

CONSUMER DEFENSE GROUP ACTION

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Sixty Day Notice of Intent to Sue The Dow Chemical Company For Violations of Health & Safety Code Sections 25249.5 and 25249.6

This Sixty Day Notice of Intent to Sue Under Health & Safety Code Section 25249.5 and 25249.6 ("the Notice") is given by the Consumer Defense Group Action ("the Noticing Party") to William S. Stavropoulos, Chairman, President and Chief Executive Officer of The Dow Chemical Company, (hereinafter, "the Violator"), as well as the entities on the attached proof of service. The Noticing Party must be contacted through its legal representative: Graham & Martin, LLP, 3 Park Plaza, Suite 2030, Irvine, California 92614.

This Notice constitutes notification that the Violator has violated The Safe Drinking Water and Toxic Enforcement Act (commencing with Health & Safety Code Section 25249.5) (hereinafter "Proposition 65") and that the Noticing Party intends to file suit after the expiration of sixty days from the date of this Notice.

Summary of Violations

Proposition 65 provides that when a party, such as the Violator, has been and is knowingly and intentionally releasing or threatening to "release chemicals known to the State of California to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water", it is in violation of Health & Safety Code Section 25249.5. For such a violation, the Violator is liable to be enjoined from such conduct and "shall" also be liable for civil penalties. Proposition 65 also provides that when a party, such as the Violator, has been and is knowingly and intentionally exposing the public and/or its employees to chemicals designated by the State of California to cause cancer and/or reproductive toxicity ("the Designated Chemicals") it has violated Health & Safety Code Section 25249.6 unless, prior to such exposure, it provides clear and reasonable warning of that potential exposure to the potentially exposed persons. For such a violation, the Violator is liable to be enjoined from such conduct and "shall" also be liable for civil penalties.

The Violator has violated, threatens to violate and continues to violate both sections of the Health & Safety Code at the landfill site located at 21641 Magnolia Street, Huntington Beach, California 92646, where it is responsible for the clean up of that site. The Violator formerly contaminated that site by the disposal or treatment of hazardous substances, including Designated Chemicals. Further, the Violator has been and presently is, by reason of that conduct, under a duty to prevent the actual and threatened "release" of Designated Chemicals from the site and "exposures" to Designated Chemicals affecting both onsite and offsite persons.

The Factual Basis for this Notice

One of the business activities the Violator engages in, on a regular and ongoing basis, is to clean up former landfill sites which it has contaminated by the disposal or treatment of hazardous substances. At such sites it is also under a duty to prevent the actual and threatened “release” of Designated Chemicals from the site and “exposures” to Designated Chemicals affecting both onsite and offsite persons.

In February, 2003 the Violator entered into a Consent Order (Docket Number I&ISE-CO 02/03-007) (hereinafter, the “Consent Order”) wherein the Violator was specifically identified by the Department of Toxic Substances Control (“DTSC”) as a “responsible party” or “liable person”, as defined in Health & Safety Code section 25323.5. The Violator has been so identified since it arranged for the disposal or treatment of hazardous substances at the Ascon Landfill Site located at 21641 Magnolia Street, Huntington Beach, California 92646 (hereinafter, “the Site”). The Violator, along with other parties, is thus responsible for the clean up of the Site. Since it is responsible for such future clean up it is not only responsible for the current dangerous condition of the Site but also under a current duty to ensure that the Site is operated in such a manner as to ensure (i) that there are no releases of any Designated Chemicals at or from the Site and (ii) to inform the public that proximity to the Site will result in exposure to Designated Chemicals. The Violator is currently not fulfilling either of those duties.

The Site consists of approximately 38 acres, and is bounded by Hamilton Avenue on the north, Magnolia Street on the east, an oil storage tank area on the south, and the Huntington Beach flood control channel and an industrial area on the west. It is identified by Assessor’s parcel numbers 114-150-75, 114-150-78, 114-150-79, and 114-150-80. The Site is 0.25 miles from the Pacific Ocean, and located within a mixed commercial/industrial, recreational and residential area; a community park (Edison Community Park) and a high school (Edison High School) are located directly across the street from the Site.

The Site consists of historic disposal areas, comprising former disposal pits, current “lagoons” and former “lagoon” areas. At present, the Site consists of five waste lagoons filled with oily waste material, covering approximately 30% of the Site, and one pit (Pit F), containing styrene waste and other waste, located in the southeast corner of the Site. Although the Site is fenced, the California Environmental Protection Agency (“CEPA”) and DTSC have noted that there is evidence that trespassers have obtained access to the Site on a number of occasions. Investigators for the Noticing Party have noted, between December 12, 2002 and June 4, 2003, that there are beaten pathways leading directly from the various breaks in the chain link fence surrounding the Site obviously suggesting that the Site is regularly “visited” by trespassers.

