

Wickham, Jerry, Env. Health

From: Wickham, Jerry, Env. Health
Sent: Tuesday, August 17, 2010 11:44 AM
To: 'Ken Cheitlin'
Cc: Desso,Michael,GLENDALE,Corporate Environment & Safety;
Costanza,Jennifer,GLENDALE,Legal
Subject: RE: ACEH Correspondence for RO18
Attachments: Alameda County's Model Deed Restriction (Final) 2010-08-11.doc; SLIC closure letter template 2010-08.docx

Mr. Cheitlin:

I received correspondence from Encinal 14th Street LLC dated July 23, 2010 that requests clarity in the Deed Restriction and Risk Management Plan. As we discussed on the phone today, Alameda County Environmental Health cannot agree to the specific language in the July 23, 2010 correspondence. However, I have included an edited Deed Restriction with suggested language in section 3.1k regarding site development that potentially may be acceptable during the case closure review process. You may wish to incorporate this suggested information as you see fit in submitting a Draft Deed Restriction by September 7, 2010. You may also wish to submit a revised Draft Risk Management Plan that incorporates additions or revisions to the Draft Deed Restriction.

Several of the items in the July 23, 2010 correspondence discussed limitations on future work at the site, which would not be acceptable as proposed. I have attached the template for the SLIC case closure letter which provides the acceptable language that would be in place at case closure regarding the completion of work at the site.

Regards,

Jerry Wickham

Senior Hazardous Materials Specialist
Alameda County Environmental Health
1131 Harbor Bay Parkway
Alameda, CA 94502-6577
phone: 510-567-6791
Fax: 510-337-9335
jerry.wickham@acgov.org

Online case files are available at the following website <http://www.acgov.org/aceh/index.htm>

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From: Ken Cheitlin [mailto:KenC@hallequitiesgroup.com]
Sent: Thursday, August 05, 2010 6:59 PM
To: Wickham, Jerry, Env. Health
Cc: Desso,Michael,GLENDALE,Corporate Environment & Safety; Costanza,Jennifer,GLENDALE,Legal
Subject: RE: ACEH Correspondence for RO18
Importance: High

Mr. Wickham, I have not heard from you in response to our joint request for an extension (below). Nestle and Encinal 14th Street, LLC are both desirous of respecting tomorrow's deadline; however, we believe it would be ultimately more useful and efficient to wait to submit the draft deed until after you have had a chance to consider our request for clarification. If

you are agreeable, could we have an extension confirmation email tomorrow? I will call you in the morning to discuss this further. Thank you. Ken

Ken Cheitlin
Tel: (925) 933-4000 ext. 249

From: Ken Cheitlin
Sent: Friday, July 30, 2010 8:42 PM
To: 'Wickham, Jerry, Env. Health'
Cc: 'Desso, Michael, GLENDALE, Corporate Environment & Safety'; Mark Hall
Subject: FW: ACEH Correspondence for RO18

Mr. Wickham, thank you again for the helpful conversation yesterday. We greatly appreciate your understanding of both our desire for clarification as well as our hope for a rapid conclusion to this matter. I communicated with Mike Desso today and have his permission to make a joint request on behalf of Nestle USA and Encinal 14th Street, LLC for an extension of the August 9, 2010 deadline, established in your letter of June 9, 2010 (attached), for submission of the draft deed restriction with risk management plan. We certainly anticipate being able to make that submission very quickly once you have had a chance to review our request for clarification, so perhaps a new deadline of two weeks thereafter would make sense? Thank you for your consideration of this extension request.

Sincerely,

Ken Cheitlin

Kenneth A. Cheitlin
COO/General Counsel
Hall Equities Group
1855 Olympic Blvd., Suite 250
Walnut Creek, CA 94596
Tel: (925) 933-4000 ext. 249
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From: dehloptoxic, Env. Health [mailto:deh.loptoxic@acgov.org]
Sent: Thursday, June 10, 2010 9:16 AM
To: 'lgriffin@oaklandnet.com'; Ken Cheitlin; 'jennifer.costanza@us.nestle.com'; 'bsearcy@ecostmanage.com'; 'Robert Flory'; 'markus@amicusenv.com'
Cc: Drogos, Donna, Env. Health
Subject: ACEH Correspondence for RO18

Dear Interested Parties,

Attached is Alameda County Environmental Health's (ACEH) correspondence for your case, RO000018.

Please add our e-mail address to your address book to prevent future e-mails from being filtered as spam.

