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July 9, 2010

VIA E-MAIL AND U.S. MAIL

Mary Rose Cassa P.G., P.G.
Engineering Geologist
California Regional Water Quality
Control Board
1515 Clay Street, Suite 1400
Oakland CA 94612

Re: **PCE Contamination Emanating from Mayhew Center LLC, 3301 Vincent Road, Pleasant Hill, California**

Dear Ms. Cassa:

Several weeks ago we had a discussion regarding the current status of Mayhew Center's ("Mayhew") remediation efforts regarding the PCE contamination emanating from its property and my client, Walnut Creek Manor's ("Manor"), continued demand that the contamination Mayhew has caused to the Manor's property be remediated to an appropriate residential standard.[1] You indicated Union Pacific Railroad representatives already had made a formal request for a Regional Board order requiring Mayhew to cleanup the PCE contamination that it has caused. Although you indicated the Regional Board would be responding to this request when you returned from jury duty, we understand from Union Pacific's counsel and the Geotracker website, however, that no response has been provided to their February 23, 2010 request.

The Manor continues to strongly urge the Regional Board to take prompt action to assure that the contaminants are removed. Although the scope of PCE contamination caused by activities at the Mayhew property is significantly greater and extends far beyond the PCE contamination that has migrated onto the Manor's property, the Manor is concerned about the adverse impacts resulting from the contamination and requests the Regional Board to order Mayhew to remediate all of the contamination emanating from its property, and specifically to

[1] As you know, I represent the Manor, which owns and operates a seniors-only apartment complex immediately to the west of the Mayhew property.

remediate the harm caused by Mayhew to the Manor property. Furthermore, because the Manor is a residential property, it is imperative the Regional Board order directs Mayhew to remediate the contamination to levels at or below the Environmental Screening Levels and California Human Health Screening Levels established for residential properties.

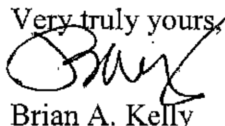
As you know, the Manor has conducted multiple soil and groundwater investigations in response to Water Code § 13267 requests from the Regional Board as well as a soil and groundwater investigation on the neighboring Mayhew property. As a result of those investigations and other compelling evidence, it has been conclusively determined by a federal jury and United States District Court Judge Claudia Wilken that the Mayhew property is 100% responsible for the PCE contamination found in the soil at the Manor property. (See, *Walnut Creek Manor LLC v. Mayhew Center LLC, et al.*, 2009 U.S. Dist. LEXIS 103797 (N.D. Cal. 2009), attached hereto.) The Regional Board has also independently accepted that the Mayhew property is a source of PCE contamination. (*See,* October 6, 2009 Regional Board letter to the Manor.) Thus, there is no reason to delay an order compelling Mayhew as the responsible party to take all reasonable efforts to remediate the PCE contamination emanating from its property.

Mayhew has been avoiding regulatory directives since 2003. We are disappointed to learn that Mayhew's delay and foot dragging in addressing the PCE problem continues. Although in Court proceedings before the Honorable Claudia Wilken, Mayhew's counsel represented it was taking all reasonable steps to assure the PCE contamination is promptly remediated and was working closely with your agency in this regard, you indicated since February there has been no communication with Mayhew or its representatives. A review of the Geotracker website confirms that there has been no further action since Mayhew's deficient work plan was submitted in December 2009, despite the fact the Regional Board has communicated to Mayhew that the December 2009 was unacceptable. The time has come for the Regional Board to take swift and decisive action to order Mayhew to remediate the PCE contamination for which Mayhew is legally responsible.

The Manor is available to assist in any way possible to assure that Mayhew, as the responsible party, undertakes all reasonable and appropriate action to assure that the PCE contamination is addressed.

We look forward to your response and are available to discuss issues further.

Very truly yours,



Brian A. Kelly

BAK:cwc
Attachment

cc: Milt Eberle

Analysis
As of: Jun 24, 2010

WALNUT CREEK MANOR, LLC, Plaintiff, v. MAYHEW CENTER, LLC; and DEAN DUNIVAN, Defendants. MAYHEW CENTER, LLC; and DEAN DUNIVAN, Cross-Claimants, v. WALNUT CREEK MANOR, LLC, Cross-Defendant.

