation of risk from site contamination requires accurate characterization of contaminant concentrations at the site. Three aspects are key to achieving this end:

- Sampling locations must represent the site as a whole or at least not avoid significant contamination.
 - The PCE vapor plume appears to be well defined, based on about 60 soil gas samples, 9 of which are under the former dry cleaner site.
 - Nonetheless, despite the fact that the 1 µg/L and 10 µg/L isopleths extend under all five businesses within the building that housed the former dry cleaner, and the 100 µg/L isopleth extends close to one of the businesses, indoor air was sampled in only two of the five suites.
- Sample collection and handling must ensure that contaminants are not lost before the samples are analyzed.
- Samples of appropriate environmental media must be analyzed using appropriate analytical methods for an appropriate suite of chemicals that may be present at the site based on the site history.

Conceptual site model

- Indoor workers are assumed to be potentially exposed to PCE in indoor air by intrusion of soil vapors from a previous dry cleaning business.
- Pathways related to direct soil contact and use of ground water are considered to be incomplete.

Vapor intrusion risk assessment

- Soil vapor has been extensively sampled and PCE concentration isopleths are provided. Soil gas PCE concentrations exceed the Industrial/Commercial CHHSL under much of the building housing the former dry cleaners. However, vapor intrusion is not estimated based on these data.
- In February and September 2011, air was sampled in the employee and customer areas of the current business (Continental Currency) occupying the site. Air in the adjacent suite was sampled in September but not in February.
- PCE levels in the Continental Currency work areas averaged $4.8 \mu\text{g}/\text{m}^3$ in February and $7.4 \mu\text{g}/\text{m}^3$ in September. Using the overall mean PCE concentration of $5.9 \mu\text{g}/\text{m}^3$, ENSI estimated a lifetime risk for Continental Currency workers of 4.4×10^{-6} . I was able to replicate and verify this estimate.
 - PCE levels in the customer area were $0.6 \mu\text{g}/\text{m}^3$ in February and $1.8 \mu\text{g}/\text{m}^3$ in September, so the risk to customers would be less than 10^{-6} .
- PCE levels in the adjacent suite averaged $4.3 \mu\text{g}/\text{m}^3$ in September. The lifetime risk to hypothetical workers in this suite, though not given in the report, would presumably be proportional to the slightly lower concentration, or about 3×10^{-6} .

Conclusions

- I agree with ENSI's estimated lifetime risk of 4.4×10^{-6} for Continental Currency workers.
- Risks in the adjacent suite would be lower in proportion to the slightly lower concentration, or about 3×10^{-6} .
- Indoor air samples in the other suites that overly the soil gas PCE plume may help to define the potential inhalation risk in those areas.

Memo reviewed by:

Hristo Hristov, MD, PhD
Staff Toxicologist

Exhibit 2

From: [Peter Ton](#)
To: [Peter Ton](#)
Subject: FW: Kenneth Hahn Plaza
Date: Friday, March 16, 2012 12:24:23 PM

From: Jennifer Fordyce [<mailto:JFordyce@waterboards.ca.gov>]
Sent: Tuesday, March 06, 2012 11:08 AM
To: Jon Wactor
Cc: Carol Ebert; Han, Su; Jones(jwjones4@pacbell.net), Jay; Young, David
Subject: RE: Site attorney requesting correspondence w/RB legal - Kenneth Hahn Plaza Reports and Docs

Hi Jon,

Your understanding of Items 1 and 2 are correct. As for Item 3, Regional Board staff and I will be discussing this further either later today or tomorrow. We will provide a response to your request for an abeyance by tomorrow.

Jennifer

Jennifer L. Fordyce, Staff Counsel
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd floor
Sacramento, CA 95814
Phone - (916) 324-6682
Fax - (916) 341-5199
Email - jfordyce@waterboards.cagov>>> Jon Wactor <JonWactor@ww-envlaw.com> 3/5/2012 5:13 PM
>>>

Thanks, Jennifer. We appreciate your help on this matter.

With your clarification statement below, I understand that the RWQCB's February 15, 2012 letter does not function as an order for the first two elements: (1) a site mitigation plan to decrease concentrations of VOCs in indoor air, and (2) a remedial action plan for cleanup of source area contamination in soil and soil vapor.

However, you still consider the letter's third element "a work plan for additional indoor air sampling to define the lateral extent of the impact within the commercial complex where the former Sky High Cleaners was located" to be an Order.

With regard to #3, I want to further explain our understanding of the Site, (please see figures 5A and 6 in the attached report to help illustrate the point):

- The extent of soil vapor has already been characterized and as predicted by the models, indoor air concentrations correspond with the soil vapor concentrations. And, since the human health risk modeled from air samples collected inside the former dry cleaner suite overlying the higher soil vapor concentrations have been determined by OEHHA to be within the acceptable

risk range, the RWQCB can safely conclude that there is no need for indoor air testing in adjacent areas underlain by even lower soil vapor concentrations.

