State of California • Natural Resources Agency
Edmund G. Brown Jr., *Governor*
DEPARTMENT OF PARKS AND RECREATION • P.O. Box 942896 • Sacramento, CA 94296-0001
Ruth Coleman, *Director*

July 18, 2012

Elizabeth Cox
United States Environmental Protection Agency
Region IX
Mail Code ORC-3
75 Hawthorne Street
San Francisco, California 94105-3901

Dear Ms. Cox:

General Notice of Potential Liability – Yosemite Creek Superfund Site

The California Department of Parks and Recreation ("CSP") received a letter from your office on August 12, 2008, advising CSP that they were named as a potentially responsible party ("PRP") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). CSP respectfully disagrees with this designation and provides the following information to refute the designation.

CERCLA holds four classes of persons strictly liable for the release of hazardous substances: "(1) current owners and operators of a facility where hazardous substances were disposed; (2) past owners or operators who owned or operated the facility at the time of disposal; (3) transporters of the hazardous substances, and; (4) persons who arranged for disposal or treatment at any facility containing such substances." (*Courtaulds Aerospace, Inc. v. Huffman* (E.D. Cal. 1993) 826 F. Supp. 345, 349, 42 U.S.C.A. § 9607, subd. (a)(1)-(4).) In order to prevail in a CERCLA cost recovery action, the Environmental Protection Agency ("EPA") must also show that the land on which the hazardous substances are contained is a "facility;" a "release" or "threatened release" of any "hazardous substance" from the facility has occurred; and that the "release" or "threatened release" has caused the EPA to incur "necessary" response costs that were "consistent with the national contingency plan." (*United States v. Honeywell Intl., Inc.* (E.D. Cal. 2008) 542 F. Supp. 2d 1188, 1197; 42 U.S.C. § 9601(9), (14), (22); 42 U.S.C. § 9607(a)(4).)

In reading your letter, it appears that you may have listed CSP as a PRP under the first class of persons liable for the release of hazardous substances as a current owner of a "facility" where hazardous substances were "disposed." The CSP currently owns the Candlestick Point State Recreation Area ("CPSRA") adjacent to the Yosemite Creek Superfund Site. The CSP also leases an area around Yosemite Slough that the State Lands Commission ("SLC") owns for open space and recreational use. These parcels,

taken together, comprise the CPSRA that CSP operates. The EPA may consider the CPSRA as a facility under CERCLA because the term "facility" includes "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." (42 U.S.C. § 9601(9)(B).) The court, in *Adobe Lumber, Inc. v. Hellman*, analyzed previous cases to determine that facility could include "every conceivable place where hazardous substances come to be located" or could "encompass virtually any place at which hazardous wastes have been found to be located." (*Adobe Lumber, Inc. v. Hellman* (E.D. Cal. 2009) 658 F. Supp. 2d 1188, 1197-98, citing *Dedham Water Co. v. Cumberland Farms Dairy, Inc.* (1st Cir.1989) 889 F.2d 1146, 1151, and *Clear Lake Props. v. Rockwell Int'l Corp.* (S.D.Tex.1997) 959 F.Supp. 763, 768.)

CSP believes that there has been no release or threatened release of hazardous substances from the CSP-owned parcels to the Slough. CERCLA defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." (42 U.S.C. § 9601(22)). However, if contaminants migrated to the CSP's property without the aid of human activity, a court may find that there was no "disposal" within the meaning of CERCLA. (*Carson Harbor Vill., Ltd. v. Unocal Corp.* (9th Cir. 2001) 270 F.3d 863, 879-80.)

A. CSP is an innocent landowner under CERCLA because third parties were the sole cause of the release of hazardous substances into the Yosemite Creek Superfund Site.

Liability does not attach to a person who is otherwise liable under CERCLA if that person "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...(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...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." (42 U.S.C.A. § 9607, subd. (b)(3).)

