



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
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February 13, 2015

Le Rodenberg, President
Gig Harbor Sportsman's Club
9721 Burnham Drive NW
Gig Harbor, WA 98332

RE: Determination of Potentially Liable Person Status

Dear Mr. Rodenberg:

On November 25, 2014, the Department of Ecology (Ecology) sent you written notice regarding your proposed status as a potentially liable person (PLP) for a release of hazardous substances at the following site:

- Name: Gig Harbor Sportsman's Club
- Address: 9721 Burnham Drive NW, Gig Harbor, WA 98322
- County Assessor's Parcel Number(s): 0222313044, 0222314016 (Pierce Co.)
- Facility/Site No.: 2566095
- Cleanup Site No.: 3115

The 30-day comment period on this preliminary notice expired on January 1, 2015.

We have received and evaluated your comments prepared on your behalf by Mr. Clark Davis of Davis Law Office, PLLC and submitted to Ecology on December 16, 2014. Based on the information available to date, Ecology finds that credible evidence exists that supports your status as a PLP for the release at the Gig Harbor Sportsman's Club (Site). On the basis of this finding, Ecology has determined that you are a PLP with regard to the Site.

In reference to your submitted comments, Ecology disagrees with the federal district court judge's conclusion in *Otay Land Co. v. U.E. Ltd., L.P.*, 440 F.Supp.2d 1152 (S.D. Cal. 2006), vacated by *Otay Land Co. v. United Enters. Ltd.*, 338 Fed.Appx. 689 (9th Cir.2009), that the "consumer product in consumer use" exception to CERCLA's definition of "facility" can be applied to shield a business entity, which owns or operates a shooting range, from being required to clean up surface or groundwater contamination resulting from the accumulation of lead shot. The judge's analysis concerns CERCLA, not MTCA, and even as to CERCLA, it cannot even be regarded as persuasive, having been vacated by the Ninth Circuit Court of Appeals. See *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) ("A decision may be reversed on other grounds, but a decision that has been vacated has no precedential authority whatsoever."); *Kuahulu v. Employers Ins. of Wausau*, 557 F.2d 1334, 1337 (9th Cir. 1977) ("we vacate the orders of the district court in order to erase any precedential or preclusionary effect of those orders").

Ecology interprets the “consumer product in consumer use” exception under MTCA as a defense that may only be invoked by an individual consumer (i.e., a natural person), not by an entity that invites people onto its property to use products containing hazardous substances in a manner that may result in large accumulations of the substance polluting environmental media. Consider accumulated spills of gasoline by individual consumers using pumps at a filling station, or accumulated hazardous metal residues along a highway from the use of brake pads containing hazardous constituents by motorists. By extension of the *Otay* judge’s theory, Ecology would be unable to require the gas station owner or highway department to clean up such releases. Even the *Otay* judge recognized that the consumer product in consumer use exception under CERCLA could not apply at shooting ranges where military and law enforcement agency employees engage in target practice. Ecology’s interpretation, in contrast, is that the relevant question is not whether the range’s customers shoot for recreation or for their employment, but whether the “consumer use” exception is being invoked by an individual consumer on the one hand, or by the range’s owner or operator, on the other. In the latter case, the “consumer product in consumer use” cannot apply.

Another error the trial court judge in *Otay* made was to conflate the question of whether a product has been “discarded” for purposes of RCRA (and therefore whether a “solid waste” has been generated) with the question of whether a “release” of a “hazardous substance” has occurred under CERCLA.

It is beyond dispute that lead is a hazardous substance under CERCLA and MTCA. However, it is also true that lead in the form of shot or bullets is a useful product, and it may not necessarily be “discarded” or “abandoned” even as it sits in surface soil at a shooting range following discharge from a firearm. See WAC 173-303-578 (Military Munitions). This is on the theory that the lead projectiles may eventually be recovered by the range operator for reuse (like golf balls at a driving range). *But see, Connecticut Coastal Fisherman’s Ass’n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1316 (lead shot and clay target debris from a shooting range that had landed in public water was a solid waste; “[w]ithout deciding how long materials must accumulate before they become discarded—that is, when the shot is fired or at some later time—we agree that the lead shot and clay targets in Long Island Sound have accumulated long enough to be considered solid waste”).

