



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

PO Box 47775 • Olympia, Washington 98504-7775 • (360) 407-6300

November 14, 2013

Paul S. Lewandowski  
Regulatory Law Department  
Owens Corning  
One Owens Corning Parkway  
Toledo, Ohio 43659

RE: Determination of Potentially Liable Person Status

Dear Mr. Lewandowski:

On August 6, 2012, the Department of Ecology (Ecology) sent written notice to Fibreboard Corporation's registered agent regarding Fibreboard Corporation's proposed status as a potentially liable person (PLP) for a release of hazardous substances at the following site:

- Name: Western Port Angeles Harbor
- Address: Port Angeles Harbor
- Facility/Site No.: 18898
- Cleanup Site No.: 11907

You responded to the status letter on behalf of Owens Corning, and after a number of extensions to the 30-day comment period on the preliminary notice, you provided documentation of Owens Corning's relationship to Fibreboard Corporation. You also explained, by telephone, Owens Corning's position in regard to its proposed status as a potentially liable person as successor to the assets and liabilities of Fibreboard Corporation. We have evaluated your comments and our conclusions are as follows.

Based on your responses and documentation, as well as other corporate successor evidence Ecology has reviewed, Ecology has concluded that during the Owens Corning 2006 corporate restructuring, "Owens Corning Debtor" became "Owens Corning Sales, Inc." and then acquired the majority of Fibreboard's assets and all of its liabilities. Subsequently, Owens Corning Sales, Inc. transferred to "Owens Corning Reorganized" Fibreboard's assets and liabilities. Owens Corning Reorganized then changed its name to "Owens Corning." Owens Corning therefore ultimately acquired the assets and liabilities of Fibreboard. To the extent Owens Corning maintains that OC Celfortec Company also succeeded to Fibreboard's liabilities, Ecology requests that Owens Corning provide notice to OC Celfortec Company of this PLP Determination. Ecology assumes that Owens Corning accepts this notice on behalf of OC Celfortec Company. If this is not the case, please provide the name and address of OC Celfortec Company's registered agent.

You asserted in a September 11, 2013, telephone conversation with Jonathan Thompson, of the Attorney General's Office, and Connie Groven, of Ecology, that any obligation Owens Corning has under RCW 70.105D to remediate releases of hazardous substances from its predecessor's operations may have been discharged when the bankruptcy plan of reorganization for Owens Corning et al. was confirmed in 2006.



Ecology disagrees with the assertion that Owens Corning's obligations under Washington's cleanup law, as Fibreboard's successor, were discharged through bankruptcy. A person's obligation to remediate releases of hazardous substances for which that person meets the definition of a potentially liable party under the Model Toxics Control Act, RCW 70.105D, is not a "claim" that is dischargeable in bankruptcy. *See, e.g., In re Torwico Electronics, Inc.*, 8 F.3d 146, 151 (3<sup>rd</sup> Cir. 1993) (holding that former operator of manufacturing plant that no longer had possession of the property where hazardous substances were released to the environment had a continuing obligation to take action, in response to a state agency order, to ameliorate the ongoing hazard from the release of hazardous substances, and that whether "authority may exist under other potentially relevant statutes for the state to perform the cleanup and seek reimbursement for its costs is irrelevant").

Under Ninth Circuit law and also under other Third Circuit law, Fibreboard's (and its successor's) responsibility to remediate environmental contamination caused by releases of hazardous substances from its operations was not a "claim" within the meaning of the bankruptcy code because it did not arise or accrue until long after Fibreboard's and Owens Corning's 2006 emergence from bankruptcy and therefore was not discharged. This is the case under both the "fairly contemplated" standard of *In re Jensen*, 995 F.2d 925 (9<sup>th</sup> Cir. 1993) or the "accrual test" of *Avellino v. M. Frenville Co.*, 744 F.2d 332 (3<sup>rd</sup> Cir. 1984). *Wright v. Owens Corning*, 679 F.3d 101, 109 (3<sup>rd</sup> Cir. 2012) (holding that *Frenville's* "accrual test" applies to the Owens Corning et al. Bankruptcy and to all bankruptcy cases in which reorganization plans were confirmed prior to June 2, 2010). Moreover, the courts have not been willing to allow bankruptcy laws to override environmental cleanup laws and have therefore devised rules which take into account the unique nature of cleanup cases in which damage or injury from historical operations is not discovered until years later or in which liability cannot be known or determined based solely on historical operations. *See, e.g., In re Jensen*, 995 F.2d at 927-31.