As an "innocent landowner," the CSP believes "(1) that a third party was the sole cause of the release of hazardous substance; (2) that the third party was not the [CSP's] employee or agent; (3) that the act or omission of the third party causing the release did not occur in connection with a contractual relationship, existing either directly or indirectly, with the [CSP]; (4) that the [CSP] exercised due care with respect to the hazardous substance concerned; and (5) that the [CSP] took precautions against foreseeable acts or omissions of the third party." (*Lincoln Prop., Ltd. v. Higgins* (E.D.Cal.1992) 823 F.Supp. 1528, 1539-1540, citing *Kelley v. Thomas Solvent Co.* (W.D.Mich.1989) 727 F.Supp. 1532, 1539–40.)

1. Third parties were the sole cause of the release of hazardous substances into the Yosemite Creek Superfund Site.

The first element of this defense is that a third party was the sole cause of the release of the hazardous substance. In *Lincoln Prop., Ltd. v. Higgins*, the court held that "'caused solely by,' as used in CERCLA, incorporates the concept of proximate or legal cause." (*Lincoln Properties, Ltd. v. Higgins*, *supra*, at p. 1542.) The 9th Circuit, in *Carson Harbor Vill. Ltd. v. Unocal Corp.*, addressed the question of whether passive migration of a third party's hazardous materials over another landowner's property constituted disposal and therefore made the landowner liable under CERCLA. The court held that, "The plain meaning of the terms used to define 'disposal' compels the conclusion that there was no 'disposal' during the [landowner's] ownership, because the movement of the contamination, even if it occurred during their ownership, cannot be characterized as a 'discharge, deposit, injection, dumping, spilling, leaking, or placing.'" (*Carson Harbor Vill. Ltd. v. Unocal Corp.*, *supra*, at pp. 877-878.) The court found that the landowner did not dispose of hazardous materials since the third party's contamination migrated onto their property. As in *Carson Harbor*, the CSP did not contribute contaminants to the Slough that match the chemical profile of the Slough. The chemical profile of the Slough mimics that of industrial discharge. (Elizabeth Nixon, Northgate Environmental Management, Inc.)

Various properties in the area were acquired by the CSP from private parties between the years of 1974 and 1981 through grant deeds pursuant to the State of California's interest in building a park in this area. The Department of General Services did the normal clearance for that time for taxes and liens. In 1983, the City and County of San Francisco transferred additional property by quitclaim deed to CSP for the express purpose of park, cultural, and recreational purposes. (*See* Attachment 1 which shows currently owned and leased CSP property.) The land was quitclaimed "without warranty, express or implied, all of its right, title and interest in and to those certain lands..." The deed reserves to the City and County of San Francisco sewer easements with rights of way and rights of entry upon and through the properties for the purposes of constructing and repairing sewer pipes. The deed and agreement say nothing about mineral or subsurface rights, CERCLA, pollution or contamination. Currently, the CSP leases an area around Yosemite Slough from the SLC for open space and recreational use. This is a lease and multi-phased transfer of ownership that started in 1986 and will end in 2035. These parcels, taken together, comprise the CPSRA that CSP operates.

In 1987-1988, the Department of Toxic Substances Control ("DTSC") conducted an expedited response action at the Bay Area Drum Site, north of the CSP property. This response action involved the removal and proper disposal of contaminated soil and stored waste materials from the drum yard and adjacent properties as well as capping and fencing the drum yard. In 1996, a group of PRPs entered into a Consent Order with DTSC and between 1996 and 1999, additional remedial investigation activities characterized the conditions at the site and surrounding area.

It is CSP's position that the CPSRA parcels are not a likely or significant source of contaminated sediments to the Yosemite Creek Superfund Site. Two studies have been performed on behalf of the San Francisco Public Utilities Commission for the Yosemite Creek Superfund Site that identified the presence of polychlorinated biphenyls

("PCBs"), the pesticides chlordane, dieldrin, and DDT, and the heavy metals chromium, lead, mercury and zinc. The EPA's August 12, 2008 letter included a speculative assertion that surface water flow during rain events may have transported contaminants from property owned by the CSP to the Slough. However, these contaminants of potential concern ("COPCs") bear little resemblance to the chemical profile of the CPSRA parcels and no viable mechanism for transport of contaminated sediment to the Slough from the CPSRA parcels has been identified.

