

LAW OFFICES OF  
**CARTER MOMSEN PC**

305 N. MAIN STREET  
POST OFFICE BOX 1709  
UKIAH, CALIFORNIA 95482

JARED G. CARTER  
BRIAN C. CARTER  
BRIAN S. MOMSEN  
ALEXANDER C. RICH  
COLIN W. MORROW

PHONE: (707) 462-6694  
FAX: (707) 462-7839  
E-MAIL: Bcarter@pacific.net  
WEBSITE: www.cartermomsen.com

November 10, 2016

**VIA E-MAIL**

Mr. Mathias St. John  
Executive Officer  
North Coast Regional Water Quality Control Board  
5550 Skylane Blvd., Suite A  
Santa Rosa, CA 95403-1072

Re: The Shiloh Group, LLC; Proposed Order #R1-2017-003

Dear Mr. St. John:

The following comments are submitted on behalf of The Shiloh Group LLC ("**TSG**"), the owner of the approximately 31 acre industrial and commercial property at 930 Shiloh Road in Windsor ("**TSG Property**") that includes the .65-acre site known as the Ecodyne Tower Site ("**Tower Site**"). Since approximately 1983, Ecodyne Corporation ("**Ecodyne**") has been remediating and monitoring the Tower Site under the orders and supervision of the North Coast Regional Water Quality Control Board ("**NCRWQCB**" or "**Board**").

These comments are submitted in response to the October 10, 2016, letter from NCRWQCB staff ("**Staff**") to Mr. Ray Awendt of The Marmon Group, LLC ("**Marmon**"), Ecodyne's representative for the Tower Site. The letter states that NCRWQCB is considering adopting proposed order No. R1-2017-0003 ("**Proposed Order**"), which would "terminat[e] the Waste Discharge Requirements for [the Tower Site] facility" by rescinding the Board's WDRs Order No. R1-2007-0006 ("**Existing Order**"; adopted February 7, 2007). In paragraphs 38 - 40, the Proposed Order contains a discussion of the grounds for staff's recommendations. Paragraph 40 of the Proposed Order states:

"In January 15, 2016 Regional Water Board staff concurred with 'Final Remedial Action Plan' dated September 2015, which includes a land use covenant and long term storm water and groundwater monitoring. Active remediation at the site has been discontinued and therefore WDRs Order No. R1-2007-0006 is no longer

Mr. Mathias St. John  
Executive Officer  
North Coast Regional Water Quality Control Board  
November 10, 2016  
Page 2

needed for the protection of water quality."

TSG submits that adoption of the Proposed Order at this time is premature. Fluor Corporation ("**Fluor**") is presently excavating on the Tower Site, under the supervision of California's Department of Toxic Substance Control ("**DTSC**"), in soil that is believed to be contaminated by hexavalent chromium ("**CrVI**") for which Ecodyne is undoubtedly responsible. The extent and timing of Fluor's excavation is not presently known, and will depend upon the weather to a significant degree. DTSC has indicated, however, that it intends to ensure that all of the contamination in the drainage ditch along the western edge of the Tower Site is addressed. There is no presently-effective Final Site Management Plan for the Tower Site, and no presently-effective land use covenant dealing with the Ecodyne constituents of concern ("**COCs**"). The Proposed Order also contains some incomplete or inaccurate facts and places some reliance upon a document that contains a prejudicial misrepresentation and other inaccuracies.

TSG submits that adoption of the Proposed Order at this time and in these circumstances would not be in accordance with law and would not be supported by evidence in the record. TSG requests that the Board postpone consideration of whether to rescind WDRs Order No. R1-2007-0006, and re-notice and circulate a revised Proposed Order once Fluor's excavation on and around the Tower Site is complete, more information is available regarding the presence of Ecodyne's CrVI and other COCs, and an agreed FSMP and land use covenant have been negotiated.

