UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

August 28, 2012

Kathryn Tobias
California Department of Parks and Recreation
1416 9th Street, 14th Floor
Sacramento, California 95814
ktobias@parks.ca.gov

RE: Yosemite Creek Sediment Site

Dear Ms. Tobias:

This letter is in response to your letter dated July 18, 2012, submitted to the United States Environmental Protection Agency (EPA) on behalf of the California Department of Parks and Recreation (CSP). In your letter you request that EPA remove CSP from the list of potentially responsible parties (PRPs) at the Yosemite Slough Superfund Site (Site). After reviewing your argument, EPA is denying your request. EPA's determination that CSP is a PRP under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 107(a)(1) remains unchanged.

Under CERCLA Section 107(a)(1) and (4), "the owner and operator of a vessel or a facility, ... from which there is a release, or a threatened release, which causes the incurrence of response costs, of a hazardous substance, shall be liable for all costs of removal or remedial action incurred by the United States Government ... not inconsistent with the national contingency plan." In order to be liable as the current owner, EPA does not have to prove that a disposal occurred at the CSP's property during its ownership. EPA only has to show that a release occurred. A "release" is defined much broader than "disposal" and can include active and passive migration. Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, at 878 (9th Cir. Cal. 2001). A release can occur long after a party discharges, deposits or otherwise disposes of a hazardous substances. Disposal of hazardous substances at CSP's property is irrelevant when establishing its liability as a current owner.

To establish liability at this Site, EPA's burden of proof is to: a) identify the contaminants at the Site; b) identify the same, or chemically similar, contaminants at the CSP property; and c) provide evidence of a plausible migration pathway by which the contamination could have traveled from CSP's property to the slough. Once EPA has met this burden and proven a prima facie case, the burden would then shift to CSP to provide evidence to disprove causation. Castaic Lake Water Agency v. Whittaker Corp., 272 F.Supp. 2d 1053, at 1065-1066 (C.D. Cal. 2003). See also, Westfarm Associates Limited Partnership v. Washington Suburban Sanitary Commission, 66 F.3d 669 (4th Cir. 1995), United States v. Alcan Aluminum Corp., 964 F.2d 252 (3d Cir. 1992), Artesian Water Co. v. New Castle County, 659 F. Supp. 1269 (D. Del. 1987), aff'd on other grounds 851 F2d 643 (3d Cir. 1988), and United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987).

EPA alleges that contaminants (lead, mercury, zinc, and PCBs) migrated from the CSP property through stormwater discharge, bank erosion, and/or subsurface migration. EPA's Yosemite Creek Sediment Removal Assessment Report dated May 2011 indicates high levels of PCBs (Aroclor-1254 and 1260 and PCB Congeners), metals (chromium, lead, mercury, and zinc), and total petroleum hydrocarbons (diesel and motor oil) exist in the slough sediment. Immediately adjacent to the slough on both the north and south banks of the slough, the CSP performed a Phase II Environmental Site Assessment (Phase II ESA) dated February 11, 2005. That report indicates that CSP's property is also contaminated with PCBs (Aroclor- 1242, 1248, 1254, and 1260), lead, mercury, and zinc. Tables 3a and 3e of the Phase II ESA present soil analytical results for metals and PCBs. Sampling results show the presence of lead at levels as high as 20,000 mg/Kg, mercury at levels as high as 5.1 mg/Kg, zinc at levels as high as 22,000 mg/Kg, and total Aroclor at levels as high as 24,300 ug/Kg.

Based on the data collected by CSP and EPA, the CSP property was and is contaminated with the same types of hazardous substances which are also located in the sediment slough. Because the CSP property is adjacent to the slough to the north and south, EPA alleges that contamination from the CSP property has migrated to the slough through stormwater discharge, bank erosion, and/or subsurface migration. As such, EPA will be able to meet its burden establishing CSP as a PRP at the Site.

In your letter, you raise three potential defenses to liability: the third party defense, the innocent landowner defense, and the contiguous landowner defense. For the reasons stated below, EPA does not believe that these defenses are applicable to your situation and that CSP is not exempt from liability.

To prevail on the third-party defense to liability under CERCLA, defendants must establish by preponderance of the evidence that a third party was the sole cause of the release, that the third party was not an employee or agent or one with whom defendants had a direct or indirect contractual relationship, that defendants exercised due care with respect to hazardous substance, and that they took precautions against foreseeable acts or omissions of the party causing the release. CERCLA Section 107(b)(3), 42 U.S.C. § 9607(b)(3). This defense is strictly construed and defenses which fail to conform in any respect to these requirements are stricken. U.S. v. Rohm and Haas Co., 939 F.Supp 1142, at 1152 (D. N.J. 1996). The Section 107(b)(3) defense is available only where a third party is the *sole* cause of a release or threatened release. U.S. v. Stringfellow, 661 F.Supp. 1053, at 1061 (C.D. Cal. 1987). Finally, defendant must provide more than unsubstantiated allegations of third-party actions that caused the contamination. Defendant's burden is to present actual evidence of third-party actions. U.S. v. W.R. Grace & Co.-Conn., 280 F.Supp 2d 1135, at 1147 (D. Mont. 2002).