Although Fibreboard's mill operations in Port Angeles ceased in 1970, Ecology did not have credible evidence that the ongoing release of hazardous substances associated with Fibreboard Corporation's past operations resulted in exceedances of applicable Model Control Toxics Control Act cleanup levels in the sediments of western Port Angeles Harbor, until well after Ecology's sediments investigation, which began in 2008. Beginning in 2008, Ecology conducted an investigation of hazardous substances in marine sediments in Port Angeles Harbor. As a result of its investigation, Ecology found a distinct source area of sediment contamination in Port Angeles Harbor, located within the western part of the Harbor. Further, Ecology found that upland sources of contaminants, including metals and dioxins, along the western harbor shoreline, including at the location of the former Fibreboard sulfite pulp mill facility, appeared to be a supplier of these contaminants to the western harbor. These sources had created chemical plumes emanating from the nearshore, spreading throughout the western harbor. Ecology's findings are detailed in reports titled *Port Angeles Harbor Sediment Characterization Study, Sediment Investigation Report*, February 2012; and *Port Angeles Harbor Supplemental Data Evaluation to the Sediment Investigation Report, Summary Report*, February 2012.

Following the collection of sediment samples and the analysis of results, Ecology reviewed documentation of current and historical uses of the western harbor shoreline to identify likely sources of the sediment contamination that had been identified. Ecology's review showed that the former Fibreboard sulfite pulp mill had discharged its wastes through five outfalls directly to western Port Angeles Harbor. The facility also operated a hog fuel boiler that burned salt-laden wood. Both of these activities appear to have resulted in the release of hazardous substances, and it is now apparent that those hazardous substances are present at elevated levels in the vicinity of the former mill site, acting as an

Paul S. Lewandowski

November 14, 2013

Page 3

ongoing source of contamination of the western harbor. Consequently, Ecology's basis for ordering remedial action by Fibreboard or its successor did not accrue, nor could the obligation have been fairly contemplated, until 10 years after the claims bar date in the Owens Corning et al. bankruptcy and six years after confirmation of the plan of reorganization.

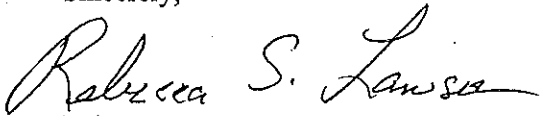
Based on these facts and under Third or Ninth Circuit law, the Owens Corning et al. bankruptcy did not discharge Owens Corning from its continuing obligation to the State of Washington to remediate contamination caused by Fibreboard Corporation's 43 years of operations on the shores of the Western Port Angeles Harbor. In addition, Owens Corning not only assumed Fibreboard's liabilities in 2006, but also profited significantly from its acquisition of Fibreboard's assets in 2006 and subsequent sale of some of those assets in 2007. Owens Corning is obligated to take responsibility for ongoing environmental contamination caused by Fibreboard's longtime presence in Washington.

Ecology finds that credible evidence exists which supports Owens Corning's and (depending on Owen's Corning's contention) OC Celfortec Company's status as a potentially liable persons for the release at Western Port Angeles Harbor Site. On the basis of this finding, Ecology has determined that Owens Corning and OC Celfortec Company are Potentially Liable Persons (PLP) with regard to Western Port Angeles Harbor Site.

Your rights and responsibilities as a PLP are outlined in Chapter 70.105D RCW, and WAC 173-340. Ecology's site manager for the facility, Connie Groven, will contact you with information about how Ecology intends to proceed with the cleanup at this site.

If you have any questions regarding this notice, please contact Connie Groven at (360)407-6254.

Sincerely,



Rebecca S. Lawson, P.E., LHG  
Southwest Region Office Section Manager  
Toxics Cleanup Program  
State of Washington  
Department of Ecology

RSL/CG/ksc:Final Owens Corning PLP determination 11132013

By certified mail: (7012 2210 0002 6581 1178)

cc: Dan McKeen, City of Port Angeles  
Norm Schaaf, Merrill & Ring  
Harold Norlund, Nippon Paper Industries USA Co., LTD  
Mike Hassett, Georgia Pacific  
Kristin Swenddal, Washington State Department of Natural Resources  
Jeff Robb, Port of Port Angeles  
Jon Thompson, Office of the Attorney General  
Connie Groven, Ecology

