IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY OF EMERYVILLE and the EMERYVILLE REDEVELOPMENT AGENCY,

Plaintiffs,

v.

ELEMENTIS PIGMENTS, INC., a Delaware corporation; THE SHERWIN-WILLIAMS COMPANY, an Ohio corporation; PFIZER, INC., a Delaware corporation; A & J TRUCKING, INC., a dissolved California corporation; BAKER HUGHES, INC., a Delaware corporation; ARTHUR M. SEPULVEDA, individually, and as TRUSTEES OF THE SEPULVEDA FAMILY LIVING TRUST; and the SEPULVEDA FAMILY LIVING TRUST,

Defendants.
_____/

No. C 99-03719 WHA

ORDER GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

The City of Emeryville paid for the costs of cleaning up the soil and groundwater on land that it obtained, then brought suit against defendants and others to recover its cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 et. seq. The plaintiffs, the City of Emeryville and the Emeryville Redevelopment Agency[1] proceed on two theories. The City's primary theory is that defendants, Elementis Pigments, Incorporated and Pfizer, Incorporated,[2] are responsible to pay the City for all of its cleanup costs. In the alternative, if the City is unable to sue for cost recovery, it seeks contribution. EPI has

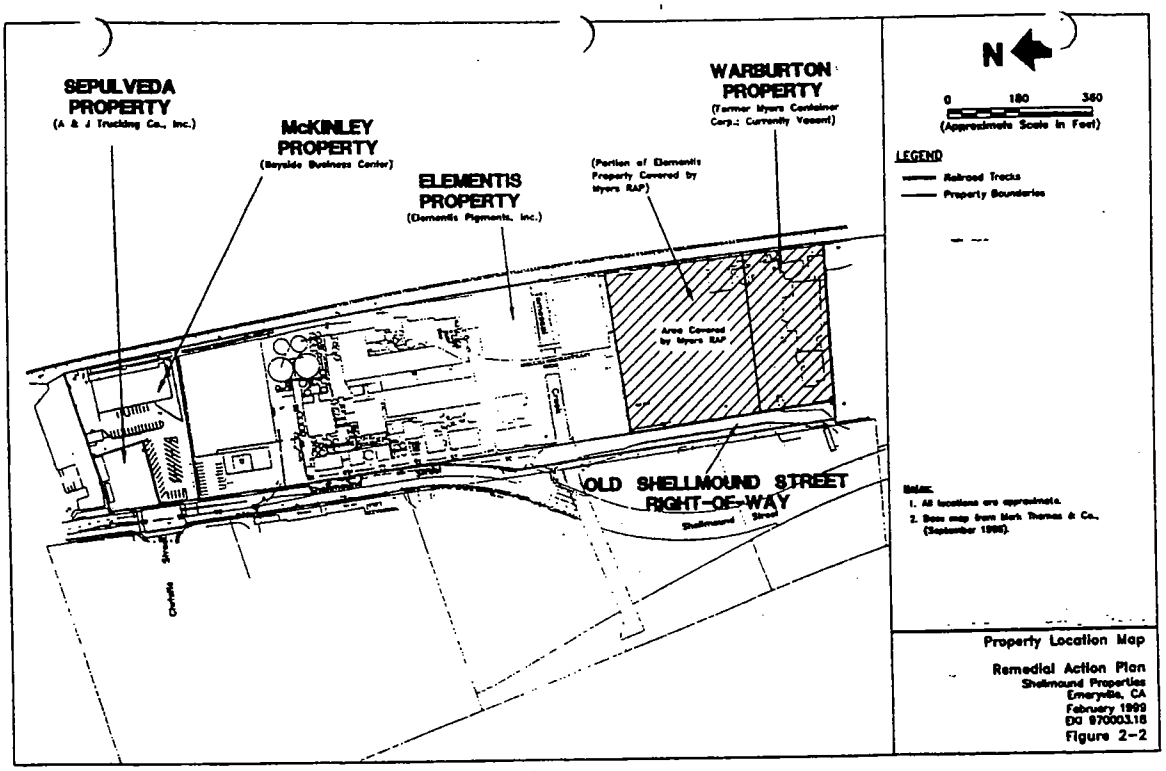
[1] Collectively, plaintiffs shall be referred to as the City in this order.