The information provided in your letter does not substantiate that the Bay Area Drum Site (BAD Site) was the sole contributor of contamination at the CSP's property. The BAD Site is located at the corner of Hawes Street and Thomas Avenue, four blocks north of the slough and CSP's property. In between the BAD Site and the slough are stormwater drains which lead to San Francisco's combined sewer system and eventually to one of three outfalls into the slough. Although it is possible that rain water at the BAD Site traveled over surface to reach the slough, it does not appear to be the most likely scenario because of the distance and the intervening

stormwater drainage system. CSP has not presented any evidence that such event actually occurred, only an allegation. Moreover, the BAD Site could not have contaminated the property south of the slough and thus, could not be the sole cause of the release.

The "innocent landowner" defense, a variation of the third-party defense, creates an exemption for landowners who purchase property after it becomes contaminated, notwithstanding the fact that a contractual relationship exists with the responsible party. 42 U.S.C. § 9601(35). In order to use this defense the landowner must prove three elements and comply with continuing obligations related to the cleanup effort. The first element of this defense requires the PRP to prove that he acquired ownership of the contaminated property after the contaminants were placed on the site. 42 U.S.C. § 9601(35)(A). The second element requires the PRP to show that (1) when he acquired the facility he did not know or have reason to know the property had already been contaminated with a hazardous substance, (2) he acquired ownership via an inheritance or bequest, *or* (3) the owner is a governmental entity that acquired the property through involuntary transfer or acquisition or through eminent domain. Id. Expanding on the second element, a PRP has no reason to know about previous contamination only if the PRP conducts "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice." 42 U.S.C. § 9601(35)(B). The final element requires the owner to satisfy the same due care and reasonable precautions requirements of the third-party defense, which essentially places a continuing duty on the landowner to diligently respond to a discovered or foreseeable release even after the purchase. 42 U.S.C. § 9601(35)(A). Moreover, to take advantage of the innocent landowner defense, an owner must establish that it: (1) provided full cooperation, assistance, and facility access to those authorized to conduct the response action; (2) complied with any land use restrictions; (3) did not impede the effectiveness or integrity of any institutional controls employed in connection with the response action. Id.

When CSP took title to the property, it did so with constructive or actual knowledge that contamination issues were possible. According to your letter, CSP started acquiring property in this area from private parties from 1974 through 1981 with the intent of building a park in the area. As illustrated by the aerial photographs you provided, before CSP acquired the property it was common knowledge or reasonably ascertainable that the property to be acquired by CSP was landfilled property. Illustrated by the 1965 and subsequent aerial photographs, some of the property to be acquired by CSP was also used for industrial or commercial purposes. These historical operations and landfill activities are the type of activities which could result in disposal of hazardous substances at the property. As you state in your letter, "[i]t is well recognized in San Francisco that these historic fill soils contain low to moderate levels of contaminants . . . ." As such, the CSP had reason to know about previous contamination when it took title to the property. Thus, CSP will not be able to meet the second element of the defense.

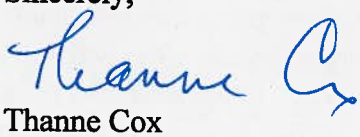
The contiguous property owner provision, CERCLA § 107(q), excludes from the definition of "owner" or "operator" a person who owns property that is "contiguous" or otherwise similarly situated to, a facility that is the only source of contamination found on his property. To qualify as a contiguous property owner, a landowner must meet the criteria set forth in CERCLA § 107(q)(1)(A). Contiguous property owners must perform all appropriate inquiry prior to purchasing the property. Persons who know, or have reason to know, prior to purchase,

that the property is or could be contaminated, cannot qualify for the contiguous property owner liability protection. For the reasons stated above, CSP will not qualify for the contiguous landowner exclusion to liability because it took title to the property with knowledge that the property could be contaminated by historical operations or activities at the property.

Moreover, innocent landowners and contiguous landowners will lose the liability exemption by interfering with the response action. At this time it is uncertain if CSP's decision to breach the dike between the CSP's wetlands restoration area and the slough, thereby allowing tidal waters to flow into the slough and the wetlands project, will result in an interference in the ultimate response action. By breaching the dike, CSP introduced a time critical aspect to the response action because of potential cross contamination issues. EPA fears that cross contamination will increase the scope of the response if the slough is not addressed in a timely manner. Further, at this time, we request that the wetlands restoration project on the southern bank of the slough not occur until after the Yosemite Slough response action is completed. EPA will follow-up this letter with another letter to CSP with further explanation and rationale for this request. We also request that CSP coordinate with EPA so that its restoration project does not interfere with the response action and the response action does not interfere with the restoration project.

The liability scheme of CERCLA is not based on equitable principles of fairness. We recognize the public benefit that CSP is providing through this wetlands restoration project and want to coordinate with CSP to make sure that both projects are completed. Unfortunately, as the current owner of the contaminated property adjacent to the slough, CSP is a liable party at the Site. Regardless of its liability status, EPA believes that CSP is an essential and necessary party at the Site. We appreciate its participation in the Stakeholder Committee and the PRP/EPA meetings and hope that CSP will continue in this role. Finally, we encourage you to work with the other PRPs as this process goes forward. As the owner of several properties near the slough and by coordinating its wetlands project with the response, EPA believes that CSP can contribute to the response action in a meaningful way.

Sincerely,



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