**1. The Proposed Order States Facts That Are Not Entirely Accurate.**

**A. Active Remediation Is Underway At The Site.**

Fluor has since the 1980's been remediating, under DTSC's supervision (per Consent Order, No. HSA 88/89-027), creosote and other contamination at the Pond Site on the TSG Property. The Pond Site adjoins the southern boundary of the Tower Site, and both sites share a drainage ditch ("**Ditch**") along their western edge, in which water flows from southeast to northwest and drains into Pruitt Creek.

Mr. Mathias St. John  
Executive Officer  
North Coast Regional Water Quality Control Board  
November 10, 2016  
Page 3

Fluor has been performing extensive soil excavation on the Pond Site this year, and is now to the point of 'chasing' its COCs in the Ditch to the north of the Pond Site (i.e., onto the Tower Site). That excavation, which involves removal of the concrete lining in the Ditch (installed in 1984 or 85), began at the start of this week.<sup>1</sup> DTSC has indicated that it intends to address not only the Fluor COCs in the Ditch, but also the Ecodyne COCs. Water Board Staff is aware of this situation and has agreed that DTSC will be the lead agency with respect to that excavation. In a letter dated September 27, 2016, regarding the Ditch, DTSC's Tom Lanphar wrote that "Arsenic, copper and chromium are known Constituents of Concern at the Ecodyne Tower Site and [results of soil tests in the Ditch; performed by Fluor pursuant to the PEA discussed in Section 3 of this letter, below] indicate that a release to the [Ditch] has occurred."

Staff communicated by email with Fluor's consultant (Joe Neely of GHD) on October 5, 2016 regarding this excavation. Staff wrote that Fluor's RDIP for the Pond Site:

"will be amended for work on Ecodyne Corporation site to conform with the 'Draft Soil Management Plan' prepared by MWH and attached to this email. This will include updating the Health and Safety Plan (HSP) to include provisions for excavating in soil that may contain hexavalent chromium (CrVI) and analyzing excavated soil for concentrations of CrVI to assure proper disposal."

Staff's email also instructed Mr. Neely (1) to not perform such work "during a storm event", (2) to cover and stabilize exposed soil "to prevent discharges of soil to the drainage channel during any storm event", and (3) to not compromise the integrity of the storm drain that intersects with the Ditch in the middle of the Tower Site. Staff's above instructions indicate a belief, if not certainty, that soil in the Ditch under the concrete liner is contaminated with CrVI.

The attachment to Staff's October 5 email is the "Final Site

---

<sup>1</sup> That work is being done with small equipment and by hand due at least in part to the presence of a PG&E gas line under the concrete liner in the Ditch.

Mr. Mathias St. John  
Executive Officer  
North Coast Regional Water Quality Control Board  
November 10, 2016  
Page 4

Management Plan" for the Tower Site, prepared by MWH Americas, Inc. ("**MWHAI**") for Marmon (for Ecodyne). The title notwithstanding, this report ("**Draft FSMP**") is undated and unsigned and is not final. TSG has not approved or agreed to it. The Draft FSMP includes as Appendix A MWHAI's September 15, 2015, "Final Remedial Action Plan" ("**FRAP**"), which is referenced in paragraph 40 of the Proposed Order.

Given that Fluor is currently excavating soil from the Ditch on the Tower Site, and given that the excavated soil may be contaminated with CrVI and/or other Ecodyne COCs, TSG submits that it simply is not true that "Active remediation at the site has been discontinued". Active remediation by Ecodyne (by injecting chemicals into the soil) may have ceased at the Tower Site, but excavation of soil in the Ditch is still occurring at the Tower Site and may continue up to and beyond the January 26, 2017, public hearing on adoption of the Proposed Order, depending on the weather and the extent of the migration of Fluor's and Ecodyne's COCs.

- B. The Final Remedial Action Plan Dated September 15, 2015, Refers To A Land Use Covenant But No Such Covenant Has Been Agreed To Or Put In Place.

The Proposed Order states in paragraph 40 that the FRAP "includes a land use covenant." Section 3.3 of the FRAP does refer to an environmental covenant: "An *Environmental Covenant* will be established between the property owner and the RWQCB. The document outlines deed restrictions and requirements for development, use, or conveyance of the Site." (italics in original).