Ecology agrees that lead shot that has come to be located in surface soil within the confines of a shooting range does not necessarily constitute “solid waste” or even a release of a hazardous substance to the environment. However, it is Ecology’s position that, while spent shot sits in the soil awaiting possible recovery, a “release” can occur, for purposes of MTCA, if natural processes cause dissolved lead to migrate in appreciable amounts from the surface soil to surface or ground water. See, *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1075 (9th Cir. 2005) (“[P]assive migration of hazardous substances into the environment from where hazardous substances have come to be located is a release under CERCLA” and therefore, “[w]e hold that the leaching of hazardous substances from the slag at the Site is a CERCLA release.”); *A&W Smelters and Refiners, Inc. v. Clinton*, 962 F.Supp. 1232, 1238 (N.D. Cal. 1997) (the fact that wind blew particles from an unsecured pile of mining ore, which otherwise constituted a marketable substance, established a release of hazardous substances); *Cf. Arkema, Inc. v. Asarco, Inc.*, (W.D. Wash. 2007) (although wood settling to waterway sediments from Weyerhaeuser operations is not a hazardous substance, when wood is placed in still water in significant volume, its degradation results in the release of hazardous substances, and therefore Weyerhaeuser is liable as the owner of a facility from which hazardous substances are released to the environment).

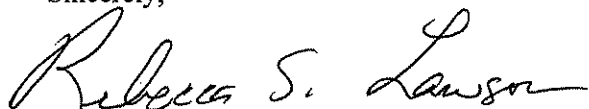
Lead that has been allowed to accumulate in surface water or in contact with groundwater, as opposed to in surface soil where it may readily be retrieved before dissolving in appreciable amounts and being transported in ground or surface water, also may present a “threatened release” for purposes of MTCA. (See EPA’s *Best Management Practices for Lead at Outdoor Shooting Ranges* (Rev. June 2005), at pp. I-2 to I-6, discussing circumstances which contribute to dissolved lead being released to the environment.)

In light of the case history presented above, the fact remains that surface water entering the Site along North Creek (when flowing) was observed to meet Washington State acute aquatic life criteria for lead and then vastly exceeds the same criteria when exiting the Site downstream. Both the Tacoma Pierce County Health Department (TPCHD) and Ecology have determined that the current soil and groundwater conditions at the Site or ongoing activities of the sportsman's club are the likely cause of the observed lead contamination in North Creek. Furthermore, North Creek has been documented to negatively impact Donkey Creek at the confluence of the two water bodies, resulting in Donkey Creek exceeding aquatic life criteria for lead as well.

Additionally, lead is not the only contaminant of concern to Ecology. During the TPCHD Initial Investigation, elevated concentrations of arsenic, naphthalene, and carcinogenic polycyclic aromatic hydrocarbon (cPAHs) were discovered in soils collected on the shooting range field, behind the field, and near the edge of North Creek. All of the listed contaminants were in excess of the MTCA soil cleanup levels at various locations at the Site. These particular contaminants have been associated with clay pigeons and their degradation in the environment. Further, the extent and magnitude of these secondary contaminants of concern, or their potential to migrate off Site, have not been evaluated.

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, Jason Landskron, 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 Jason Landskron at (360) 407-6388 or via email at Jason.Landskron@ecy.wa.gov.

Sincerely,



Rebecca S. Lawson, P.E., LHG
Section Manager
Toxics Cleanup Program
Southwest Region

By certified mail: 91 7199 9991 7031 7903 2741

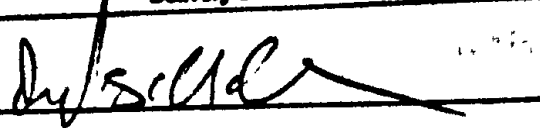
cc: Jonathan Thompson – AGO
Clark Davis – Davis Law Office, PLLC
Jason Landskron – Ecology
Scott Rose – Ecology

Date: March 4, 2015

Jason Landskron:

The following is in response to your March 4, 2015 request for delivery information on your Certified Mail™ item number 9171999991703179032741. The delivery record shows that this item was delivered on February 25, 2015 at 12:19 pm in GIG HARBOR, WA 98332. The scanned image of the recipient information is provided below.

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