[2] Collectively, defendants shall be referred to as EPI because Pfizer has defended the case jointly with Elementis.

counterclaimed against the City for contribution. In a letter to the Court dated March 2, 2001, the City stated that it would "dismiss its second claim for relief (contribution under CERCLA Section 113) if the Court grants [the City's] motion for summary judgment." This order GRANTS the City's motion for summary judgment on EPI's counterclaims, DENIES EPI's motion for summary judgment on the City's cause of action for cost recovery and DISMISSES WITHOUT PREJUDICE the City's cause of action for contribution. The City's state law tort claims shall be addressed in a separate order.

STATEMENT

The property at issue consists of approximately 15 acres located east of Interstate 80, west of the tracks of the Union Pacific Railroad, south of Powell Street, and north of the new IKEA store in Emeryville. A site-map submitted by the City's experts is provided below. At present, the City owns all the areas depicted in the map. The shaded areas (including the Warburton property) were the subject of an action involving different parties and are irrelevant to the present action. Historically, the property at issue in this action was divided into four parcels: the McKinley parcel, the Sepulveda parcel, the Elementis parcel, and the Old Shellmound Street parcel.



Temescal Creek bisects the property and drains westward into the San Francisco Bay. According to the City's experts, the soil and groundwater on the property is contaminated with lead, arsenic, other heavy metals, petroleum hydrocarbons, volatile and semi-volatile organic compounds, pesticides, and a number of other toxins (Doty Decl., Exh. 2).[3]

In 1903, part of the property was occupied by Shell Mound Park (Loughrey Decl., Exh. 1). The park consisted of a race track, two dancing pavilions, a bowling alley, shooting galleries, a restaurant, and other entertainment facilities (*ibid.*). Industrial operations began around the 1920's (*ibid.*).

The Sherwin-Williams Company owned the northern third of the site and manufactured pesticides there from approximately the 1920's until the early 1960's. Part of the land Sherwin-Williams used comprises what is now the Elementis parcel. Both sides agree that Sherwin-Williams caused a significant amount of contamination at the site.

In the late 1940's, Sherwin-Williams ceased its pesticide operations on the Sepulveda parcel. From around 1950 until the 1990's, Josephine and Arthur Sepulveda operated A & J Trucking on what is now the Sepulveda parcel. A trust related to them also ran a small trucking business there. In the course of these operations, petroleum hydrocarbons and perhaps solvents were stored in underground tanks, which leaked.

Sherwin-Williams sold the McKinley parcel to Dorothy Warburton in 1965. The McKinley parcel was paved and used as a warehouse for the Artificial Flower Association and a storage area for an electric-sign business. In 1981, she sold the property to Richard McKinley. Under the name Develco, Baker-Hughes operated a machine shop on the McKinley parcel from around 1982 to 1992. Develco generated metal shavings and solvent wastes.

From the 1920's to 1990, Pfizer, Inc. and Pfizer Pigments, Inc. and C. K. Williams manufactured and packaged iron-oxide pigments on the Elementis parcel. C. K. Williams merged into Pfizer in 1962. In 1990, Pfizer sold its land and operations to Harcros Pigments, Inc. In 1992, Harcros changed its name to Elementis. Elementis ceased production in 1998.

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[3] Different declarations were filed by the same attorneys and experts in support and in opposition of the cross-motions. Unless denoted "Opp.," a declaration corresponds to the moving party's motion.

According to the remedial action plan produced by the City's experts, Erler & Kalinowski ("EKI"), the Old Shellmound Street parcel was part of the San Francisco Bay prior to the 1930's (Doty Decl., Exh. 2). During the 1930's, the area was landfilled with unknown substances. It was used as a roadway after it was filled (*ibid.*).

Acquisition of the Property

In 1995, the City began negotiating with the Sepulvedas and Mr. McKinley to acquire their parcels, but the parties were unable to agree. The City then initiated the statutorily-required procedures for taking the land by eminent domain. On May 22, 1998, the City made an offer of just compensation to Mr. McKinley. On August 17, 1998, the City submitted a similar offer to the Sepulvedas, which the City modified on September 17, 1998. Subsequently, the City issued notices of intent to adopt resolutions of necessity for acquisition of both parcels. These notices sought public participation in whether to institute eminent domain proceedings. On October 20, 1998, a public meeting was held, and these resolutions were formally adopted. The resolutions directed the City to file an action in state court to acquire title to the two parcels. Instead, the City purchased the Sepulveda parcel in November of 1998 and the McKinley parcel in February of 1999, expressly reserving the right to sue for cleanup costs (Loughrey Decl., Exh. 5).