- Water Code Section 13267 information requests are limited by statute to "investigate the quality of any waters of the state" and the studies must be cost effective. Note that #3 doesn't ask for studies of the water, and given the large amount of data already collected on this small site, a workplan for and performance of additional rounds of expensive indoor air testing (already done twice) to show again that the risk is acceptable doesn't appear to meet either 13267 requirement.
- The client is committed to seeing this matter through to a mutually satisfactory conclusion and has already spent hundreds of thousands of dollars investigating the soil, soil vapor and groundwater at the site as directed by RWQCB staff. Note that the dry cleaner has been gone for many years (so there is no continuing source) and the shallow impacted groundwater is separated by a thick clay layer from any drinking water supplies.
- Since we don't know how long it will take Board staff, yourself or OEHHA to review the information or for us to meet to discuss any questions you may have and to generate and discuss options for proceeding, it doesn't make sense to demand additional specific work now, or to set a date for that work to be done, because the final investigation report and updated site conceptual model not yet in your hands may obviate the need for any such work. As you point out, that report is due in mid-April and so will be to you shortly.
- Therefore, I ask that #3 also be held in abeyance, until the RWQCB has received and evaluated the upcoming soil investigation report and the updated site conceptual model and we have a meeting or call to go over it and to discuss options for next steps for any remaining concerns at the site.

Please let me know if you agree with my proposal to hold #3 in abeyance as well. In the meantime, we will look into the increased ventilation of the former dry cleaner suite as you request.

Best Regards,

Jon

Jon K. Wactor, Esq.; Wactor & Wick LLP Environmental Attorneys; 180 Grand Avenue, Suite 950; Oakland, California 94612; Phone: 510.465.5750; Fax: 510.465.5697; Mobile: 415.816.3580; Email: jonwactor@ww-envlaw.com; Website: www.ww-envlaw.com. This e-mail is sent by a law firm and is privileged and confidential. If you are not the intended recipient, please delete the e-mail and any attachments without reading, printing, copying or forwarding it, and please notify us immediately. Thank you.



From: Jennifer Fordyce [<mailto:JFordyce@waterboards.ca.gov>]
Sent: Monday, March 05, 2012 2:01 PM
To: Jon Wactor
Cc: David Young; Carol Ebert; Su Han
Subject: RE: Site attorney requesting correspondence w/RB legal - Kenneth Hahn Plaza Reports and Docs

Hello Jon,

I had an opportunity to discuss your concerns with David Young last week after we spoke. As a point of clarification to your email earlier today, when you and I spoke last week, I only agreed that Items 1 and 2 of the Board's letter dated February 15, 2012 did not appear to be enforceable. As I confirmed with Mr. Young last week, Items 1 and 2 were intended to be requests, rather than enforceable requirements. Therefore, if your client does not comply with Items 1 and 2, the Regional Board could not enforce those specific items. Understandably, this intention was not made clear as the letter did state "the Regional Board has the following requirements." As you and I discussed last week, however, while Items 1 and 2 are not enforceable requirements, the Regional Board hopes that your client will nevertheless comply with Items 1 and 2 voluntarily. As indicated in the letter, the Regional Board is concerned that shallow soil is causing indoor air impacts, and therefore is concerned about human health. As we discussed, I understand from Mr. Young that complying with Item 1 may be as simple as submitting a plan to install fans to increase air circulation indoors. In the end, if your client does not voluntarily comply with Items 1 and 2, the Regional Board may incorporate Items 1 and 2 in a separate Cleanup and Abatement Order (CAO) issued to your client, which would be enforceable. We hope that we can work cooperatively with each other such that a CAO would not be necessary.

Item 3, as indicated in the last full paragraph of the letter, is an enforceable requirement. This is because Item 3 amended the existing California Water Code section 13267 order dated June 25, 2009. If your client does not comply with Item 3, your client could be subject to enforcement, including penalties for non-compliance. When we spoke last week, you indicated that you want the deadline for Item 3 (currently May 11, 2012) to be same as a forthcoming "conceptual model" (you thought the model was due May 15, 2012). I discussed your request with Mr. Young and he tells me that an assessment of the deep soil investigation is currently due April 15, 2012, and that he is not aware of a "conceptual model" due in May. I am not sure if the deep soil investigation is what you were referring to when you spoke about the conceptual model. If it is, I assume that you no longer request that the deadline for Item 3 be modified to be the same day as the deep soil assessment since Item 3 is due nearly a month after the deep soil assessment investigation. If I am incorrect, please let me know.

I hope this provides the clarification that you requested. If it does not, I suggest that we convene a conference call with you, your clients, Regional Board staff, and myself to discuss this further. Please let me know if you have any questions.