Extensive chemical testing of soil was completed during three phases of environmental investigation at the CPSRA parcels. More than 250 soil samples were collected and analyzed. Results of the soil analysis demonstrate that the CPSRA parcels are not a likely source of PCBs, pesticides or heavy metals to the Slough sediments. Less than a quarter of the soil tested contained traces of PCBs; only a fraction of samples contained low concentrations of pesticides; and chromium, mercury and zinc were not detected at concentrations of concern. Lead was detected in localized areas at elevated concentrations; however, these localized areas occur at depth and in upland areas, and therefore would not be a likely source available for bank erosion or surface migration via stormwater discharge. Industrial use of a small portion of the property could be associated with the elevated lead found in a limited area, but no link between the lead-impacted soil area and the Slough has been established. There is no evidence that historical activities on the CPSRA parcels were a source of PCBs, pesticides or heavy metals.

The City of San Francisco maintains sewer easements for its combined sewer and stormwater system, which has historically traversed the CPSRA parcels. Three outfalls from San Francisco's combined sewer and stormwater system discharged into Yosemite Creek prior to 1958, and starting in 1959, combined wet-weather flows continued to be discharged from the three outfalls. In 1965, the three Yosemite Basin overflow structures were consolidated into a single system located at the mouth of Yosemite Creek. It wasn't until the 1980s and 1990s, substantially after the purchase by CSP, that several infrastructure improvements were developed, including the placement of large storage and treatment boxes to contain combined flows during wet weather. The storm water line that serviced the Bay Area Drum Site traversed the CSP property pursuant to the city's easement. A mechanism that has been identified for transport of contamination from the Bay Area Drum Site is via these combined storm water/sewer outfalls into the Slough.

Mechanisms for possible migration from the Bay Area Drum Site to the CSP property include surface water runoff directly from the Bay Area Drum Site onto the CSP property during storm events, wind-blown contamination onto CSP property, or leakage from the combined sewer line. It is also possible that contaminants were re-deposited onto the shoreline, owned by the SLC, after they were discharged to the Slough through the storm drain overflow. However, evidence supports that the CSP property is an unlikely source of contaminants to the Slough because the contaminant profile in the Slough does not match contaminants found on CSP property.

Historical usage of the adjacent Navy shipyard property resulted in documented releases of PCBs into the South Basin sediments and those PCBs may subsequently have been transported into Yosemite Slough through tidal action. There was also an

industrial landfill operated near the mouth of Yosemite Creek used by the Navy to dispose of solid and industrial wastes from 1958-1974.

CSP has not engaged in any conduct leading to the contamination of the Yosemite Creek Superfund Site. If the CSP property did result in contamination of the Yosemite Slough, then it was only through passive migration of contaminants from the Bay Area Drum Site which would not invoke liability under CERCLA. The CPSRA parcels are not a likely or significant source of contaminated sediments found in the Superfund Site. CSP's conduct was therefore not the proximate cause of the release of hazardous substances to the Superfund Site.

2. The third parties responsible for the release of hazardous substances into the Yosemite Creek Superfund Site were not employees or agents of the CSP.

The second element of the third party defense is that the third parties that caused the release of hazardous substances were not employees or agents of the CSP. The other named potentially responsible parties ("PRPs") were not employees or agents of the CSP.

3. The other PRPs' acts or omissions that resulted in the release of hazardous substances into the Yosemite Creek Superfund Site did not occur in connection with a contractual relationship between the third parties and the CSP.