In the mid-1990's the City began negotiating with EPI to purchase EPI's parcel. According to the City, in November of 1997, the City offered EPI $9.8 million in exchange for EPI's land if EPI would clean the site to the satisfaction of the Department of Toxic Substances Control, a state environmental agency (Biddle Decl. ¶ 10). EPI never responded to the offer, and the City sent EPI an offer of just compensation. On January 14, 1998, EPI filed an inverse condemnation action against the City in state court. On January 22, 1998, the City issued a notice of intent to adopt resolutions of necessity for acquisition of defendants' parcel. The resolution was adopted at a public meeting on February 18, 1998. On February 19, 1998, the City filed an eminent domain action against EPI, seeking title to EPI's parcel.

On the same day that the City filed its eminent domain action, EPI[4] entered into a voluntary cleanup agreement with the DTSC (Groth Decl., Exh. 4). On June 8, 1998, one of the

[4] There is no evidence that Pfizer was part of said agreement.

City's attorneys sent a letter to the DTSC, requesting the DTSC to terminate its agreement with EPI (*id.*, Exh. 5). The letter stated that although EPI "was aware of serious contamination on its site no later than early 1996" it had done nothing to clean up the property (*ibid.*). The letter claimed that EPI and Sherwin-Williams wished to pursue less expensive cleanup measures than the ones the City proposed and that EPI and Sherwin-Williams were unduly delaying the cleanup process and preventing the City from obtaining regulatory approval to clean up the adjoining properties (*ibid.*). On June 23, 1998, the Alameda Superior Court granted plaintiffs prejudgment possession of EPI's parcel. On June 26, the DTSC terminated EPI's voluntary cleanup agreement. On January 11, 1999, after a hearing, a state court held that the City was "authorized to take the property by eminent domain" (Biddle Decl., Exh. 11).

On April 19, 2000, the City filed an eminent domain complaint against seven defendants, regarding the Old Shellmound Street property. The complaint stated five of the defendants had possible reversionary interests in the land. According to a title search performed by the City on January 31, 2000, the City was granted an easement to use the land "for street and highway" on November 6, 1940 (Biddle Reply Decl., Exh. 1). The title search stated that title to the land was vested in: "the Sherwin-Williams, Co. of California, a corporation; Judson Steel Corporation, a corporation; Luella Peterson, a widow; C.K. Williams & Co. of California LTD., formerly C.K. Williams & Co. of California, a corporation; Southern Pacific Company, a Kentucky corporation; as their interest may be judicially determined" (*ibid.*). The complaint stated: "this is an action to acquire a reversionary interest in a portion of the Shellmound Street in the City of Emeryville. The property was dedicated for use as a public street in 1940 and the City has continued uninterrupted use of the street since that time" (Loughrey Opp. Decl., Exh. 1 ¶ 3).

Cleanup

In 1997, prior to attempting to acquire the land, the City conducted an investigation into contamination at the site. In 1998, it entered into an oversight and consultation agreement with the DTSC. Under DTSC oversight, the City's consultants progressed through the various phases of remediation: they conducted a remedial investigation and prepared health risk assessment, a feasibility study and a draft remedial action plan. With DTSC approval, the remedial action plan

was finalized into a final remedial action plan and then a remedial design implementation plan. In 1999, all the buildings on-site were demolished. Beginning in May of 1999, contractors removed and disposed of more than 25,000 cubic yards of contaminated soil and 635,000 gallons of contaminated water. On May 8, 2000, the DTSC sent a letter to the City certifying that the project was complete under state law (James Opp. Decl., Exh. A). The final remedial action plan requires groundwater monitoring for the next five years (James Decl., Exh. 3). If further groundwater contamination is discovered, treatment may be necessary (James Opp. Decl. ¶ 9).

* * *

On August 4, 1999, the City filed suit herein against Sherwin-Williams, the Sepulvedas and Sepulveda trustees, Baker-Hughes, Pfizer, and Elementis, seeking relief under CERCLA and state law for cleanup costs. On February 15, 2001, Sherwin-Williams, the Sepulvedas and the Sepulveda trustees, and Baker-Hughes all settled, and their settlement was approved.