Sincerely,

Jennifer

Exhibit 3



**California Regional Water Quality Control Board
Los Angeles Region**



320 W. 4th Street, Suite 200, Los Angeles, California 90013
(213) 576-6600 • FAX (213) 576-6640
<http://www.waterboards.ca.gov/losangeles>

Matthew Rodriguez
Secretary for
Environmental Protection

Edmund G. Brown Jr.
Governor

March 13, 2012

Mr. Kevin J. Smith
KIMCO Realty Corporation
1621 B South Melrose Drive
Vista, CA 92081

Certified Mail
Return Receipt Requested
Claim No. 7009 2820 0001 6537 5500

SUBJECT: APPROVAL OF EXTENSION REQUEST TO SUBMIT WORK PLAN FOR ADDITIONAL INVESTIGATION OF INDOOR AIR QUALITY, PURSUANT TO CALIFORNIA WATER CODE SECTION 13267 ORDER

SITE/CASE: KENNETH HAHN PLAZA, 11700 WILMINGTON AVENUE, LOS ANGELES, CALIFORNIA (SCP NO. 1040, SITE ID NO. 204FW00)

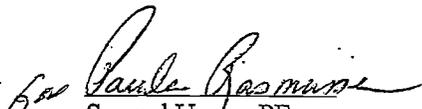
Dear Mr. Smith:

State Water Resources Control Board Office of Chief Counsel (OCC) staff received an email from your attorney, Mr. Jon Wactor of Wactor & Wick, LLP, dated March 5, 2012, requesting that the Los Angeles Regional Water Quality Control Board (Regional Board) requirement to submit a work plan (Work Plan) for additional indoor air sampling, as specified in the letter dated February 15, 2012, be held in abeyance. The Work Plan was required to be submitted to the Regional Board by May 11, 2012. Following multiple telephone conversations and follow up emails between OCC staff, Mr. Wactor, and Regional Board staff, it is our understanding that you are requesting an extension to submit the required Work Plan to allow additional time for all involved parties to evaluate the data from a recently completed soil and groundwater investigation at the subject site. These investigation results will be included in an assessment report due to the Regional Board by April 15, 2012. Therefore, the Regional Board is hereby granting you a ninety (90) day extension to submit the Work Plan from May 11, 2012 to **August 10, 2012**.

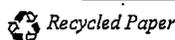
The due date extension to submit the Work Plan is an amendment to Item 1 of the existing California Water Code (CWC) section 13267 Order issued by the Regional Board on June 25, 2009 and amended on February 15, 2012. Pursuant to section 13268 of the CWC, failure to submit the required Work Plan by the specified due date may result in civil liability administratively imposed by the Regional Board in an amount up to one thousand dollars (\$1,000) for every day the Work Plan is not received. These civil liabilities may be assessed by the Regional Board for failure to comply, beginning with the date that the violations first occurred, and without further warning.

If you have any questions, please contact the project manager Mr. David Young at (213) 576-6733 (dyoung@waterboards.ca.gov).

Sincerely,


Samuel Unger, PE
Executive Officer

California Environmental Protection Agency



Mr. Kevin J. Smith
Kenneth Hahn Plaza
SCP No: 1040

- 2 -

March 13, 2012

cc: Ms. Jennifer Fordyce, OCC
Ms. Megan Moloughney, Kimco Realty Corporation
Mr. Jon Wactor, Wactor & Wick, LLP
Mr. Peter Ton, Wactor & Wick, LLP
Mr. Jay Jones, ENSI

California Environmental Protection Agency

Recycled Paper



From: [Jennifer Fordyce](#)
To: [Jon Wactor](#)
Cc: [David Young](#); [Carol Ebert](#)
Subject: RE: Kenneth Hahn Plaza
Date: Thursday, March 15, 2012 11:17:05 AM

Hi Jon,

You are correct, the time extension does NOT extend the time to appeal the amendment to the State Water Board. As I explained previously, the Regional Board has no authority to extend the time to appeal to the State Water Board since the deadline to appeal is specified in Water Code section 13320 and the State Water Board's regulations at Title 23, California Code of Regulations, Chapter 6, section 2050. Therefore, if you intend to file a protective petition, the State Water Board must receive the petition within 30 days of the Regional Board's action, which would be by 5:00 pm tomorrow. Instruction for filing petitions can be found at the following link:
http://www.waterboards.ca.gov/public_notices/petitions/water_quality/index.shtml

Jennifer

Jennifer L. Fordyce, Staff Counsel
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd floor
Sacramento, CA 95814
Phone - (916) 324-6682
Fax - (916) 341-5199

Email - [<jfordyce@waterboards.cagov>](mailto:jfordyce@waterboards.cagov) >>> Jon Wactor <JonWactor@ww-envlaw.com> 3/15/2012 10:49 AM >>>

Jennifer, we did receive the extension letter. Thanks for your efforts on this. However, unless I'm interpreting this incorrectly, the time extension doesn't extend the time to appeal the order amendment itself, and as we'd previously discussed, if that is the case, my client wants us to do a protective petition to the SWRCB asking that the Order amendment be overturned. Can you please let me know if that is necessary, or the deadline to appeal the order amendment was also extended 90 days?

Best regards,

Jon

Jon K. Wactor, Esq.; Wactor & Wick LLP Environmental Attorneys; 180 Grand Avenue, Suite 950; Oakland, California 94612; Phone: 510.465.5750; Fax: 510.465.5697; Mobile: 415.816.3580; Email: jonwactor@ww-envlaw.com; Website: www.ww-envlaw.com. This e-mail is sent by a law firm and is privileged and confidential. If you are not the intended recipient, please delete the e-mail and any attachments without reading, printing, copying or forwarding it, and please notify us immediately. Thank you.