A Baseline Health Risk Assessment (“BHRA”), which evaluated the potential health impacts associated with human exposure to chemicals released from the waste pits and lagoons at the Site, has specifically found that the estimated health risk for adults and children living in the immediate vicinity of the Site, onsite workers, and trespassers, exceeds levels considered acceptable by California regulatory agencies. These potential risks were found to be associated with the volatilization and subsequent inhalation of volatile organic compounds and oral and

dermal contact with contaminants in the soil.

Metals detected at the Site, greater than typical background concentrations, include arsenic, lead, chromium, cadmium, mercury, and thallium. Lead and lead compounds, chromium (hexavalent compounds), arsenic (inorganic arsenic compounds), and cadmium and cadmium compounds are Designated Chemicals known to the State of California to cause cancer. Arsenic (inorganic arsenic compounds), lead, cadmium, mercury and mercury compounds are Designated Chemicals known to the State of California to cause reproductive toxicity. Significant risks from many of these chemicals may occur primarily by direct contact with soils, ingestion, and dermal exposure.

Pesticides detected at the Site include lindane and chlordane. Lindane and lindane compounds and chlordane are Designated Chemicals known to the State of California to cause cancer. Significant risks from these chemicals occur primarily by direct contact with soils, ingestion and dermal exposure.

Semi-volatile organic compounds ("SVOCS") detected at the Site include benzo(a)pyrene, naphthalene, benzidine, and polychlorinated biphenyl. Benzo(a)pyrene, naphthalene, benzidine (and its salts), and polychlorinated biphenyls are Designated Chemicals known to the State of California to cause cancer. Polychlorinated biphenyls is a Designated Chemical known to the State of California to cause reproductive toxicity. Significant risks from these chemicals occur primarily by direct contact with soils, ingestion and dermal exposure.

Volatile organic compounds ("VOCS") detected at the Site include benzene, toluene, styrene, chloroform, and dichloroethane. Benzene, styrene oxide, chloroform, and dichloroethane are Designated Chemicals known to the State of California to cause cancer. Benzene and toluene are Designated Chemicals known to the State of California to cause reproductive toxicity. Significant risks from these chemicals occur primarily by inhalation.

The route of exposure for the chemicals noted herein is as follows: volatile waste components present in the lagoons and Pit F may volatilize from the surface and disperse in the atmosphere which may cause exposure to people both onsite and offsite via inhalation. Moreover, disturbance of the lagoons or pit will result in the release of vapors or hazardous particulates into the atmosphere where persons may inhale or ingest such substances. Moreover, though the Site is fenced, there is evidence that trespassers are regularly onsite and there is therefore a potential for direct contact with contaminated soils and accumulated contaminated runoff by persons either legally at the Site (such as investigators or site workers) or by trespassers. Further, the lagoons have previously overflowed during heavy rains causing hundreds of gallons of overflow to run down the streets offsite. Rainwater runoff which has come into contact with contaminated soils on the Site is likely to lead to offsite contamination by direct contact with persons in the area.

According to the DTSC that chemicals that were disposed of at the Site by the Violator have migrated and will continue to migrate into the soil and groundwater beneath and adjacent to the Site. The DTSC has also noted that exposure to impacted groundwater may occur if

groundwater is pumped for use or if discharged into a surface water body” and that the potential thus exists for “Site contamination to impact drinking water supplies.” This threat will exist until the waste materials at the Site are effectively contained. Further, until effectively contained there exists the potential for future migration of the waste materials from the Site to the wetlands through the unlined Huntington Beach flood control channel that currently passes the westerly edge of the Site and flows through the Talbert Marsh wetland.

The DTSC has specifically found that at the Site there have “releases” and that there is presently a “threatened release” of the Designated Chemicals noted herein, as the term “release” is defined by Health & Safety Code section 25320 [“‘Release’ means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment”]. Moreover, the DTSC has specifically found that the actual and threatened release of the Designated Chemicals noted herein (as well as the chemicals listed in Paragraph 2.4 of the Consent Order) presents an imminent and substantial endangerment to the public health or welfare.

Based on all of the facts known to the Noticing Party at this time, the Violator has violated Health & Safety Code section 25249.5 since it has, “in the course of doing business”, “knowingly and intentionally released chemicals known to the State of California to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water, notwithstanding any other provision or authorization of law except as provided in Section 25249.9”. It has done so by failing to effectively contain at the Site the Designated Chemicals it disposed of at the Site and for which it is currently responsible.

Upon filing of the Complaint relating to this violation, the Noticing Party will seek an injunction requiring that the Violator immediately take effective action to safely contain the Designated Chemicals at the Site so as to prevent further actual or potential releases, until such time as the clean up required by the Consent Order is completed pursuant to Health & Safety Code section 25249.7. The Noticing Party will also seek civil penalties against the Violator for its past and ongoing violations of Health & Safety Code section 25249.5.