ANALYSIS

Legal Standard

Summary judgment is granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party "has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). When the moving party meets its burden, the burden then shifts to the party opposing judgment to "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

The City's Liability

The main issue is whether the City can be held liable under CERCLA for any of the cleanup costs it incurred. Since the City cannot be held liable for the reasons stated below, it is

entitled to summary judgment on EPI's counterclaims for contribution,[5] and its cost recovery claim will proceed to trial.

Congress passed CERCLA to ensure the cleanup of hazardous waste. *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 877, 890 (9th Cir. 1986). With few exceptions, anyone who has ever polluted a property or who currently owns contaminated real estate can be held liable for the entire cost of cleaning up the land, regardless of fault. While liability is expansive, the statue provides two mechanisms for recovering cleanup costs from those actually responsible: cost recovery under Section 9607 and contribution under Section 9613. When a plaintiff is also a party that can be held liable under CERCLA (for instance, one of many industrial tenants that used the same property), a plaintiff may only sue for contribution under Section 9613. *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1306 (9th Cir. 1997). This limitation is important, because under Section 9607 (cost recovery), a plaintiff may hold any defendant jointly and severally liable for the entire cleanup cost, whereas under Section 9613 (contribution), a plaintiff may only sue a defendant for that defendant's share of the costs. *Ibid.*

To establish that a defendant is liable under CERCLA, a plaintiff must prove that there was a "release" of a "hazardous substance" from a "facility," and this caused the plaintiff to incur "response costs."[6] A plaintiff must also prove that a defendant falls within one, or more, of four categories, two of which are relevant here:

> (1) the owner and operator of a vessel or facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . .

42 U.S.C. 9607(a)(1)–(2). There is no dispute that releases of hazardous substances occurred on the properties at issue, and that this has caused plaintiffs to incur response costs. The point of contention is whether the City fits into any of the statutory categories of "responsible parties,"

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[5] The counterclaims are brought under CERCLA Section 9613(f) and California Health and Safety Code Sections 25300, et. seq., CERCLA's state law analog.

[6] The terms "release," "facility," "response costs," and "hazardous substance" are all defined by statute, but their definitions have no bearing on this case.

namely a prior "owner or operator," or a current "owner." EPI advances several theories of liability, which shall be considered in turn.

(i) Prior Owner

EPI has not established a genuine issue of material fact as to whether the City was a prior "owner" as defined by CERCLA. According to EPI, the City's complaint in the proceeding to obtain title to the Old Shellmound Street constituted a judicial admission of ownership, because the complaint stated that the land was "dedicated for use as a public street." There are two types of dedication under California law: statutory and common law. Under either method, a city may obtain either a fee interest (defeasible or not) or an easement. *Burlingame v. Norberg*, 210 Cal. 105, 107–08 (1930) (common law); *Berton v. All Persons*, 176 Cal. 610, 615 (1917) (statutory). EPI has offered no evidence that the City ever had title to the property, and the only evidence in the record — the results of the title search done by the City — points to the conclusion that the City only had an easement.

"Having an easement does not make one an 'owner' for purposes of CERCLA liability." *Long Beach Unified School District v. Dorothy B. Godwin Living Trust*, 32 F.3d 1364, 1370 (9th Cir. 1994). EPI attempts to distinguish *Long Beach*, because in that case, the plaintiffs were merely running a pipeline across the defendants' land. EPI likens an easement for use as a road to a leasehold, which some courts have found sufficient to create owner liability. *E.g.*, *United States v. South Carolina Recycling and Disposal Inc.*, 653 F. Supp. 984, 1002–03 (D.S.C. 1984). In *Long Beach*, however, the court's construction of the term "owner" was not premised on the degree of control afforded by the easement. 32 F.3d at 1368. Rather, the court held that CERCLA incorporates the common law definition of "owner," and that under the common law, the holder of an easement is not a landowner. *Ibid.* EPI has thus failed to establish that the City was an owner of the land at the time that a hazardous substance was released.

(ii) Prior Operator

Similarly, EPI has not raised a factual issue as to whether the City was ever an operator within the meaning of CERCLA. EPI argues that the City had a duty to control what went underneath its easement. A party using an easement can still be held liable as an operator, but he

"must do more than stand by and fail to prevent the contamination." *Long Beach*, 32 F.3d at 1367. "[A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *United States v. Bestfoods*, 524 U.S. 51, 66–67 (1998).