No. C 07-05664 CW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2009 U.S. Dist. LEXIS 103794

October 2, 2009, Decided
October 2, 2009, Filed

SUBSEQUENT HISTORY: Costs and fees proceeding at, Motion denied by Walnut Creek Manor, LLC v. Mayhew Ctr., LLC, 2010 U.S. Dist. LEXIS 21698 (N.D. Cal., Feb. 22, 2010)

PRIOR HISTORY: Walnut Creek Manor, LLC v. Mayhew Ctr., LLC, 622 F. Supp. 2d 918, 2009 U.S. Dist. LEXIS 32285 (N.D. Cal., 2009)

CORE TERMS: hazardous substances, contingency plan, incur, groundwater, contamination, tortfeasor, answered, cleanup, concentration, adjudicate

COUNSEL: [*1] For Walnut Creek Manor, LLC, Plaintiff, Cross-defendant: Brian Anthony Kelly, LEAD ATTORNEY, Christian Penn Foote, DUANE MORRIS LLP, San Francisco, CA; Andrew Thomas Lloyd, Pacific Legal Foundation, Sacramento, CA.

For Mayhew Center, LLC, a California limited liability company, Defendant: Joseph Blaise Adams, LEAD ATTORNEY, Fred M. Blum, Bassi, Martini, Edlin & Blum LLP, San Francisco, CA; Brian Anthony Kelly, Duane Morris LLP, San Francisco, CA; Jeffrey M. Judd, Leigh Aimee Kirmsse, Howrey LLP, San Francisco, CA; Jeremy D. Huie, Bassi, Martini & Blum LLP, San Francisco, CA; Jonathan Eric Meislin, San Francisco, CA.

For Dean Dunivan, Defendant: Fred M. Blum, Joseph Blaise Adams, Bassi, Martini, Edlin & Blum LLP, San Francisco, CA; Jeffrey M. Judd, Leigh Aimee Kirmsse, Howrey LLP, San Francisco, CA; Jeremy D. Huie, Bassi, Martini & Blum LLP, San Francisco, CA; Jonathan Eric Meislin, San Francisco, CA.

For Mayhew Center, LLC, a California limited liability company, Cross-claimant: Brian Anthony Kelly, DUANE MORRIS LLP, San Francisco, CA; Fred M. Blum, Joseph Blaise Adams, Bassi, Martini, Edlin & Blum LLP, San Francisco, CA; Jeffrey M. Judd, Leigh Aimee Kirmsse, Howrey LLP, San Francisco, [*2] CA.

JUDGES: CLAUDIA WILKEN, United States District Judge.

OPINION BY: CLAUDIA WILKEN

OPINION

ORDER ON REMAINING CAUSES OF ACTION

On June 1, 2009, the jury returned a verdict in favor

of Walnut Creek Manor (WCM) and against Mayhew Center (MC) on the negligence, ultrahazardous activity, trespass and nuisance claims. The jury also found that MC did not file its negligence claim within the statute of limitations. The Court must now adjudicate the remaining non-jury claims under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the California Hazardous Substance Account Act (HSAA).

The parties are familiar with the facts of this case; thus, the Court need not restate them here.

CERCLA "generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed." *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1357 (9th Cir. 1990). To that end, CERCLA "authorizes private parties to institute civil actions to recover the costs involved in the cleanup of hazardous wastes from those responsible for their creation." *Id.*

> To prevail in a private cost recovery action, a plaintiff must establish that (1) the site on which the hazardous [*3] substances are contained is a "facility" under CERCLA's definition of that term, Section 101(9), 42 U.S.C. § 9601(9); (2) a "release" or "threatened release" of any "hazardous substance" from the facility has occurred, 42 U.S.C. § 9607(a)(4); (3) such "release" or "threatened release" has caused the plaintiff to incur response costs that were "necessary" and "consistent with the national contingency plan," 42 U.S.C. §§ 9607(a)(4) and (a)(4)(B); and (4) the defendant is within one of four classes of persons subject to the liability provisions of Section 107(a).

Stevens Creek, 915 F.2d at 1358. Similar to CERCLA, California's HSAA provides for civil actions for indemnity and contribution and expressly incorporates CERCLA's liability standards and defenses. *See Castaic Lake Water Agency v. Whittaker Corp.*, 272 F. Supp. 2d 1053, 1084 (C.D. Cal. 2003) ("HSAA 'create[s] a scheme that is identical to CERCLA with respect to who is liable.'" (quoting *City of Emeryville v. Elementis Pigments, Inc.*, No. 99-3719, 2001 U.S. Dist. LEXIS 4712, 2001 WL 964230, at *11 (N.D. Cal.)) (alteration in original)); *see also BKHN, Inc. v. Department of Health Services*, 3 Cal. App. 4th 301, 305, 4 Cal. Rptr. 2d 188 (1992); *T H Agriculture & Nutrition Co., Inc. v. Aceto Chemical Co., Inc.*, 884 F. Supp. 357, 363 (E.D. Cal. 1995).