The Violator has also violated Health & Safety Code section 25249.6 since it has “in the course of doing business” “knowingly and intentionally expose[ed] [persons] to a chemical known to the State of California to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual.” Investigators for the Noticing Party visited the Site on December 12, 2002, January 23, 2003, March 15, 2003 and again on June 4, 2003. They examined the entire perimeter fencing of the Site and saw no clear and reasonable warning sign even purporting to comply with the requirements of Health & Safety Code section 25249.6, nor the regulations relating to that code section. Further, agents of the Noticing Party living in Huntington Beach know that there has been no attempt by the Violator to provide a clear and reasonable warning to the local residents living in the area, the children and personnel (teachers, administrators, security and other personnel).at the high school or the users of the local park located next to the Site that physical proximity to the Site may expose them to Designated Chemicals.

Upon filing of the Complaint relating to this violation the Noticing Party will seek an injunction requiring that the Violator immediately take effective action to inform all likely affected persons of the likely exposures to Designated Chemicals in a clear and reasonable manner. The Noticing Party will also seek civil penalties against the Violator for its past and ongoing violations of Health & Safety Code Section 25249.6.

Both as to violations of Health & Safety Code Section 25249.5 and Health & Safety Code Section 25249.6 the Noticing Party will seek civil penalties for the maximum period allowed by law, which the Noticing Party believes is one year prior to the date of this Notice. With this Notice the Noticing Party has also included a copy of "The Safe Drinking Water and Toxic Enforcement Act of,1986 (Proposition 65): A Summary."

If you have any questions or comments, please do not hesitate to contact the undersigned at your earliest convenience.

Dated: June 10, 2003

By:

A handwritten signature consisting of a simple, stylized mark that resembles a 'u' with a small dot to its right.

cc. Consumer Defense Group Action
Attached Service List

CERTIFICATE OF MERIT

I, Anthony G. Graham, declare as follows:

1. I am a member of the State Bar of California, a partner of the law firm of Graham & Martin LLP, and one of the attorneys principally responsible for representing The Consumer Defense Group Action, the “Noticing Party” as to the “60 Day Notice of Intent to Sue” (hereinafter, “the Notice”) served concurrently herewith. I have personal knowledge of the facts set forth herein and, if called upon, could and would testify competently thereto.

2. I have consulted with appropriate and qualified scientific experts and, having reviewed relevant scientific data and results of relevant test reports, as well as having reviewed the facts as set forth below and the documentary evidence of those facts regarding the exposures to the chemicals as set forth in the Notice, I have a good faith basis for believing that the exposures set forth in the Notice are likely to be above the minimum significant risk level for the chemicals at issue. I have provided the information, documents, data, reports and/or opinions I have relied upon to the Attorney General’s office as required by the regulations promulgated under Proposition 65.

3. Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that “reasonable and meritorious case for the private action” means that the information provides a credible basis that all elements of the plaintiffs’ case can be established and the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.

4. The information referred to in paragraph 3 is as follows: by physical investigation

of the location referenced in the Notice and by investigation of relevant information, documents, data, and reports Consumer Defense Group Action discovered that:

- (1) the Violator is responsible for, and thus “operates”, the specific subject property for purposes of Health and Safety Code section 25249.5 and 25249.6;
- (2) the Violator has more than nine employees;
- (3) the Violator permits and has permitted the “release” of the chemicals set forth in the Notice and such “releases” threaten to pass in sources of drinking water;
- (4) exposures to the chemicals set forth in the Notice have occurred and continue to occur both to offsite and onsite persons;
- (5) the Violator has not put in place a clear and reasonable warning as required under Health & Safety Code section 25249.6, or any other sign purporting to comply with the requirements of that section.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Irvine, California on June 10, 2003.

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CERTIFICATE OF SERVICE

I am over the age of 18 and not a party to this case. I am a resident of or employed in the county where the mailing occurred. My business address is 3 Park Plaza, Suite 2030, Irvine, California 92614.

I SERVED THE FOLLOWING:

- 1.) Sixty Day Notice of Intent to Sue Under Health & Safety Code Sections 24249.5 and 25249.6;
- 2.) Certificate of Merit;
- 3.) Copy of "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary" (*sent only to Violators*)
- 4.) Supporting Documents (*sent only to Office of Attorney General*)

by enclosing a true copy of the same in a sealed envelope addressed to each person whose name and address is shown below and depositing the envelope in the United States mail with the postage fully prepaid:

Date of Mailing: June 10, 2003
Place of Mailing: Irvine, California

NAME AND ADDRESS OF EACH PERSON TO WHOM DOCUMENTS WERE MAILED:

William S. Stavropoulos
Chairman, President and Chief Executive Officer
The Dow Chemical Company
2030 Dow Center
Midland, Michigan 48674

California Attorney General
Office of Proposition 65 Enforcement
1515 Clay Street
20th Floor, P.O. Box 70550
Oakland, CA 94612-0550

Orange County District Attorney
401 Civic Center Dr. W.
Santa Ana, CA 92701

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: June 10, 2003