EPI argues that testimony from two witnesses creates triable issues of fact as to whether the City played an active role in placing drums of waste under what was once Shellmound Street. First, EPI relies on the deposition testimony of plaintiffs' expert, Earl James, which reads (James Dep. 102–03):

> Q: What about the Old Shellmound Street, any observations regarding the sources of contamination there?
>
> A: Old Shellmound Street, fill soils, whatever operations went on and Myers Drum operations and the Barbary Coast Judson Steel Operations.
>
> Q: Tell me about the filling operations on the Old Shellmound Street property.
>
> A: When we concluded our excavation activities on Old Shellmound Street, we found drums as well as other debris in the subsurface. Some of the drums apparently contained chemicals of concerns.
>
> Q: Do you have any sense of when the drums and debris were put into the Old Shellmound Street Property?
>
> A: I do not. It would be in the period 20's, 30's, 40's, back in that period of time.
>
> Q: Did it appear that the filling activities had anything to do with -- the road construction?
>
> A: I couldn't tell you why — filling activities have occurred in that general area starting probably when Shellmound Park began at the turn of the Century right up on through the sixties. So I cannot tell you what the purpose of the filling that went on specifically out there other than the general drive to fill the shallow edges around the Bay everywhere and create usable dry land.
>
> Q: Approximately how far below the road surface were the drums and debris that you just described?
>
> A: Three or four feet was the top of them and they went down to about nine feet.

Q: And it's your opinion that this filling activity occurred during the 1920's, 1930's and 1940's. Is that right?

A: And could have been on into the sixties and seventies. There are various periods of filling that have occurred out there.

This testimony does not raise a question of fact as to whether the City managed, directed or conducted operations specifically related to the pollution. It does not show who buried the drums there, much less implicate the City. Nor does it reveal that burial of the drums had any relation to road construction performed by the City. Mr. James' statement that filling occurred in "that general area" does not even establish precisely where some of the more recent filling activity he described occurred. EPI has not offered any other evidence, such as expert testimony, linking the City to placement of the drums underneath Old Shellmound Street. Mr. James' statements fail to establish a triable issue as to whether the City was a prior operator.

EPI next argues that the testimony of Wayne Groth, Elementis' business director, creates an issue of material fact as to whether the City was an operator. Mr. Groth testified that during the course of the City's recent demolition of structures on EPI's parcel, the City damaged a tank belonging to EPI, which resulted in five to ten thousand gallons of sludge containing iron oxide spilling onto a concrete pad (Groth Dep. 47–49). Apparently, EPI is relying on *Kaiser Aluminum & Chemical Corporation v. Catellus Development Corporation*, 976 F.2d 1338, 1341 (9th Cir. 1992). In *Kaiser*, a contractor spread toxic soil on uncontaminated land while grading a site. *Id.* at 1339. Then, the party who hired the contractor sued the previous landowner for the cost of cleaning up the contamination caused by the contractor. *Id.* at 1340. The court held that a contribution claim against the contractor should not have been dismissed at the pleading stage, because the contractor was potentially liable as an operator. *Id.* at 1341.

Unlike *Kaiser*, this case is not at the pleading stage. EPI has not offered any evidence that this alleged spill actually got beneath the concrete pad and contributed to the contamination on-site. EPI has not submitted any expert testimony linking this spill to any soil contamination, any photographs of sludge on the ground, any photograph of the pad where the spill occurred, or any witness testimony establishing that contamination may have occurred. In an attempt to create a question of fact, it points to an expert report provided by the City, which stated: "Spill

management consisted of concrete pads and berms leading to a channel system directing solids, sludges, and solutions to a sump and settling pond and in later years a wastewater treatment plant. . . . Concrete is an alkaline matrix which is unsuitable for low pH (acidic) solution containment as it becomes permeable and disintegrates over time resulting in leakage" (Doty Opp. Decl., Exh. 7 at 12–13).

This general statement does not establish that the concrete pad where the sludge spilled was cracked or permeable from exposure to acid. Nor does it establish that any component of the sludge would have quickly disintegrated the pad. The only evidence in the record about the effect of the spill is that when asked about the specific spill, EPI's expert gave the following testimony: "Q: Do you have any recollection of there being any contamination whatsoever underneath the area that you've identified as the sludge spill? A: Yes. Q: And what is that? A: There isn't any" (Langerman Dep. 258). Since there is no evidence that this specific spill actually contributed to any contamination on-site, it does not transform the City into an operator.