The third element is that the third party's acts or omissions that resulted in the release did not occur in connection with a contractual relationship between the third party and the CSP. A contractual relationship "includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession." (42 U.S.C.A. § 9601, subd. (35)(A).) The opposing party to a third party defense must show "something more than a mere contractual relationship." (*Lincoln Properties, Ltd. v. Higgins* (E.D. Cal. 1992) 823 F. Supp. 1528, 1543, quoting *Westwood Pharmaceuticals v. National Fuel Gas Distribution Corp.* (2nd Cir.1992) 964 F.2d 85, 89.) A landowner is only precluded from bringing the third party defense if the contract between the landowner and the third party is connected with handling hazardous waste. (*Westwood Pharmaceuticals v. National Fuel Gas Distribution Corp.*, *supra*, at p. 89.)

Section 9601 also requires that, "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." (42 U.S.C.A. § 9601, subd. (35)(A).)

Various properties in the area were acquired by the CSP from private parties between the years of 1974 and 1981, and in 1983 the City of San Francisco transferred property by quitclaim deed to CSP. The land was quitclaimed "without warranty, express or implied, all of its right, title and interest in and to those certain lands..." The deed reserved to San Francisco sewer easements with rights of way and entry upon and through the properties to construct and repair sewer pipes.

In *Adobe Lumber, Inc. v. Hellman*, the court held that a sewer operated by the City of Woodland, CA was a facility for purposes of CERCLA and held that the city was responsible for contamination caused by a drycleaner dumping wastewater containing a

hazardous substance down the drain. (*Adobe Lumber, Inc. v. Hellman* (E.D. Cal. 2009) 658 F. Supp. 2d 1188, 1202.) In this case, the wastewater from the Bay Area Drum Site and other industries found its way into the sewers operated by the City of San Francisco. When the sewers got too full, the wastewater overflowed into adjacent storm drains and made its way into Yosemite Slough.

At the time the CSP acquired the land from the City of San Francisco, the CSP 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 parcel. For property purchased before May 31, 1997, which encompasses all of the property in the CPSRA, in order to determine if the CSP had reason to know of contamination, a court should take into account, "[a] any specialized knowledge or experience on the part of the defendant; [b] the relationship of the purchase price to the value of the property, if the property was not contaminated; [c] commonly known or reasonably ascertainable information about the property; [d] the obviousness of the presence or likely presence of contamination at the property; and [e] the ability of the defendant to detect the contamination by appropriate inspection." (42 U.S.C.A. § 9601.)

The CSP had no expertise in hazardous materials at the time the land was acquired. The 1975 Settlement Summary of the property that the CSP acquired pursuant to the *People v. Harney, et al.* condemnation action, included an Inspection Report that stated, "There are no hazardous conditions other than those noted below." (Settlement Summary, *People v. Harney*, p. 4.) An Inspecting Agent signed this line and the document does not list any potentially hazardous conditions. A Settlement Summary from 1981, concerning *People v. Cahill Construction Co.*, also lacks any information in the section titled, "Potentially Hazardous Conditions Noted." (Settlement Summary, *People v. Cahill Construction Co.*, p. 4.)

The City and County of San Francisco originally calculated that the lands it quitclaimed to the CSP were worth around $6,750,000. However, in order to "preserve as much of the $10,000,000 appropriation as possible for actual park construction and development, [the] State...offered a total payment of $410,000 to [the] City for all [of the] City's right, title and interest in lands within [the] project area." (Agreement, p. 1.) The City accepted this offer "[i]n recognition of the need to conserve available funds for park development...provided that the conveyance be by quitclaim deed which: (1) Reserves to City easements for sewer facilities...[and] (2) Is subject to a condition subsequent, with right of reverter, that the conveyed lands are to be used only for park and related cultural and recreational purposes." (Agreement, p. 2.) The land was appraised by Hector Leslie in 1980 at an authorized value matching the settlement value of $410,300. (Settlement Summary, p. 1.)