However, no land use covenant has been agreed to and put into effect as of this date. Staff has proposed a land use covenant and deed restriction, but TSG objects thereto, as indicated in this firm's May 2, 2016, letter to the Board. TSG's Manager Jared Carter met once at the site with Marmon's Ray Avedt, but TSG has to date received no response to the May 2 letter and there are no ongoing discussions and no agreement regarding revisions to the proposed land use covenant. In sum, the "land use covenant" referenced in the FRAP has not been put in place, and when and if it will be put in place remains in doubt. The Proposed Order appears to be premised upon such a

Mr. Mathias St. John  
Executive Officer  
North Coast Regional Water Quality Control Board  
November 10, 2016  
Page 5

covenant being in place. If so, the Proposed Order should not be adopted until a reasonable covenant is in effect. TSG intends to cooperate reasonably with Board efforts to negotiate such a covenant.

It should also be noted that there is no final site management plan in place for the Tower Site. The Draft FSMP has not been finalized, to TSG's knowledge. To the extent adoption of the Proposed Order is premised or conditioned upon such an FSMP being in effect, the Proposed Order should not be adopted before an agreed FSMP is in effect.

**2. The Final Remedial Action Plan Contains Material Inaccuracies.** The Proposed Order (§ 40) reflects Staff's reliance on the FRAP, to some extent, in recommending adoption of the Proposed Order. However, the FRAP contains a prejudicial misrepresentation and other factual inaccuracies. The Board's reliance on that document is misplaced.

A. The FRAP Was Not Prepared "On Behalf Of TSG".

In the first sentence in the Introduction (Section 1.0) of the FRAP, MWHAI states that it "has prepared [the FRAP] on behalf of The Marmon Group, LLC . . . and The Shiloh Group, LLC". This representation that MWHAI prepared the FRAP on behalf of TSG is false. TSG has never retained or - to TSG's knowledge - been represented by MWHAI or Marmon. Neither MWHAI, Marmon or Ecodyne communicated with TSG, much less actively collaborated with TSG, in the preparation of the FRAP. The basis for MWHAI's false representation is not known by TSG and is not evident.

TSG has been prejudiced by this misrepresentation to the extent it prevented Staff from seeking input from TSG before concurring with the FRAP in January 2016. TSG was and is entitled, under California Water Code § 13307.1(b), to participate and provide input and recommendations before the Board makes final decisions regarding TSG's property. To the extent that MWHAI's misrepresentation caused Staff to conclude that the FRAP contains and reflects TSG's "participation", "input and recommendations", that belief is in error.

///

Mr. Mathias St. John  
Executive Officer  
North Coast Regional Water Quality Control Board  
November 10, 2016  
Page 6

**B. The FRAP Contains Other Inaccuracies.**

The FRAP also states (2<sup>nd</sup> paragraph of Section 2.1, on page 2-1) that the one-time owners of the TSG Property (the Rivases) "maintained ownership of" the TSG Property after a dispute with their vendor Mr. Siddharth Shah ("**Shah**"), and that TSG "purchased the [TSG Property] from the Rivases in the early 1990's." These facts are not accurate. TSG was not formed until February 1999, at which time Mr. Shah contributed the TSG Property and TSG's other member contributed cash and other property into TSG. TSG did not purchase the TSG Property from the Rivases in the early 1990's.

The FRAP contains contradictory statements about the direction of groundwater flow at and around the Tower Site, at p. 2-2, lines 2 and 3 (Section 2.2) and p. 2-3, 2<sup>nd</sup> full paragraph, line 2 (Section 2.4).

The multiple inaccuracies in the FRAP suggest that Staff and the Board should not place material reliance thereon in adopting the Proposed Order. The Board should require MWHAI to prepare a new FRAP, and should postpone adoption of any Proposed Order that places any reliance upon the FRAP.

**3. Soil In The Ditch North Of The Tower Site Is Known To Be Contaminated With Chromium That Ecodyne Discharged.**

In 2015, Fluor entered into a voluntary cleanup agreement ("**VCA**") with DTSC (DTSC Docket No. HAS-FY14/15-039, Site No. 202038, effective July 15, 2015) regarding the entire TSG Property other than the Pond Site and the Tower Site. Pursuant to that VCA, Fluor prepared a preliminary endangerment assessment ("**PEA**") that includes results of soil tests under the concrete liner in the Ditch. Those tests results reveal high concentrations of total chrome in at least two locations in the Ditch north of the Tower Site. TSG is reluctant to include in this record the entire PEA report, which TSG is informed is more than 1,200 pages thick. Bill Wiggins of Trans Tech Consultants discusses in his attached declaration the pertinent information in that report.

It is clear that Ecodyne's work at the Tower Site has not resulted in the remediation of all of the "[a]rsenic, copper and

Mr. Mathias St. John  
Executive Officer  
North Coast Regional Water Quality Control Board  
November 10, 2016  
Page 7

chromium" discharged by Ecodyne at the Tower Site. As Mr. Lanphar noted on September 27, 2016, "a release to the [Ditch] has occurred". This chrome was undoubtedly discharged by and is the responsibility of Ecodyne. See Ecodyne Corporation v. Siddharth Shah, 718 F.Supp. 1454, 1989 U.S. Dist. LEXIS 10545 (N.D.Cal., No. C-88-4813-JPV, Aug. 28, 1989) ("undisputed that Ecodyne, not defendants, introduced the chromium to the property", at 1457; "Ecodyne alone is responsible for the disposal" of the chromium, at 1457-58). This lawsuit and decision is discussed further in Section 5 of this letter, at page 9, below.

**4. WDRs Order No. R1-2007-0006 Is Still Needed For The Protection Of Water Quality.**

The Existing Order (Section A, Discharge Prohibitions, p. 4) broadly prohibits Ecodyne from allowing the discharge of chromium and other Ecodyne COCs to groundwater or surface/storm water. Those Ecodyne COCs are present in the soil in the Ditch, and that soil is being exposed (by removal of the concrete liner) and excavated. The opportunities for and likelihood of a release prohibited by the Existing Order have thus increased significantly. It seems anomalous to relieve Ecodyne of its duty to avoid discharges at this point in time, as that would deprive TSG, DTSC and/or Fluor of the benefits that flow from Ecodyne being subject to the mandates in the Existing Order.

Staff instructed Fluor's contractor on October 5 to test the soil excavated by Fluor for CrVI and to handle it appropriately. It is not clear, however, that Staff has instructed the contractor to test for the other Ecodyne COCs. While DTSC (as lead agency on the excavation in the Ditch) is aware of those COCs and will probably require such tests, it is not apparent that relieving Ecodyne of its duty to prevent discharges of its COCs will assist DTSC in holding Ecodyne responsible for remediation of all of its COCs.<sup>2</sup> Having the Existing Order in place may spare DTSC from having to do a lot of (duplicative) work in connection with issuing a new DTSC order to Ecodyne.

---

<sup>2</sup> The last paragraph of Section 2.4 of the Draft FSMP states that soil samples "have not been collected at the [Tower Site] since 2011."

Mr. Mathias St. John  
Executive Officer  
North Coast Regional Water Quality Control Board  
November 10, 2016  
Page 8

It may make sense to rescind the Existing Order when excavation in the Ditch is done, but it does not appear to make much sense before then. TSG questions whether rescission of that order even after the excavation is done would make sense, but for present purposes TSG simply requests that the Board refrain from rescinding the Existing Order at this time, at least until the excavation in the Ditch under DTSC's supervision is completed. At present, the Existing Order is still "needed for the protection of water quality."

**5. Ecodyne Should Not Be Allowed To Shift To TSG, Fluor Or Others The Expense Of Remediating Ecodyne's CrVI And Other COCs.**

Ecodyne's effort to be relieved of the Existing Order, while Ecodyne COCs are still present in the soil in the Ditch, is an effort to circumvent the primary objectives of national and local environmental laws and policy, including but not limited to CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act; 42 U.S.C. §§ 9601 - 9675) and California's Carpenter-Presley-Tanner Hazardous Substance Account Act (California Health & Safety Code §§ 25300 - 25395.45)].

CERCLA was "designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination". Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 602, 129 S.Ct. 1870, 1874 (2009) (citation, quotation omitted).<sup>3</sup> In allocating liability for cleanup expenses, CERCLA "focuses not on current ownership per se but on the real world acts and contributions of all present and prior owners as well as other parties that may have created or otherwise fostered the hazardous contamination." Waste Management of Alameda County, Inc. v. East Bay Regional Park District, 135 F.Supp.2d 1071, 1091 (N.D.Cal. 2001) (rejecting polluter contention that non-polluting current owner would benefit from remediation and should thus bear share of cleanup costs). See Gopher Oil Co. v. Union Oil Co. of Cal., 955 F.2d 519, 527 (8th Cir. 1992) (prior owner responsible for

---

<sup>3</sup> See, e.g., Voggenthaler v. Maryland Square LLC, 724 F.3d 1050, 1064 (9<sup>th</sup> Cir. 2013); Chubb Custom Ins. Co. v. Space Systems/ Loral, Inc., 710 F.3d 946, 956 (9<sup>th</sup> Cir. 2013); Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1185 (9<sup>th</sup> Cir. 2000).



Mr. Mathias St. John  
Executive Officer  
North Coast Regional Water Quality Control Board  
November 10, 2016  
Page 9

contamination, current owner allocated zero liability); Foster v. United States, 130 F.Supp.2d 68, 77 (D.D.C. 2001)(same).

Here, Fluor is already undoubtedly incurring extra expenses testing for CrVI in the soil in the Ditch, and may continue to incur such expenses during its excavation. If Ecodyne is not reimbursing Fluor, Ecodyne is already successfully shunting to a third party expenses Ecodyne should bear, in circumvention of the law's 'polluter pays' policy. And if any of Ecodyne COC's remain in the soil when the Existing Order is rescinded, this will violate both the "pollution gets cleaned up" and the "polluter pays" policies/objectives. TSG and/or its successor(s) will in that event probably suffer material economic losses that Ecodyne should bear.

Ecodyne has previously attempted to shift cleanup costs on the TSG Property to a subsequent owner. In Ecodyne Corporation v. Shah, 718 F.Supp. 1454, 1989 U.S. Dist. LEXIS 10545 (N.D.Cal., No. C-88-4813-JPV, Aug. 28, 1989), Ecodyne sued its vendee (Shah) and his successors, claiming that they had 'disposed' (within the meaning of CERCLA) of the chromium Ecodyne had discharged, because it had passively migrated through the soil and groundwater during their ownership. The U.S. District Court for the Northern District of California rejected Ecodyne's argument. The court answered the question of "who will ultimately bear the cost of cleaning up chromium polluted groundwater **and soil** . . . at 930 Shiloh Road, Windsor, California", id. at 1455 (bolding supplied), basically by noting that it was "undisputed that Ecodyne, not defendants, introduced the chromium to the property". Id. at 1457. The court also dismissed Ecodyne's claim with prejudice because Ecodyne could "prove no set of facts which would entitle it to relief under [CERCLA] § 9607(a)(2) since Ecodyne alone is responsible for the disposal." Id. at 1457-58.

The Board should not, by rescinding the Existing Order, allow Ecodyne to accomplish what it was unable to achieve while the facts and evidence were fresh and the dispute litigated at length in the late 1980's. "Ecodyne alone is responsible for the" CrVI and other Ecodyne COCs, and should be required to clean them up at Ecodyne's expense. Rescinding the Existing Order before that is done might encourage Ecodyne to attempt to avoid the economic burdens that a polluter is supposed

Mr. Mathias St. John  
Executive Officer  
North Coast Regional Water Quality Control Board  
November 10, 2016  
Page 10

to bear.

**6. Conclusion.** Active remediation is ongoing at the Tower Site and is exposing and increasing the opportunities for discharges of CrVI and other Ecodyne COCs. So much depends on the weather that one can only speculate on how long Fluor or perhaps Ecodyne will be excavating in the Ditch. The FRAP is a flawed and inaccurate document prepared without TSG's input and in prejudicial violation of (a) TSG's rights under Water Code § 13307.1(b) and (b) TSG's economic interests. There is no presently effective land use covenant regarding the Ecodyne COCs at the Tower Site,<sup>4</sup> and no ongoing discussions with TSG re same. The Draft FSMP has not been finalized and is not in effect. The Existing Order, in sum, is still needed to protect water quality.

The Existing Order is the only order that presently requires Ecodyne to prevent discharges of CrVI and other COCs for which "Ecodyne alone is responsible". Rescission of the Existing Order might encourage Ecodyne to attempt to circumvent the central objectives and purposes of CERCLA and other environmental laws and policies, if that is not already happening. As long as any of Ecodyne's carcinogenic CrVI or other COCs remain on the TSG Property (including in the Ditch), Ecodyne should not be relieved of the duty of preventing releases of those COCs. The Board should postpone consideration of any proposed order that would rescind the Existing Order.

TSG sincerely appreciates Staff's professional, diligent work on the Tower Site over the past many years, and the significant remediation that has been accomplished. TSG is anxious (1) to work with Staff to negotiate (A) reasonable terms for a land use covenant for the Tower Site, eliminating provisions that reduce the economic usefulness and value of the TSG Property without any corresponding benefit to anyone, and (B) a FSMP, and (2) to facilitate final closure of the Board's work on the Tower Site. Until these tasks are complete, however, the Existing Order should remain in effect. There is no apparent need to consider such rescission while the excavation is

---

<sup>4</sup> A deed restriction and covenant was executed by TSG and Fluor and recorded in connection with the settlement of a lawsuit pertaining to the Fluor COCs, but that covenant does not deal with the Ecodyne COCs.

Mr. Mathias St. John  
Executive Officer  
North Coast Regional Water Quality Control Board  
November 10, 2016  
Page 11

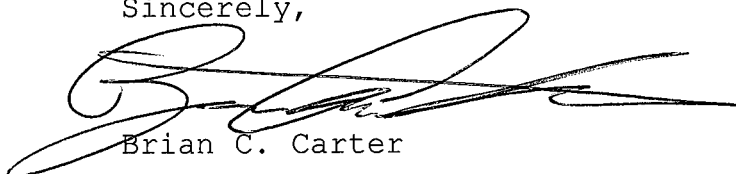
underway. TSG can only speculate, at this time, what the situation will be when the excavation is complete. TSG requests that the Board decline to adopt the Proposed Order at this time.

TSG intends to offer the declaration and, if appropriate, the live testimony of Bill Wiggins (Trans Tech Consultants) at the January 26, 2017, public meeting regarding the Proposed Order.

Jared Carter (co-Manager of TSG) will or could also testify to the facts regarding TSG's above-referenced experience and the history of its ownership of the TSG Property. The undersigned has represented TSG since its formation and also has personal knowledge of those facts. I do hereby swear under penalty of perjury that those foregoing facts are true and correct, except for those matters stated on information and belief, and as to those matters I am informed and believe them to be true. Executed on this date at Ukiah, California. The attached Wiggins declaration, with exhibits, summarizes the testimony Mr. Wiggins would give at the January 26, 2017, meeting on the Proposed Order.<sup>5</sup>

Thank you for your consideration of the foregoing.

Sincerely,



Brian C. Carter

Enclosures: declaration of Bill Wiggins, with exhibits

---

<sup>5</sup> Mr. Wiggins' testimony includes his observations and opinions that Ecodyne has not employed best management practices to avoid discharges from the areas where soil on the non-ditch portions of the Tower Site was excavated, sprayed/mixed with calcium polysulfide, and replaced in the ground. Ecodyne also has not maintained an earthen berm just to the east of the Ditch, and has not carefully maintained the straw wattle barrier on this slope above the Ditch. Ecodyne's failure to fulfill its obligations under the Existing Order argue against rescinding it before Ecodyne does come into full compliance.