(iii) Current Owner

In response to EPI's contention that the City is liable as a current owner, the City has asserted CERCLA's "innocent landowner" defense. This defense provides complete immunity to current owner liability when (1) the owner did not cause any of the contamination; (2) the contamination was not caused by an agent of the owner; (3) the owner was not in a "contractual relationship" with the person who caused the contamination; (4) the owner exercised "due care" regarding the contamination; and (5) the owner took precautions against foreseeable acts by third persons. 42 U.S.C. 9607(b)(4).[7] As already noted, EPI has not raised an factual issue as to whether the City or any of its agents caused the contamination. EPI instead directs its attack on

[7] The statutory language reads: "There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by — (1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . ."

the "contractual relationship" element. The term "contractual relationship" is defined to include land purchases, but to exclude when a "government entity acquire[s] the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation." 42 U.S.C. 9601(35)(A)(ii).[8]

EPI argues that because the City purchased the McKinley and Sepulveda parcels, the City did not exercise its eminent domain authority and cannot assert the innocent landowner defense. In EPI's view, the innocent landowner defense is unavailable unless a municipality obtains a property by filing an action for eminent domain. The Ninth Circuit has not addressed what the phrase "exercise of eminent domain authority by purchase or condemnation" means, and the legislative history regarding the meaning of this phrase is silent.

While defenses to CERCLA liability are narrowly circumscribed, EPI's reading of the phrase "exercise of eminent domain authority by purchase or condemnation" is too constricted. The statute's plain language does not require any type of eminent domain proceeding. Rather, it uses the broader phrase "exercise of eminent domain authority." Additionally, the words "by purchase or condemnation" encompass purchases and do not limit the defense to the result of a judicial proceeding. It is doubtful that Congress intended to require senseless litigation as a prerequisite to the defense or to saddle state courts with unnecessary litigation, as this would frustrate CERCLA's purpose of ensuring "the prompt and effective cleanup of waste disposal

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[8] The full text provides: "The term "contractual relationship," for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

> (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.
>
> (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.
>
> (iii) The defendant acquired the facility by inheritance or bequest. "

42 U.S.C. 9601(35)(A).

sites." *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1455 (9th Cir. 1986) (citing 126 Cong. Rec. 31964 (statement of Rep. Florio)).

As support for its reading, EPI cites *City of Toledo v. Beazer Materials & Services*, 923 F. Supp. 1013, 1020 (N.D. Ohio 1996), where a court addressed a similar situation. In *Beazer*, Toledo Coke sold its land to the city when confronted with the threat of eminent domain proceedings. The court held that the city could not maintain an innocent landowner defense. Construing Ohio law, it held that the city's actions did not constitute "the exercise of eminent domain authority" under CERCLA. It reasoned that Ohio law permits the exercise of eminent domain "only after the agency is unable to agree, for any reason, with the owner." *Ibid.* Since the parties had agreed, the court found that the city had not exercised its eminent domain authority.

In contrast to Ohio law, California courts distinguish between two different types of real estate sales: "routine buy/sell transaction[s]" and "precondemnation situation[s]." *Melamed v. City of Long Beach*, 15 Cal. App. 4th 70, 73 (1993). The reason for this distinction is that California's statutory scheme is premised on avoiding eminent domain litigation. *Id.* at 77. California Government Code Section 7267 provides in part: "In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the public programs, and to promote public confidence in public land acquisition practices, public entities shall, to the greatest extent practicable, be guided by the provisions of Sections 7267.1 to 7267.7, inclusive." Government Code Section 7267.1 provides in part: "the public entity shall make every reasonable effort to acquire expeditiously real property by negotiation."

Here, unlike *Beazer*, state law expressly contemplates government entities exercising their "eminent domain authority" without resorting to litigation. It is undisputed that the City followed all the eminent domain procedures required by state law. It did everything short of filing a complaint and litigating. It made "every reasonable effort" to buy the land, terminating the dispute without a lawsuit, as required by law. The City has duly exercised its eminent domain authority within the meaning of CERCLA Section 9601(35).