Aerial photographs (Attachments 2 – 7) from 1946, 1956, 1965, 1973, 1986 and 1990 show the development of the Yosemite Slough area. The 1946 photo shows the area before drastic amounts of fill were added. (Attachment 2.) The 1956 photo shows fill material that was added on either side of the Slough, which started creating the narrow Slough shape that exists today. (Attachment 3.) The 1965 photo shows another addition of fill material; developments are also more visible both on the fill material and everywhere around the Slough. (Attachment 4.) The current CSP property, however, lacks evidence of much development in this photo. CSP property still appears to be

mostly barren in the 1973 photo and the only developed CSP property is within "Area C" in the 1986 photo. (Attachments 5 – 6.) Finally, the 1990 photo appears to show development on those same two parcels near the Slough, but not on any other CSP property surrounding the Slough. (Attachment 7.)

The developments pictured in the aerial photographs were industrial metal warehouses which have since been demolished. When CSP purchased the property on the north side, the premises contained these industrial metal warehouses. However, the metal warehouses are not a likely source of contamination to the Slough since the contamination in the Slough does not match the composition of the CSP property.

DTSC did not conduct any analysis to determine the presence of hazardous materials on the property until 1988. Third parties conducted extensive research in 1987 and 1999 in order to ascertain potential sources of contamination to the Yosemite Creek area; the CSP was never identified as a source of contamination. (Attachment 8: Yosemite and Fitch Outfalls Consolidation Project: City of San Francisco Soil Investigation Report, ERM-West, January 1987; Attachment 9: Evaluation of Remedial Investigation Results, Harding Lawson Associates, December 1999; Attachment 10: Potential Offsite Sources, Final Remedial Investigation, Harding Lawson Associates, December 1999; Attachment 11: Copy of Yosemite Creek – Potential Sources of Contamination; and Attachment 12: Yosemite Creek Map – Potential Sources.) This leads to the conclusion that there was no commonly known or reasonably ascertainable information about the property to show it might have been contaminated. One source of hazardous materials that could possibly have been ascertained was a small underground petroleum storage tank not mentioned in the quitclaim deed or agreement. However, this tank could not be correlated with the contaminants found in the Slough. There is no evidence that historical activities on the CPSRA parcels were a source of COPCs associated with Slough sediments. There are no documented releases of PCBs, pesticides, or heavy metals at the CPSRA parcels although some lead and petroleum contamination was identified and removed during site restoration. The Regional Water Quality Control Board ("RWQCB") has not identified the CPSRA parcels as a potential historical or current source of contamination to the Slough.

The CSP 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 parcel.

4. The CSP exercised due care with respect to the hazardous substances and the CSP took precautions against foreseeable acts or omissions of third parties.

The final elements necessary to prove the third party defense are, the CSP exercised due care with respect to the hazardous substances, and the CSP took precautions against foreseeable acts or omissions of third parties. "The [CSP] must show that it exercised due care with respect to [the hazardous waste] 'in light of all relevant facts and circumstances' and that it took precautions against the 'foreseeable acts or omissions' of third parties." (*Lincoln Properties, Ltd. v. Higgins* (E.D. Cal. 1992) 823 F. Supp. 1528, 1543.)

The CSP exercised due care with respect to hazardous substances because there is no evidence that historical activities on the CPSRA parcels were a source of the COPCs associated with Slough sediments. There are no documented releases of PCBs, pesticides, or heavy metals at the CPSRA parcels. The RWQCB has not identified the CPSRA parcels as a potential historical or current source of contamination to the Slough. Historical industrial and business practices on the property are not identified with PCB or pesticide use, storage, or disposal. Industrial use of the small portion of the north side of the property could be associated with the elevated localized volume of lead found in a limited area, but no link between the lead-impacted soil area and the Slough has been established.