The [*4] issues remaining to be resolved by the Court are the source of the release of PCE and whether that release caused either party to incur response costs that were necessary and consistent with the national contingency plan.

Although the Court is not bound by the jury determination on the source issue, Fed. R. Civ. P. 39(c), the Court notes that, at the conclusion of the trial, the jury answered "yes" to the question, "Do you find that the source of PCE in the Walnut Creek Manor property was PCE released at the Mayhew Center property?" The jury also answered "no" to the question, "Do you find that the source of PCE in the Mayhew Center property was released at the Walnut Creek Manor property?" Notwithstanding the jury's answers to these questions, the Court independently comes to the same conclusions.

CERCLA defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22). This definition encompasses both active and passive conduct. *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 878-79 (9th Cir. 2001). Based on the entirety of the evidence presented [*5] at trial, the Court concludes that the MC property was the source of the PCE released onto the WCM property and that the WCM property was not the source of the PCE released onto the MC property. The evidence of this is overwhelming.

Evidence at trial showed that the PCE contamination exists at far greater concentrations on the MC side of the property line. Upon release, PCE gradually moves away from the source area, but retains its highest concentration at the point of release, which acts as a marker. Warner Trial Test. at 567:7-13, 607:20-22, 613:11-614:6, 615:7-619:8 and 865:24-867:10. Moreover, an electronics manufacturing operation that likely utilized PCE formerly leased space on the MC property; whereas WCM has been a senior-citizen residential apartment complex since it opened in 1964. K. Beard Trial Test. at 233:2-17; Williams Trial Test. at 334:11-17; Trial Exh. 107 at 2; Cuff Trial Test. at 196:18-199:15; Trial Exh. 253 at 1, 5; M. Eberle Trial Test. at 265:6-8. It is also important to

note that MC performed a slant boring from the MC property onto the WCM property that created a "pathway" which allowed PCE to migrate from the MC property to the WCM property. Dunivan Trial [*6] Test. at 1126:3-1127:3; Warner Trial Test. at 569:21-573:2.

MC's theory that WCM was the source was not supported by the evidence. MC attempted to show that PCE traveled from the WCM property onto the MC property through the groundwater. However, it presented no evidence that PCE existed in groundwater beneath the WCM property; no evidence that the site-specific groundwater flow was from the WCM property and onto the MC property; and no evidence that PCE existed in the MC groundwater in amounts sufficient to lead to the MC soil readings. Schutze Trial Test. at 1293:1-7, 1295:12-18, 1302:18-22; Warner Trial Test. at 654:24-655:1, 863:12-25.

For these reasons, the Court concludes that the source of PCE in the WCM property was PCE released at the MC property.

Because no CERCLA quality cleanup plan has been created to date, the amount of CERCLA response costs cannot be determined at this juncture. However, the Court concludes that MC is 100 percent liable for any future response costs that are necessary and consistent with the national contingency plan. *See* 42 U.S.C. § 9613(g). Conversely, WCM is not liable for MC's response costs. "CERCLA provides that a party that releases a hazardous substance [*7] is liable for another's response costs, but only if its release caused the other party to incur those response costs." *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1182 (9th Cir. 2000). Here, the Court concludes that, because MC's property is the sole contamination source, MC's CERCLA claims fail. Any costs that MC will incur will be the result of its own or its predecessors' release of PCE. [1]

1 Because the Court has concluded that MC cannot recover response costs, it need not decide whether WCM is protected by the third party defense. 42 U.S.C. § 9607(b)(3).

The Court also denies MC's request for contribution. A CERCLA contribution claim may be brought against a "person who is liable or potentially liable under section 9607(a)." 42 U.S.C. § 9613(f)(1). "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." *Id.* "Contribution is defined as the tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault." *United States v. Atlantic Research Corp.*, 551 U.S. 128, 139, 127 S. Ct. 2331, 168 L. Ed. 2d 28 (2007). [*8] Here, MC's contribution claim is no different from its cost recovery action. The Court has determined that WCM is not liable for the PCE released onto its property. Therefore, MC's contribution claim fails.

CONCLUSION

For the foregoing reasons, the Court declares that the MC property is the source, and that the WCM property is not the source, of all PCE contamination on WCM and MC property. The Court also concludes that MC is 100 percent liable for any future response costs that will be necessary and consistent with the national contingency plan. The Court denies MC's claim for contribution. This order adjudicates all remaining claims pending in this case. The clerk shall enter judgment for WCM and close the file. WCM shall recover its litigation costs from MC.

IT IS SO ORDERED.

Dated: 10/2/09

/s/ Claudia Wilken

CLAUDIA WILKEN

United States District Judge