

CONSUMER DEFENSE GROUP ACTION

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Sixty Day Notice of Intent to Sue Union Pacific Railroad 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 Igor J. Evans, the President and COO of Union Pacific Railroad 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 property located at the Union Pacific Oakland Coliseum Site, located at 700 73rd Avenue, Oakland, California 94621 (hereinafter “the Site”), where it is responsible for the clean up of the Site, as well as the area beyond the Site contaminated by the activities on the 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

The Violator is the owner of the Site. As such it is under a duty to prevent the actual and threatened "release" of Designated Chemicals at the Site and "exposures" to Designated Chemicals affecting both onsite and offsite persons.

In April, 2002 the Department of Toxic Substances Control ("DTSC") filed an Imminent and Substantial Endangerment Determination and Order and Remedial Action Order (Docket Number I&ISE-CO 01/02-007) (hereinafter, the "Order") wherein the DTSC specifically identified the Violator as a "responsible party" or "liable person", as defined in Health & Safety Code section 25323.5, as the owner of the Site. The Violator is thus responsible for the future clean up of the Site. Since it is responsible for such future clean up it is not only responsible for the current dangerous and hazardous 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 is located at 700 73rd Avenue, Oakland, Alameda County, California 94621. The Site is located in block 50 of the subdivision of Fitchburg Homestead Lots, June 1870. The property consists of a rectangular lot (approximately 120 feet by 350 feet) and is identified by Assessor's Parcel numbers 41-3901-7-4 and 41-3901-7-3. The Site is bounded by the Oakland Coliseum Bay Area Rapid Transit pedestrian walkway on the north, by Alameda flood control canal (Arroyo Viejo Creek) to the south and west, and by industrial properties to the east. Railroad tracks (three sets) traverse the Site in a north-south orientation. The Oakland Coliseum is located near the Site to the west. The BART Coliseum station is on San Leandro Street to the north and east of the Site.

Soil investigations were conducted at the Site in 1998, 2000 and 2001. Based on those investigations, the following chemicals were detected in the soil at the Site: Polychlorinated biphenyls ("PCBs") up to 420 mg/kg; tetrachloroethene (a.k.a. perchloroethene ("PCE")) up to 6400 mg/kg; trichloroethene ("TCE") up to 740 mg/kg; and total petroleum hydrocarbons ("TPH") up to 1600 mg/kg. The following chemicals have been detected in the groundwater at the Site: PCBs up to 0.008 mg/l; PCE up to 150,000 ug/l; TCE up to 21,000 ug/l and TPH up to 390,000 ug/l. The following substances have been found above their primary maximum contaminant level (MCL) : PCBs up to 0.008 mg/l (MCL is 0.0005mg/l); PCE up to 150,000 ug/l (MCL 0.005 mg/l); TCE up to 21,000 ug/l (MCL 0.005 mg/l); vinyl chloride up to 0.012 mg/l (MCL 0.0005 mg/l).

Polychlorinated Biphenyls ("PCB") are listed as a chemical known to the State to cause cancer and reproductive toxicity pursuant to the Safe Drinking water and Toxic Enforcement Act of 1986. Significant risks from this chemical occurs primarily by inhalation and ingestion. PCBs can also cause liver damage, skin pigmentation

changes and chloracne. Irritation of the eyes, nose, and throat may also occur. Systemic effects are usually dependent upon the degree of chlorination - the higher the degree, the stronger the effects. PCBs are known to bioaccumulate in human and animal tissues.

Tetrachloroethene (also known as Perchloroethene ("PCE")). PCE is listed as a chemical known to the State to cause cancer pursuant to the Safe Drinking water and Toxic Enforcement Act of 1986. Significant risks from this chemical occurs primarily by inhalation and ingestion. In addition to cancer, short term exposure to this chemical may cause nausea, vomiting, headache, dizziness, drowsiness, and tremors. Skin contact with PCE causes irritation and blistering. Long term exposure can cause liver and kidney toxicity.

Trichloroethene ("TCE") is listed as a chemical known to the State to cause cancer pursuant to the Safe Drinking water and Toxic Enforcement Act of 1986. Significant risks from this chemical occurs primarily by inhalation and ingestion. Acute exposure to TCE causes headache, dizziness, vertigo, tremors, irregular heartbeat, fatigue, nausea, vomiting, and blurred vision. TCE vapors may cause irritation of the eyes, nose, and throat. Long-term effects may include liver and kidney damage.

Vinyl Chloride is listed as a chemical known to the State to cause cancer pursuant to the Safe Drinking water and Toxic Enforcement Act of 1986. Significant risks from this chemical occurs primarily by inhalation. In addition to cancer, this chemical causes headache, dizziness, abdominal pain, numbness, and tingling of the extremities. Vinyl chloride vapors also cause eye irritation and may cause skin irritation. Long term effects of vinyl chloride exposure include liver damage and liver.

The route of exposure for the chemicals noted herein is as follows: people working or living (e.g. as unauthorized transients) on the site could be exposed to contaminants via dermal contact or via inhalation of volatile or dust-borne contaminants. The public at risk includes those people who work, or live (as transients nearby) or attend Oakland Coliseum events (parking), those who excavate into contaminated soil or groundwater, and/or persons who otherwise come into contact with, inhale or ingest contaminated air, soil or groundwater. Excavation of soil in the areas where the contamination exists could expose workers to contamination via dermal contact or via inhalation of contaminants, either from soil or groundwater. The Site is approximately 2600 feet up gradient from Oakland Estuary and San Francisco Bay. The potential thus exists for contaminated groundwater to migrate into the adjacent Alameda flood control canal (Arroyo Viejo Creek) , and consequently discharge into the wetlands and San Francisco Bay.

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 presents an imminent and substantial endangerment to the public health or welfare. Since the on-site Designated

Chemicals can migrate and will continue to migrate into the soil and groundwater beneath and adjacent to the Site, 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 and San Francisco Bay.

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 17, 2002 and again on March 14, 2003. They examined the entire perimeter 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, there has been no attempt by the Violator to provide a clear and reasonable warning to the local residents living in the area 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: July 23, 2003

GRAHAM & MARTIN, LLP

By:

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 or properties 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 July 22, 2003.

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: July 23, 2003

Place of Mailing: Irvine, California

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

Igor J. Evans
President and COO
Union Pacific Railroad Company
49 Stevenson Street, 15th Floor
San Francisco, CA 94105

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

Alameda County DA
1225 Fallon Street
Oakland, CA 94612

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

Dated: July 23, 2003