Fill quality at the CPSRA parcels is similar to historical fill placed throughout the San Francisco Bay margin. "Analysis of historic-era maps indicates that the project area remained relatively unchanged up through the 1930s, and the majority of the infilling of the bay occurred between 1947 and 1956... Infilling of the bay continued during the 1960s as access to the area was improved with the construction of Candlestick Park. By 1972 the approximate current shoreline was established, with the project area elevated five to 20 feet above sea level. Since the reclamation of the bay waters, the project area has been used for light industrial and commercial development, as well as a discharge location for storm and sanitary water overflow." (Attachment 13: *Extended Phase I Geoarchaeological Explorations for the Yosemite Slough Restoration Project, Candlestick Point Recreation Area, San Francisco, California*, Philip Kaijankoski and Jack Meyer, August 2011.) Historically, Bay Area fill material "rang[ed] from local soil and quarry rock...[to] building debris after the 1906 earthquake, and...sand dredged from the Bay during construction of much of Treasure Island and Alameda." (*Detailed Mapping of Artificial Fills, San Francisco Bay Area, California* (2008) p. 4, 12, http://earthquake.usgs.gov/research/external/reports/07HQGR0078.pdf.) It is possible that in the 1950s when the area was filled, the fill material was placed upon preexisting contaminated land or the fill itself was contaminated. It is well recognized in San Francisco that these historic fill soils contain low to moderate levels of contaminants and the city has a program to deal with this generic issue. (San Francisco Pub. Health Code, Art. 22A, § 1220 et seq.) However, no link between the contaminated fill and the Slough has been established.

The CSP took precautions and continues to take precautions against foreseeable acts or omissions of third parties. CSP has conducted extensive chemical testing of the CPSRA parcels to evaluate the quality of the soils. More than 250 soil samples were collected and analyzed for environmental contaminants, including the COPCs associated with Slough sediments. The lead-impacted soil in the northern parcels was removed during recent restoration construction for the Yosemite Slough Restoration Project. During the earthwork recently completed for the wetland restoration on the north side, over 150,000 cubic yards of fill materials were excavated and regraded. No materials were discovered during the earthwork that would suggest the CPSRA parcels are a source of contamination to the Slough.

The CSP is committed to restoring the Yosemite Slough. The Yosemite Slough Restoration Project will create 12 acres of tidal wetlands in the Yosemite Slough. The sediment quality of the wetland cover will meet Action Goals established in the RWQCB Waste Discharge Requirements permit. The Action Goals for the upper cover are

based on either ambient levels for the San Francisco Bay, or the National Oceanic and Atmospheric Administration Effects-Range Low screening levels for marine sediments. These Action Goals are cleaner than the proposed Action Levels for the Yosemite Creek Superfund Site, which use Effects-Range Median values. The restoration project at the CPSRA parcels is adding significantly to the wetlands habitat of the Yosemite Slough, improving the ecological health of the ecosystem, and improving environmental quality of the adjacent uplands areas.

5. The CSP should not be listed as a PRP for the Yosemite Creek Superfund Site, but if the CSP is listed, it is exempt from liability under the CERCLA innocent landowner defense.

Third parties were the sole cause of the release of hazardous substances into the Yosemite Creek Superfund Site. CSP's conduct was not the proximate cause of the release of hazardous substances into the Slough. The other named PRPs were not employees or agents of the CSP. Although the CSP and the City of San Francisco had a contractual relationship involving sewer easements, this relationship was nothing more than a mere contractual relationship and was not connected with the handling of hazardous waste. At the time the CSP acquired the land from the City of San Francisco, the CSP 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 parcel. The CSP exercised due care with respect to the hazardous substances and the CSP took precautions against foreseeable acts or omissions of the other PRPs. The CSP is committed to restoring the Yosemite Slough and voluntarily began the Yosemite Slough Restoration Project to improve the quality of the Yosemite Creek area.