The due-care requirement is met when a party promptly attempts to remove the environmental hazards on its land. *State of New York v. Lashins Arcade. Co.*, 91 F.3d 353, 360–61 (2d Cir. 1996) (citing H.R. Rep. No. 1016 at 34 (1980)). The numerous remedial plans and reports provided by the City demonstrate that it diligently pursued remediation from the time it obtained the property in 1998 until the time the DTSC certified that the cleanup was complete in May of 2000. EPI claims that Mr. James' testimony creates a material issue of fact about whether the City was aware of the contamination since the 1940's. As already discussed, Mr. James' testimony does not link the City to the contamination or show that the City was aware of it in any way. EPI offers no other evidence to support its contention that the City lacked due care. Nor does it offer any evidence to contradict the City's evidence that from the initiation of demolition through completion of the soil remediation activities, the site was fenced-off and subject to 24-hour security to prevent foreseeable acts or omissions by third-parties (James Decl. ¶ 5). EPI fails to raise a genuine issue of material fact as to whether the City exercised due care or took precautions against acts of third persons.

Because EPI has established no triable theory under which the City could be held liable for the on-site contamination, the City's motion for summary judgment as to the counterclaims for contribution under CERCLA and California Health and Safety Code Sections 15300 et. seq., which mirrors CERCLA, is granted. Additionally, EPI's motion for summary judgment on the City's cause of action for cost recovery under Section 9607 is denied. The City's cause of action for contribution under Section 9613 is dismissed without prejudice, so that it may "pursue the contribution claims should further proceedings, such as an appeal, result in a determination" that it is liable (Plaintiffs' Letter, dated March 2, 2001).

Divisible Harm

When a defendant can clearly demonstrate that the contamination it caused is divisible, *i.e.*, its wastes are distinguishable from the other wastes on-site, it may only be held severally, not jointly liable. *United States v. Stringfellow*, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987). EPI admits that it contributed small amounts of arsenic and lead to the site, but argues that it was impossible for their substances to have been transported to areas not used by EPI or off-site

(Loughrey Decl., Exh. 4). Specifically, EPI argues that given the soil conditions of the site, migration of contaminants would be impossible, and there is no plume of contaminants emanating from EPI's parcel (*ibid.*). Since no wastes have migrated from the parcel, EPI argues, it can trace any wastes that it generated to areas that it historically used.

In response, the City has submitted several expert reports, all of which raise factual issues that must be resolved at trial. EKI's report, dated December 8, 2000, states that EPI contributed to the groundwater contamination. According to the report, EPI spilled raw materials onto the soil, which leached lead, arsenic and other chemicals into the groundwater, and EPI's pipes leaked acidic and basic solutions into the soil, which mobilized contaminants in the soil. (Doty Opp. Decl., Exh. 5 at 23–26). Additionally, one of the City's experts personally observed and tested layers of fill material that he believed were pigment, and they showed arsenic levels of up to 382 parts per million, which is six times what the DTSC deems acceptable (James Opp. Decl. ¶ 7).

The City has also produced evidence that EPI contributed to soil contamination outside of its parcel. According to the December 8 report, EPI's manufacturing process and storage of raw materials discharged lead and arsenic into the air, which scattered in all directions due to the wind patterns at the site (Doty Opp. Decl., Exh. 5). The expert report of D. Patrick Fairley, Dr. A.Y. Chamsi and L.M. Fairley estimated that defendants contributed 146,315 pounds of arsenic to the "local environment" (*id.*, Exh. 7). While EPI's expert contends that wind-driven contaminants are deposited in a uniform pattern (Loughrey Decl., Exh. 4), the City's expert opines: "Given the variable nature of wind directions at the Pigment Operations releases such as those documented by BAAQMD would have impacted all of the Shellmound properties, particularly the northern portion of the former Elementis Parcels and the former McKinley and Sepulveda parcels" (Doty Opp. Decl., Exh. 5). This is but one of the numerous factual disputes raised by the conflicting expert reports.

Geographical distribution is the only means to distinguish arsenic that EPI allegedly discharged from arsenic other parties left. It is thus impossible to differentiate between the harm caused by EPI and the harm caused by others. Additionally, there is evidence that EPI, among

others, may have contributed sulfates which are now in the groundwater (*ibid.*) and that EPI's acidic and basic discharges may have mobilized contaminants, contributing to the "synergistic effects of the commingling of different wastes." *Stringfellow*, 661 F. Supp. at 1060. How much hazardous waste EPI contributed to the site, and where those wastes went are questions of fact for trial. *Ibid.*

Section 9607(a)(4)(A)