Sincerely,

Recording Requested By:

[CURRENT OWNER]

When Recorded, Mail To:

Ariu Levi, Director
Alameda County Environmental Health Services
1131 Harbor Bay Parkway
Alameda, California 94502

COVENANT AND ENVIRONMENTAL RESTRICTION
ON PROPERTY

[NAME OF SITE and ADDRESS OF PROPERTY]

This Covenant and Environmental Restriction on Property (this "Covenant") is made as of the ____ day of _____, 20__ by [CURRENT OWNER/S] ("Covenantor") who is the Owner of record of that certain property situated at ___(address)___, in the City of _____, County of _____, State of California, which is more particularly described in Exhibit A attached hereto and incorporated herein by this reference (such portion hereinafter referred to as the "Burdened Property"), for the benefit of the Alameda County Environmental Health Services (the "County"), with reference to the following facts:

A. The Burdened Property and groundwater underlying the property contains hazardous materials.

B. Contamination of the Burdened Property. Soil at the Burdened Property was contaminated by [BRIEFLY DESCRIBE OPERATIONS THAT CAUSED CONTAMINATION] conducted by _____. These operations resulted in contamination of [SOIL AND/OR GROUNDWATER] with [INORGANIC AND/OR ORGANIC] chemicals including _____, which constitute hazardous materials as that term is defined in Health & Safety Code Section 25260. [BRIEFLY DESCRIBE REMEDIATION AND CONTROLS IMPLEMENTED].

C. Exposure Pathways. The contaminants addressed in this Covenant are present in [SOIL AND/OR GROUNDWATER] on the Burdened Property. Without the mitigation measures which have been performed on the Burdened Property, exposure to these contaminants could take place via [LIST AS APPROPRIATE: IN-PLACE CONTACT, SURFACE-WATER RUNOFF, AND WIND DISPERSAL, RESULTING IN DERMAL CONTACT, INHALATION, OR INGESTION BY HUMANS, ETC.]. The risk of public exposure to the contaminants has been substantially lessened by the remediation and controls described herein.

D. Adjacent Land Uses and Population Potentially Affected. The Burdened Property is used for _____ and is adjacent to [LIST AS APPROPRIATE: INDUSTRIAL, COMMERCIAL, RESIDENTIAL] land uses.

E. Full and voluntary disclosure to the County of the presence of hazardous materials on the Burdened Property has been made and extensive sampling of the Burdened Property has been conducted.

F. Covenantor desires and intends that in order to benefit the County, and to protect the present and future public health and safety, the Burdened Property shall be used in such a manner as to avoid potential harm to persons or property that may result from hazardous materials that may have been deposited on portions of the Burdened Property.

ARTICLE I GENERAL PROVISIONS

1.1 Provisions to Run with the Land. This Covenant sets forth protective provisions, covenants, conditions and restrictions (collectively referred to as "Restrictions") upon and subject to which the Burdened Property and every portion thereof shall be improved, held, used, occupied, leased, sold, hypothecated, encumbered, and/or conveyed. The restrictions set forth in Article III are reasonably necessary to protect present and future human health and safety or the environment as a result of the presence on the land of hazardous materials. Each and all of the Restrictions shall run with the land, and pass with each and every portion of the Burdened Property, and shall apply to, inure to the benefit of, and bind the respective successors in interest thereof, for the benefit of the County and all Owners and Occupants. Each and all of the Restrictions are imposed upon the entire Burdened Property unless expressly stated as applicable to a specific portion of the Burdened Property. Each and all of the Restrictions run with the land pursuant to section 1471 of the Civil Code. Each and all of the Restrictions are enforceable by the County.

1.2 Concurrence of Owners and Lessees Presumed. All purchasers, lessees, or possessors of any portion of the Burdened Property shall be deemed by their purchase, leasing, or possession of such Burdened Property, to be in accord with the foregoing and to agree for and among themselves, their heirs, successors, and assignees, and the agents, employees, and lessees of such owners, heirs, successors, and assignees, that the Restrictions as herein established must be adhered to for the benefit of the County and the Owners and Occupants of the Burdened Property and that the interest of the Owners and Occupants of the Burdened Property shall be subject to the Restrictions contained herein.

1.3 Incorporation into Deeds and Leases. Covenantor desires and covenants that the Restrictions set out herein shall be incorporated in and attached to each and all deeds and leases of any portion of the Burdened Property. Recordation of this Covenant shall be deemed binding on all successors, assigns, and lessees, regardless of whether a copy of this Covenant and Agreement has been attached to or incorporated into any given deed or lease.

1.4 Purpose. It is the purpose of this instrument to convey to the County real property rights, which will run with the land, to facilitate the remediation of past environmental contamination and to protect human health and the environment by reducing the risk of exposure to residual hazardous materials.

ARTICLE II DEFINITIONS

2.1 County. "County" shall mean the Alameda County Environmental Health Services and shall include its successor agencies, if any.

2.2 Improvements. "Improvements" shall mean all buildings, roads, driveways, regradings, and paved parking areas, constructed or placed upon any portion of the Burdened Property.

2.3 Occupants. "Occupants" shall mean Owners and those persons entitled by ownership, leasehold, or other legal relationship to the exclusive right to use and/or occupy all or any portion of the Burdened Property.

2.4 Owner or Owners. "Owner" or "Owners" shall mean the Covenantor and/or its successors in interest, who hold title to all or any portion of the Burdened Property.

ARTICLE III DEVELOPMENT, USE AND CONVEYANCE OF THE BURDENED PROPERTY

3.1 Restrictions on Development and Use. Covenantor promises to restrict the use of the Burdened Property as follows:

[INCLUDE THE FOLLOWING PROVISIONS, A-I, IF APPROPRIATE]:

- a. Development of the Burdened Property shall be restricted to industrial, commercial or office space;
- b. No residence for human habitation shall be permitted on the Burdened Property;
- c. No hospitals shall be permitted on the Burdened Property;
- d. No schools for persons under 21 years of age shall be permitted on the Burdened Property;
- e. No day care centers for children or day care centers for Senior Citizens shall be permitted on the Burdened Property;

f. No Owners or Occupants of the Property or any portion thereof shall conduct any excavation work on the Property, unless expressly permitted in writing by the County. Any contaminated soils brought to the surface by grading, excavation, trenching, or backfilling shall be managed by Covenantor or his agent in accordance with all applicable provisions of local, state and federal law;

g. All uses and development of the Burdened Property shall be consistent with any applicable County Cleanup Order or Risk Management Plan, each of which is hereby incorporated by reference including future amendments thereto. All uses and development shall preserve the integrity of any cap, any remedial measures taken or remedial equipment installed, and any groundwater monitoring system installed on the Burdened Property pursuant to the requirements of the County, unless otherwise expressly permitted in writing by the County.

h. No Owners or Occupants of the Property or any portion thereof shall drill, bore, otherwise construct, or use a well for the purpose of extracting water for any use, including but not limited to, domestic, potable, or industrial uses, unless expressly permitted in writing by the County.

i. The Owner shall notify the County of each of the following: (1) The type, cause, location and date of any disturbance to any cap, any remedial measures taken or remedial equipment installed, and of the groundwater monitoring system installed on the Burdened Property pursuant to the requirements of the County, which could affect the ability of such cap or remedial measures, remedial equipment, or monitoring system to perform their respective functions and (2) the type and date of repair of such disturbance. Notification to the County shall be made by registered mail within ten (10) working days of both the discovery of such disturbance and the completion of repairs;

j. The Covenantor agrees that the County, and/or any persons acting pursuant to County cleanup orders, shall have reasonable access to the Burdened Property for the purposes of inspection, surveillance, maintenance, or monitoring, as provided for in Division 7 of the Water Code.

k. No Owner or Occupant of the Burdened Property shall act in any manner that will aggravate or contribute to the existing environmental conditions of the Burdened Property. All use and development of the Burdened Property shall preserve the integrity of any capped areas. In the event that the site is to be redeveloped for commercial or industrial land use, replacement of the existing building slab during site development may be acceptable provided that:

1. The new building slab provides a similar or greater level of protection from vapor intrusion as the existing building slab.
2. No subsurface structures are constructed other than utility trenches.
3. No unexpected conditions are encountered during removal of the existing slab.
4. The new perimeter building foundation will extend to a similar depth as the existing perimeter foundation to potentially provide a similar barrier to off-site contaminant migration.

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Approved development/constructions plans are to be submitted to the County for review and approval to assure that the above conditions are met and the integrity of the cap will be maintained.

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3.2 Enforcement. Failure of an Owner or Occupant to comply with any of the restrictions, as set forth in paragraph 3.1, shall be grounds for the County, by reason of this Covenant, to have the authority to require that the Owner modify or remove any Improvements constructed in violation of that paragraph. Violation of the Covenant shall be grounds for the County to file civil actions against the Owner as provided by law.

3.3 Notice in Agreements. After the date of recordation hereof, all Owners and Occupants shall execute a written instrument which shall accompany all purchase agreements or leases relating to the property. Any such instrument shall contain the following statement:

The land described herein contains hazardous materials in soils and in the ground water under the property, and is subject to a deed restriction dated as of _____, 199_, and recorded on _____, 199_, in the Official Records of _____ County, California, as Document No. _____, which Covenant and Restriction imposes certain covenants, conditions, and restrictions on usage of the property described herein. This statement is not a declaration that a hazard exists.

ARTICLE IV VARIANCE AND TERMINATION

4.1 Variance. Any Owner or, with the Owner's consent, any Occupant of the Burdened Property or any portion thereof may apply to the County for a written variance from the provisions of this Covenant.

4.2 Termination. Any Owner or, with the Owner's consent, any Occupant of the Burdened Property or a portion thereof may apply to the County for a termination of the Restrictions as they apply to all or any portion of the Burdened Property.

4.3 Term. Unless terminated in accordance with paragraph 4.2 above, by law or otherwise, this Covenant shall continue in effect in perpetuity.

ARTICLE V MISCELLANEOUS

5.1 No Dedication Intended. Nothing set forth herein shall be construed to be a gift or

dedication, or offer of a gift or dedication, of the Burdened Property or any portion thereof to the general public.

5.2 Notices. Whenever any person gives or serves any notice, demand, or other communication with respect to this Covenant, each such notice, demand, or other communication shall be in writing and shall be deemed effective (1) when delivered, if personally delivered to the person being served or official of a government agency being served, or (2) three (3) business days after deposit in the mail if mailed by United States mail, postage paid certified, return receipt requested:

If To: "Covenantor"
[Owners name and address]

If To: "County"
Alameda County Environmental Health Services
Attention: Director
1131 Harbor Bay Parkway
Alameda, California 94502

5.3 Partial Invalidity. If any portion of the Restrictions or terms set forth herein is determined to be invalid for any reason, the remaining portion shall remain in full force and effect as if such portion had not been included herein.

5.4 Article Headings. Headings at the beginning of each numbered article of this Covenant are solely for the convenience of the parties and are not a part of the Covenant.

5.5 Recordation. This instrument shall be executed by the Covenantor and by the Director of Environmental Health Services. This instrument shall be recorded by the Covenantor in the County of _____ within ten (10) days of the date of execution.

5.6 References. All references to Code sections include successor provisions.

5.7 Construction. Any general rule of construction to the contrary notwithstanding, this instrument shall be liberally construed in favor of the Covenant to effect the purpose of this instrument and the policy and purpose of the Water Code. If any provision of this instrument is found to be ambiguous, an interpretation consistent with the purpose of this instrument that would render the provision valid shall be favored over any interpretation that would render it invalid.

IN WITNESS WHEREOF, the parties execute this Covenant as of the date set forth above.
Covenantor: _____

By: _____
Title: _____
Date: _____

Agency: Alameda County
Environmental Health Services

By: _____
Title: Director
Date: _____

EXHIBIT A
LEGAL DESCRIPTION OF PROPERTY



ENVIRONMENTAL HEALTH SERVICES
ENVIRONMENTAL PROTECTION
1131 Harbor Bay Parkway, Suite 250
Alameda, CA 94502-6577
(510) 567-6700
FAX (510) 337-9335

Date, 2010

Responsible Parties
Address

Subject: SLIC Case RO000XXXX –Case Closure

Dear RP:

This letter confirms the completion of site investigation and remedial actions for the soil and groundwater investigation at the above referenced site. We are also transmitting the enclosed case closure summary. These documents confirm the completion of the investigation and cleanup of the reported releases at the subject site with the provision that the information provided to this agency was accurate and representative of existing conditions. The subject Spills, Leaks, Investigation, and Cleanup (SLIC) case is closed. This case closure letter and the case closure summary can also be viewed on the State Water Resources Control Board's Geotracker website (<http://geotracker.swrcb.ca.gov>) and the Alameda County Environmental Health website (<http://www.acgov.org/aceh/index.htm>).

SITE INVESTIGATION AND CLEANUP SUMMARY

Please be advised that the following conditions exist at the site:

- Soils in the area of a former underground storage tank (UST) at the site contain xxxxx.
- Groundwater beneath the site contains residual TPH as gasoline at concentrations up to XXXX ppb.

If you have any questions, please call Jerry Wickham at (510) 567-6791. Thank you.

Sincerely,

xxxxx
Chief, LOP and Toxics Program

Enclosure: Case Closure Summary

Responsible Parties
RO000xxxx
Date, 2010
Page 2

cc: Leroy Griffin, Oakland Fire Department, 250 Frank H. Ogawa Plaza, Ste. 3341
Oakland, CA 94612-2032

Donna Drogos, ACEH
Jerry Wickham, ACEH
File