B. CSP is exempt from CERCLA liability as a contiguous landowner.

Another exemption from CERCLA liability is the contiguous landowner exemption. "A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a...facility...solely by reason of the contamination." (42 U.S.C.A. § 9607, subd. (q)(1)(A).) CSP is a contiguous landowner because the CPSRA could have been contaminated by a release from the Bay Area Drum Site or other PRPs' polluted sites. This exemption has eight elements.

The elements of the contiguous landowner exemption are:

"[1] the person did not cause, contribute, or consent to the release or threatened release;

[2] the person is not potentially liable, or affiliated with any other person that is—

[a] potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or

[b] the result of a reorganization of a business entity that was potentially liable;

[3] the person takes reasonable steps to—

[a] stop any continuing release;
[b] prevent any threatened future release; and
[c] prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

[4] the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility);

[5] the person—

[a] is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and
[b] does not impede the effectiveness or integrity of any institutional control employed in connection with a response action;

[6] the person is in compliance with any request for information or administrative subpoena issued by the President under this chapter;

[7] the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility; and

[8] at the time at which the person acquired the property, the person—

[a] conducted all appropriate inquiry within the meaning of section 9601(35)(B) of this title with respect to the property; and
[b] did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person." (42 U.S.C.A. § 9607, subd. (q)(1)(A).)

1. The CSP did not cause, contribute, or consent to the release of hazardous substances to the Yosemite Creek Superfund Site.

The first element of the contiguous landowner exemption is: "the person did not cause, contribute, or consent to the release or threatened release." (42 U.S.C.A. § 9607, subd. (q)(1)(A)(i).) Because third parties are the sole cause of the release of hazardous substances as stated in section (A)(1) of this document, the CSP did not cause, contribute, or consent to the release of hazardous substances to the Yosemite Creek

Superfund Site. If contaminants passively migrated to the CSP's property without the aid of human activity, a court may find there was no 'disposal' within the meaning of CERCLA and find the landowner not liable under CERCLA. (*Carson Harbor Vill., Ltd. v. Unocal Corp.* (9th Cir. 2001) 270 F.3d 863, 879-80.)

2. The CSP is not potentially liable or affiliated with any other person that is potentially liable for response costs through any direct or indirect relationship.

The second element is: "the person is not [a] potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services); or [b] the result of a reorganization of a business entity that was potentially liable." (42 U.S.C.A. § 9607, subd. (q)(1)(A)(ii).) Various properties in the area were acquired by the CSP from private parties between the years of 1974 and 1981, and in 1983 the City of San Francisco transferred property by quitclaim deed to CSP. The deed reserves to San Francisco sewer easements with rights of way and entry upon and through the properties to construct and repair sewer pipes. The City of San Francisco's sewer easement through the property is not connected with the handling of hazardous waste. (The opposing party must show "something more than a mere contractual relationship." (*Lincoln Properties, Ltd. v. Higgins* (E.D. Cal. 1992) 823 F. Supp. 1528, 1543, quoting *Westwood Pharmaceuticals v. National Fuel Gas Distribution Corp.* (2nd Cir.1992) 964 F.2d 85, 89.))

3. The CSP did not release hazardous substances to the Yosemite Creek Superfund Site and the CSP prevented or limited exposure to hazardous substances on the CPSRA property.

The third element is: "the person takes reasonable steps to [a] stop any continuing release; [b] prevent any threatened future release; and [c] prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person." (42 U.S.C.A. § 9607, subd. (q)(1)(A)(iii).) Because third parties are the sole cause of the release of hazardous substances as stated in section (A)(1), the CSP did not contribute to the release of hazardous substances to the Yosemite Creek Superfund Site. All of the CPSRA parcels were purchased in order to create more parkland. CSP also prevented and limited exposure, and continues to limit exposure, to hazardous substances on the CPSRA site through its Yosemite Slough Wetland Restoration Project addressed in section (A)(4) of this document.

4. The CSP has provided full cooperation, assistance, and access to the EPA concerning the facility and the Yosemite Creek Superfund Site and has voluntarily engaged in restoration on the CPSRA property. The CSP is in compliance with land use restrictions established in connection with the Yosemite Creek Superfund Site.

The fourth and fifth elements concern response actions. The fourth element is: "the person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at the vessel or facility from

which there has been a release or threatened release (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility)." (42 U.S.C.A. § 9607, subd. (q)(1)(A)(iv).) The fifth element is: "the person [a] is in compliance with any land use restrictions established or relied on in connection with the response action at the facility; and [b] does not impede the effectiveness or integrity of any institutional control employed in connection with a response action." (42 U.S.C.A. § 9607, subd. (q)(1)(A)(v).) The CSP has complied with the EPA throughout its response to the contamination of the Yosemite Creek Superfund Site. The CSP has entertained a request from the EPA to use State Parks property to dry out contaminated soil. The CSP has also voluntarily engaged in restoration and remediation of the CPSRA property through its Yosemite Slough Wetland Restoration Project.

5. The CSP is in compliance with any request for information or administrative subpoena issued by the President and has provided all legally required notices with respect to discovery or release of hazardous substances.

The sixth element is: "the person is in compliance with any request for information or administrative subpoena issued by the President under this chapter." (42 U.S.C.A. § 9607, subd. (q)(1)(A)(vi).) The seventh element is: "the person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility." (42 U.S.C.A. § 9607, subd. (q)(1)(A)(vii).) No subpoenas or requests issued by the President have been received by the CSP. The CSP has not received any notices with respect to discovery or release of hazardous wastes, other than the EPA letter informing the CSP that the EPA believes the CSP to be a PRP under CERCLA.

6. The CSP conducted appropriate inquiry and did not know or have reason to know that the property was or could be contaminated by a release or threatened release of hazardous substances from property not owned by the CSP.

The eighth element is: at the time at which the person acquired the property, the person conducted all appropriate inquiry within the meaning of section 9601(35)(B) of this title with respect to the property; and did not know or have reason to know that the property was or could be contaminated by a release or threatened release of one or more hazardous substances from other real property not owned or operated by the person. At the time the CSP acquired the land from the City of San Francisco, the CSP 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 parcel because the land was quitclaimed "without warranty, express or implied, all of its right, title and interest in and to those certain lands..." and the deed said nothing about mineral or subsurface rights, CERCLA, pollution or contamination. There is no evidence that historical activities on the CPSRA parcels were a source of COPCs associated with Slough sediments. There are no documented releases of PCBs, pesticides, or heavy metals at the CPSRA parcels. The RWQCB has not identified the CPSRA parcels as a potential historical or current source of contamination to the Slough.

CONCLUSION

The CSP should not be listed as a PRP for the Yosemite Creek Superfund Site, but if the CSP is listed, it is exempt from liability under the CERCLA innocent landowner defense or the contiguous landowner exemption.

The CSP did not cause, contribute, or consent to the release of hazardous substances to the Yosemite Creek Superfund Site. The CSP is not potentially liable or affiliated with any other person that is potentially liable for response costs through any direct or indirect relationship. The CSP did not contribute to the release of hazardous substances to the Yosemite Creek Superfund Site. CSP also prevented and limited exposure, and continues to limit exposure, to hazardous substances on the CPSRA site through its Yosemite Slough Wetland Restoration Project. The CSP has complied with the EPA throughout its response to the contamination of the Yosemite Creek Superfund Site. The CSP offered to let the EPA use State Parks property to dry out contaminated soil. The CSP has also voluntarily engaged in restoration and remediation of the CPSRA property through its Yosemite Slough Wetland Restoration Project. The CSP conducted appropriate inquiry and did not know or have reason to know that the property was or could be contaminated by a release or threatened release of hazardous substances from property not owned by the CSP.

If you have any questions, I can be reached at (916) 651-8454.

Sincerely,

Kara E. Zysk for

Kathryn J. Tobias
Senior Staff Counsel

Enclosures