CERCLA only allows for the recovery of cleanup expenses that are consistent with the national contingency plan. The NCP is a complex guide to cleanup activities that "provide[s] the organizational structure and procedures for preparing for and responding to . . . releases of hazardous substances." 40 C.F.R. 300.1. CERCLA creates two different standards for determining whether cleanup costs are consistent with the NCP. The United States and "states" recover under Section 9607(a)(4)(A), which provides recovery of "all costs of removal or remedial action . . . not inconsistent with the national contingency plan." All other "persons" recover under Section 9607(a)(4)(B), which only allows recovery of "necessary costs of response" that are "consistent with the national contingency plan." In other words, Section 9607(a)(4)(A) creates a presumption that a federal or state plaintiff's cleanup costs are recoverable. *Washington State Dept. of Transp. v. Washington Natural Gas Co., Pacificorp*, 59 F.3d 793, 709–800 (9th Cir. 1995).

EPI correctly argues that the City cannot seek recovery under Section 9607(a)(4)(A). CERCLA's definition of "state" does not include municipalities.[9] The City does not dispute this point. While EPI's motion for summary judgment as to this issue is granted, if the City prevails at trial, the City will nonetheless be entitled to a presumption of consistency with the NCP. As will be discussed below, the City is entitled to a presumption of consistency with the NCP under its state law claim under the Polanco Redevelopment Act.

[9] Section 9601(27) provides: "The terms 'United States' and 'State' include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction."

State Law Claims

(i) Polanco Redevelopment Act

The Polanco Redevelopment Act, California Health & Safety Code 33459 et. seq., empowers municipal redevelopment agencies to take actions that are "consistent with other state and federal laws to remedy or remove a release of hazardous substances on, under, or from property within a project area." Cal. Health & Safety 33459.1(a)(1). It requires municipalities to conduct site remediation under the oversight of state environmental authorities. *Ibid.* Section 33459.4(a) of the Act provides: "if a redevelopment agency undertakes action to remedy or remove, or to require others to remedy or remove a release of hazardous substance, any responsible party shall be liable to the redevelopment agency for the costs incurred in the action."

The immediate dispute regards whether the Act creates a presumption that an agency's cleanup activities are consistent with the NCP. Neither party has presented any authority, state or federal, that bears on this question. Nor is the Court aware of any. The Act, however, is straightforward. It provides: "An agency may recover any costs incurred to develop and to implement cleanup or remedial action plan approved pursuant to Sections 33459.1 and 33459.3, to the same extent the department is authorized to recover those costs." Cal. Health & Safety 33459.4(c). The word "department" is defined as the DTSC. Cal. Health & Safety 33459(a). The Act further provides: "The scope and standard for cost recovery pursuant to this section shall be the scope and standard of liability under" CERCLA. Cal. Health & Safety 33459.4(c). Put simply, the Act provides that municipal redevelopment agencies that clean up property under state supervision may recover their costs to the extent that the DTSC could recover under CERCLA. Under CERCLA, state agencies such as the DTSC are considered "states" and are thus eligible to recover under Section 107(a)(4)(A). *Washington Natural Gas Co.*, 59 F.3d at 801. Consequently, if the City prevails on its Polanco Act claim, EPI will bear the burden of proving that the City's cleanup was inconsistent with the NCP. *Ibid.*

(ii) Hazardous Substance Account Act

California Health and Safety Code Sections 25300, et. seq., create a scheme that is identical to CERCLA with respect to who is liable. EPI argues that, as opposed to CERCLA, the HSAA only creates several liability. Since the City can hold EPI jointly and severally liable under CERCLA, and the proof required for either statute is identical, the state-law issue as to whether the HSAA creates joint or several liability is mooted.

(iii) Other Claims

The City has asserted causes of action for violation of the California Fish & Game Code and numerous torts. These will be addressed in a subsequent order.

CONCLUSION

The City's motion for summary judgment on EPI's counterclaims for contribution under CERCLA and the California Health & Safety Code is **GRANTED**. EPI's motion for summary judgment on all the City's claims is **DENIED**. The City may not recover as a state would under CERCLA Section 9607(a)(4)(A), but may do so under its Polanco Redevelopment Act claim. The City's cause of action for contribution is **DISMISSED WITHOUT PREJUDICE**. The City's cause of action under the HSAA is mooted. The state law claims shall be addressed subsequently.

IT IS SO ORDERED.

Dated: March 6, 2001.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE