

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION**

COMPLAINT NO. R2-2012-0022

ADMINISTRATIVE CIVIL LIABILITY  
IN THE MATTER OF  
MAYHEW CENTER, LLC  
3301-3341 VINCENT ROAD  
PLEASANT HILL, CONTRA COSTA COUNTY

This Complaint is issued to Mayhew Center, LLC (Mayhew Center) pursuant to California Water Code section 13268, subdivision (b)(1), which authorizes the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Water Board) to impose administrative civil liability, and Water Code section 13323, which authorizes the Executive Officer to issue this Complaint. The Complaint alleges Mayhew Center's failure to submit a required technical report acceptable to the Executive Officer of the Regional Water Board for a cumulative period of 253 days between May 13, 2011, and January 20, 2012, in violation of Water Code section 13267. The Complaint assesses \$16,942 in penalties.

The Assistant Executive Officer of the Regional Water Board hereby gives notice that:

1. Mayhew Center owns the property located at 3301-3341 Vincent Road, Pleasant Hill, Contra Costa County (Property). The building parcels were developed in the early to mid-1970s. Mayhew Center assumed ownership of the property on January 3, 1993. Commercial space at the Property has been and continues to be used primarily as leased commercial office space.<sup>1</sup>
2. Mayhew Center is the responsible party as the owner of the Property where the highest concentration of perchloroethylene (PCE), a chlorinated hydrocarbon, was detected in vadoze-zone soil. Elevated concentrations of PCE have also been detected in soil gas and groundwater at the Property.
3. Mayhew Center is alleged to have violated provisions of the law for which the Regional Water Board may impose civil liability pursuant to Water Code section 13268, subdivision (b)(1). This Complaint proposes to assess \$16,942 in penalties for the violations cited, consistent with the State Water Resources Control Board Enforcement Water Quality Enforcement Policy (Enforcement Policy). On November 17, 2009, the State Water Resources Control Board (State Water Board) adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy. The Enforcement Policy was approved by the Officer of Administrative Law and became effective on May 20, 2010.

<sup>1</sup> LFR. Scope of Work to Address Data Gaps at the 3301-3341 Vincent Road Property in Pleasant Hill, California. Attachment 1, p.6, Conceptual Site Model and Data Gap Evaluation, 3301-3341 Vincent Road Property, Pleasant Hill, California. May 16, 2007.

The entire Enforcement Policy can be found at:  
[http://www.waterboards.ca.gov/water\\_issues/programs/enforcement/docs/enf\\_policy\\_fin\\_all111709.pdf](http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_fin_all111709.pdf)

The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code section 13327. The civil liability is assessed at \$16,942. The Assistant Executive Officer intends to seek additional liability for staff costs incurred in bringing the matter to settlement or hearing.

4. Unless waived, the Regional Water Board will hold a hearing on this matter on September 12, 2012, in the Elihu M. Harris State Building, First Floor Auditorium, 1515 Clay Street, Oakland. The attached Hearing Procedure provides important information on how those proceedings will be conducted and deadlines by which parties must take specific actions and/or submit information.

#### **STATEMENT OF PROHIBITIONS AND REQUIREMENTS**

5. The Regional Water Board is required to prescribe requirements as to the nature of any proposed discharge to waters of the state pursuant to Water Code section 13263. The term "waters of the State" includes all surface water and groundwater within the State. (Water Code § 13050, subd. (d)).
6. Water Code section 13267 authorizes the Regional Water Board to investigate and to require technical or monitoring reports from any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposed to discharge waste to the waters of the State.

#### **ALLEGED VIOLATIONS OF PROHIBITIONS AND REQUIREMENTS APPLICABLE TO MAYHEW CENTER**

7. On April 4, 2011, the Executive Officer approved a revised *Site Investigation Work Plan*, dated March 15, 2011, and required Mayhew Center to submit technical reports for the subsurface investigations described in the work plan pursuant to Water Code section 13267 (Exhibit A; incorporated by this reference as if fully set forth therein). This 13267 order required submittal by May 13, 2011, of a technical report of findings from a Membrane Interface Probe (MIP) investigation.
8. On July 27, 2011, the Assistant Executive Office issued a Notice of Violation (NOV) to Mayhew Center (Exhibit B; incorporated by this reference as if fully set forth therein). The NOV states that Mayhew Center failed to submit the technical MIP investigation report by May 13, 2011, and that a fine of up to a \$1,000 may be imposed for each day the report is late.

9. Regional Water Board staff conveyed to Mayhew Center that investigation of its property should proceed and not be held up while attempting to obtain access to the neighboring property for a portion of the investigation. Staff sent emails about proceeding with investigation of its property on August 18 and September 26, 2011.
10. On January 20, 2012, Regional Water Board staff received a partial submittal for the technical MIP investigation report. The submittal consisted of raw (pending final) MIP data for one of the three MIP borings identified in the March 15, 2011, work plan along with an email (Exhibit C; incorporated by this reference as if fully set forth therein) which provided preliminary findings from the investigation and recommendations for conducting additional investigation. Regional Water Board staff received this information 253 days after the May 13, 2011 deadline. Due to alleged property access issues, a final technical report for the MIP investigation is pending completion of two remaining MIP borings on the neighboring property.

#### **WATER CODE SECTIONS UPON WHICH LIABILITY IS BEING ASSESSED DUE TO NONCOMPLIANCE WITH CALIFORNIA WATER CODE SECTION 13267**

11. Pursuant to Water Code section 13368, subdivision (a)(1), any person who violates a 13267 order issued by the Regional Water Board is liable under Water Code section 13368, subdivision (b)(1), wherein administrative civil liability may be imposed by the Regional Water Board in an amount not to exceed one thousand dollars (\$1,000) for each day in which the violation occurs.

#### **PROPOSED CIVIL LIABILITY**

12. Regional Water Board Enforcement staff used the Enforcement Policy methodology to calculate a proposed administrative civil liability, which is described in detail in Exhibit D. Exhibit D is incorporated by this reference as if fully set forth therein.
13. The Assistant Executive Officer of the Regional Water Board proposes that administrative civil liability (ACL) be imposed in the amount of \$16,942, of this amount \$8,475 is for recovery of staff costs incurred thus far.

The proposed liability amount is more than the minimum liability, 10 percent higher than the economic benefit received as a result of the alleged violations or \$1,595, and less than the maximum liability of \$253,000 (Exhibit D).

14. If this matter proceeds to hearing, the Assistant Executive Officer reserves the right to amend the proposed amount of civil liability to conform to the evidence presented, including, but not limited to, increasing the proposed amount to account for the costs of enforcement (including staff, legal, and expert witness costs) incurred after the date of the issuance of this complaint through completion of the hearing.

15. Issuance of this Complaint is an enforcement action, and is therefore exempt from the provisions of the California Environmental Quality Act (Pub. Res. Code § 21000 et seq.) in accordance with Title 14, California Code of Regulations, section 15321, subdivision (a)(2).



for

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Dyan C. Whyte  
Assistant Executive Officer

June 18, 2012  
Date

- Exhibit A:** Approval of Investigation Work Plan and Requirement for Technical Reports – Mayhew Center, 3301-3341 Vincent Road, Contra Costa County. April 4, 2011.  
**Exhibit B:** Notice of Violation for Failure to Submit Technical Report Mayhew Center, 3301-3341 Vincent Road, Contra Costa County. July 27, 2011.  
**Exhibit C:** January 20, 2012, Regional Water Board Staff Correspondence.  
**Exhibit D:** Factors Considered in Determining Administrative Civil Liability

**EXHIBIT A**

April 4, 2011, 13267 Order



# California Regional Water Quality Control Board

## San Francisco Bay Region



Linda S. Adams  
Acting Secretary for  
Environmental Protection

1515 Clay Street, Suite 1400, Oakland, California 94612  
(510) 622-2300 • Fax (510) 622-2460  
<http://www.waterboards.ca.gov/sanfranciscobay>

Edmund G. Brown, Jr.  
Governor

April 4, 2011  
File No. 07S0183 (RAL)

Mayhew Center, LLC  
Attn: Dean Dunivan  
[rddunivan@yahoo.com](mailto:rddunivan@yahoo.com)  
3317 Vincent Road  
Pleasant Hill, CA 94523

**SUBJECT: Approval of Investigation Work Plan and Requirement for Technical Reports – Mayhew Center, 3301-3341 Vincent Road, Contra Costa County**

Dear Mr. Dunivan:

This letter approves your March 15, 2011, revised *Site Investigation Work Plan* and requires that you submit technical reports presenting the results of the subsurface investigations.

We have reviewed your work plan as well as comments from AMEC Geomatrix dated February 11, 2011, on the earlier work plan, and March 29, 2011, on the revised work plan. AMEC is the consultant for the adjacent Walnut Creek Manor.

Your work plan proposes advancing three Membrane Interface Probe (MIP) boreholes, drilling 28 shallow soil borings and collecting soil and groundwater samples, installing and sampling six monitoring wells in the shallow A-zone, collecting soil gas samples from four boreholes, and collecting indoor air samples from Buildings 2 and 3. All sample locations are proposed for the Mayhew Center property or the adjacent Walnut Creek Manor. Modifications to the scope of work will be based on evaluations of the results as they become available. The proposed work will take place over several phases with a summary report and appropriate review period after each phase. Based on the results of the investigation around what you call “source area 1,” an interim remedial excavation may occur along the common property boundary between Mayhew Center and Walnut Creek Manor. It is anticipated that additional investigation and remediation work may be required both on- and off-site depending on the results of these investigations.

**You are required to submit your first summary report, presenting your findings from the MIP investigation and any recommendations, to our office by May 13, 2011.** Subsequent summary reports and recommendations will be required within 30 days of the completion of each phase of work. We understand that off-site access may affect your schedule for several of the proposed activities.

Mayhew Center, LLC, is considered the responsible party as the owner of the site where the highest concentration of PCE in vadose-zone soil has been reported, thus indicating an on-site release. Elevated concentrations of PCE have also been found in soil gas and groundwater samples from your property. The PCE release has adversely impacted groundwaters of the State and there is a threat of indoor vapor intrusion that could threaten public health. Therefore, the site requires further investigation and remediation.

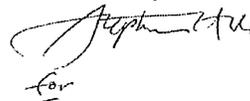
This requirement for reports is made pursuant to Water Code Section 13267, which allows the Regional Board to require technical or monitoring program reports from any person who has discharged, discharges, proposes to discharge, or is suspected of discharging waste that could affect water quality. The attachment provides additional information about Section 13267 requirements. Any extension to the above deadline must be confirmed in writing by Board staff.

You are required to submit all documents in electronic format to the State Water Resources Control Board's Geotracker database. Guidance for electronic information submittal is available at [http://www.waterboards.ca.gov/water\\_issues/programs/ust/electronic\\_submittal](http://www.waterboards.ca.gov/water_issues/programs/ust/electronic_submittal). Please note that this requirement includes all analytical data, monitoring well latitudes, longitudes, and elevations, water depths, site maps, boring logs (PDF format), and complete copies of reports and correspondence including the signed transmittal letters and professional certifications (PDF format). All reports submitted should have the Regional Board file number 07S0183 on the first page of the report. Copies of all submittals should also be sent to the Contra Costa County Health Services Department (CCCHSD) in Martinez.

Please provide at least three day notification prior to any field work.

If you have any questions, please contact Ralph Lambert of my staff at (510) 622-2382 or via e-mail at [ralambert@waterboards.ca.gov](mailto:ralambert@waterboards.ca.gov).

Sincerely,



Digitally signed by Stephen Hill  
Date: 2011.04.04 13:27:52  
-07'00'

Bruce H. Wolfe  
Executive Officer

Attachment: Fact Sheet – Requirements for Submitting Technical Reports Under Section 13267 of the California Water Code.

cc w/ attachment: see next page

cc w/ attachment:

Walnut Creek Manor, LLC, Attn: Milt Eberle  
[Wgidinc@aol.com](mailto:Wgidinc@aol.com)

Paul Andrews, CCCHSD,  
[pandrews@hds.co.contra-costa.ca.us](mailto:pandrews@hds.co.contra-costa.ca.us)

John Gregory, Farella Braun  
[jgregory@fbm.com](mailto:jgregory@fbm.com)

Elizabeth Weaver, Howrey LLP  
[weaverE@howrey.com](mailto:weaverE@howrey.com)

Dorothy Dickey, SWRCB,  
[ddickey@waterboards.ca.gov](mailto:ddickey@waterboards.ca.gov)

Jim Kennedy, Contra Costa County Redevelopment  
Agency, [jkenn@cd.cccounty.us](mailto:jkenn@cd.cccounty.us)

Dan Helix  
[danelix@comcast.net](mailto:danelix@comcast.net)

Brian Kelly, DuaneMorris  
[bakelly@duanemorris.com](mailto:bakelly@duanemorris.com)

Union Pacific Railroad Company  
Attn: James Diel, [jediel@up.com](mailto:jediel@up.com)

Scott D. Warner, AMEC Geomatrix  
[swamer@AMEC.com](mailto:swamer@AMEC.com)

Jan Schutze, Schutze & Assoc.  
[js@schutze-inc.com](mailto:js@schutze-inc.com)



Linda S. Adams  
Acting Secretary for  
Environmental Protection

# California Regional Water Quality Control Board

## San Francisco Bay Region



Edmund G. Brown, Jr.  
Governor

1515 Clay Street, Suite 1400, Oakland, California 94612  
(510) 622-2300 • Fax (510) 622-2460  
<http://www.waterboards.ca.gov/sanfranciscobay>

### Fact Sheet – Requirements For Submitting Technical Reports Under Section 13267 of the California Water Code

#### **What does it mean when the Regional Water Board requires a technical report?**

Section 13267<sup>1</sup> of the California Water Code provides that "...the regional board may require that any person who has discharged, discharges, or who is suspected of having discharged or discharging, or who proposes to discharge waste...that could affect the quality of waters...shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires."

#### **This requirement for a technical report seems to mean that I am guilty of something, or at least responsible for cleaning something up. What if that is not so?**

The requirement for a technical report is a tool the Regional Water Board uses to investigate water quality issues or problems. The information provided can be used by the Regional Water Board to clarify whether a given party has responsibility.

#### **Are there limits to what the Regional Water Board can ask for?**

Yes. The information required must relate to an actual or suspected or proposed discharge of waste (including discharges of waste where the initial discharge occurred many years ago), and the burden of compliance must bear a reasonable relationship to the need for the report and the benefits obtained. The Regional Water Board is required to explain the reasons for its request.

#### **What if I can provide the information, but not by the date specified?**

A time extension may be given for good cause. Your request should be promptly submitted in writing, giving reasons.

#### **Are there penalties if I don't comply?**

Depending on the situation, the Regional Water Board can impose a fine of up to \$5,000 per day, and a court can impose fines of up to \$25,000 per day as well as criminal penalties. A person who submits false information or fails to comply with a requirement to submit a technical report may be found guilty of a misdemeanor. For some reports, submission of false information may be a felony.

#### **Do I have to use a consultant or attorney to comply?**

There is no legal requirement for this, but as a practical matter, in most cases the specialized nature of the information required makes use of a consultant and/or attorney advisable.

#### **What if I disagree with the 13267 requirements and the Regional Water Board staff will not change the requirement and/or date to comply?**

You may ask that the Regional Water Board reconsider the requirement, and/or submit a petition to the State Water Resources Control Board. See California Water Code sections 13320 and 13321 for details. A request for reconsideration to the Regional Water Board does not affect the 30-day deadline within which to file a petition to the State Water Resources Control Board.

#### **If I have more questions, whom do I ask?**

Requirements for technical reports include the name, telephone number, and email address of the Regional Water Board staff contact.

*Revised January 2008*

<sup>1</sup> All code sections referenced herein can be found by going to [www.leginfo.ca.gov](http://www.leginfo.ca.gov).

**EXHIBIT B**

July 27, 2011, Notice of Violation



# California Regional Water Quality Control Board

## San Francisco Bay Region



Linda S. Adams  
Acting Secretary for  
Environmental Protection

1515 Clay Street, Suite 1400, Oakland, California 94612  
(510) 622-2300 • Fax (510) 622-2460  
<http://www.waterboards.ca.gov/sanfranciscobay>

Edmund G. Brown, Jr.  
Governor

July 27, 2011  
File No. 07S0183 (RAL)

Mayhew Center, LLC  
Attn: Dean Dunivan  
[rddunivan@yahoo.com](mailto:rddunivan@yahoo.com)  
3317 Vincent Road  
Pleasant Hill, CA 94523

**SUBJECT: Notice of Violation for Failure to Submit Technical Report**  
Mayhew Center, 3301-3341 Vincent Road, Contra Costa County

Dear Mr. Dunivan:

Mayhew Center, LLC has failed to submit a technical report as required pursuant to our Water Code Section 13267 Order dated April 4, 2011 (13267 Order). As explained below, the Regional Water Board may pursue enforcement action for this violation. We recognize that you have not yet been granted access to work on WCM property, nonetheless, Mayhew Center can perform the investigation work on its' own property. ***In order to avoid, or minimize, enforcement action against Mayhew Center, we urge you to proceed with the field work on your property while seeking to resolve access issues with WCM.***

The 13267 Order directs Mayhew Center to implement your *Revised Site Investigation Work Plan*. The work plan calls for an initial investigation phase which includes gathering data from three MIP boreholes. This work is to be followed by boring, monitoring well, and air/vapor sampling. A summary report of your MIP investigation was due May 13, 2011. We understand that you have not been granted access for work at WCM. We do not have documentation that you have complied with access requirements. You have not responded to our staff e-mail of July 8, 2011, requesting written confirmation that you have submitted all that is required for access according to your court agreement. We note that your consultant has kept us informed of tentative field investigation start dates and attempts to file the required paperwork; however the report is now two months late and field work has yet to start.

Elevated concentrations of PCE have been found in soil, soil gas, and groundwater samples from your property. The PCE release has adversely impacted groundwater and indoor vapor intrusion poses a potential threat to public health. Therefore, the site requires further investigation and remediation.

*Preserving, enhancing, and restoring the San Francisco Bay Area's waters for over 60 years*

Please be aware that the California Water Code Section 13268 allows the Regional Water Board to impose administrative civil liability of up to \$1,000 per violation day for failure to submit required technical reports. I urge you to do the work and submit the required investigation report as soon as possible to minimize the gravity of this violation. You must also provide at least three days notification prior to any field work.

If you have any questions and to provide notice, please contact Ralph Lambert of my staff at (510) 622-2382 or via e-mail at [ralambert@waterboards.ca.gov](mailto:ralambert@waterboards.ca.gov).

Sincerely,

*Chuck Headlee*  
for

Digitally signed by  
Chuck Headlee  
Date: 2011.07.27  
08:34:39 -07'00'

Dyan C. Whyte  
Assistant Executive Officer

cc:

Walnut Creek Manor, LLC, Attn: Milt Eberle  
[Wgidinc@aol.com](mailto:Wgidinc@aol.com)

Dan Helix  
[danelix@att.net](mailto:danelix@att.net)

Paul Andrews, CCCHSD,  
[pandrews@hsd.co.contra-costa.ca.us](mailto:pandrews@hsd.co.contra-costa.ca.us)

Brian Kelly, DuaneMorris  
[bakelly@duanemorris.com](mailto:bakelly@duanemorris.com)

John Gregory, Farella Braun  
[jgregory@fbm.com](mailto:jgregory@fbm.com)

Union Pacific Railroad Company  
Attn: James Diel, [jedi@up.com](mailto:jedi@up.com)

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Scott D. Warner, AMEC Geomatrix  
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Yuri Won, RWQCB  
[ywon@waterboards.ca.gov](mailto:ywon@waterboards.ca.gov)

Jan Schutze, Schutze & Assoc.  
[js@schutze-inc.com](mailto:js@schutze-inc.com)

Jim Kennedy,  
Contra Costa County Redevelopment Agency  
[jkenn@cd.cccounty.us](mailto:jkenn@cd.cccounty.us)

**EXHIBIT C**

January 20, 2012, Regional Water Board Communication

## Ralph Lambert - RE: Revised Work Summary, case 07S0183

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**From:** Jan Schutze <js@schutze-inc.com>  
**To:** 'Ralph Lambert' <ralambert@waterboards.ca.gov>  
**Date:** 1/20/2012 11:51 AM  
**Subject:** RE: Revised Work Summary, case 07S0183  
**CC:** mari <mari@schutze-inc.com>  
**Attachments:** WP Figure 1-Mayhew only (January 2012).pdf

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Hi Ralph,

I have edited the map to show 3 wells (attached).

I believe we have to ignore if the wells will be in the excavation area. I think that they have to be in the court-determined Source Area I.

I discussed the wells with the Contra Costa Inspector (Ed Diaz) and he would require additional permit applications and reviews if the cement portion of the annular seal is less than 10 ft. It would be less if we use a 10 ft screened interval. Therefore, I went back to 5 ft.

Thanks,

Jan

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**From:** Ralph Lambert [mailto:ralambert@waterboards.ca.gov]  
**Sent:** Friday, January 20, 2012 10:58 AM  
**To:** Jan Schutze  
**Subject:** Revised Work Summary, case 07S0183

The revisions in the text look good. However, here are a few comments and questions:

- 1) On your 5th bullet you propose three wells "as shown on previously prepared map" but the map only shows two wells "MW-1A (and MW-1B if required)"
- 2) Do you want the proposed wells in the area you expect to excavate, or just out-side of it? Or maybe the B & C wells outside of the expected excavation (I don't know what is best).
- 3) We also discussed the possibility of a longer screen in the A well if you want to test-extract vadose zone vapors. If you just plan to excavate then it may not make sense. I leave it up to you.

Ralph Lambert, PG, CHg  
 SF Bay Regional Water Quality Control Board  
 1515 Clay St., Suite 1500  
 Oakland, CA 94612

(510) 622-2382

ralambert@waterboards.ca.gov >>> Jan Schutze <js@schutze-inc.com> 1/20/2012 9:59 AM >>>

**SF Bay Regional Water Quality Control Board**  
**1515 Clay St., Suite 1500**  
**Oakland, CA 94612**  
**Att.: Mr. Ralph Lambert PG CHP**

**Re: Case: 07S0183  
Mayhew Center and Walnut Creek Manor  
Follow-up Work at Source Area 1 (Rev. 1)**

Dear Mr. Lambert

On January 13, 2012, we completed one MIP boring directly in the area described as Source Area 1. The purpose of the boring was to generate data to guide the follow-up tasks, which are 14 Geoprobe borings, and monitoring wells (the number of which have to be determined). Based on the Membrane Interface Probe (MIP) results (see attachment), the following information was generated:

- The MIP boring was advanced to 78 ft bgs, at which depth drill refusal was encountered.
- Based on the Electric Conductivity (EC) data, three horizons with coarse sediments were encountered, at approximately 14 - 18, 35 - 38 and 57 - 68 ft bgs. These intervals likely correspond with groundwater horizons A, B and C, respectively.
- Based on the Electron Capture Detector (ECD) data, **chlorinated solvents** were detected in the three horizons. In addition, the Flame Ionization Detector (FID) indicated the presence of **possibly** hydrocarbon contamination in the C-horizon.

Based on these results, SCHUTZE & Associates, Inc. recommends the following:  
Regarding the Proposal dated December 22, 2011:

- Advancement of the 14 proposed Geoprobe borings just into the silt/clay layer directly below the A-horizon (approximately 22 ft bgs). **Locations as shown on previously prepared map (attached). This work is scheduled for Jan. 26/27.**
- Drilling and installation of 3 side-by-side monitoring wells, with screened intervals at approximately 15 - 20, 35 - 40 and 60 - 65 ft bgs. **Locations as shown on previously prepared map (attached). This work is scheduled for Jan. 26/27.**

Regarding subsequent work on the Walnut Creek Manor site:

**(This work is not scheduled yet and a brief proposal is being prepared)**

- Drill one MIP on the Walnut Creek Manor site **at the previously shown location** to further explore contamination in the A, B and C horizons.
- Based on the MIP results, drill a Geoprobe boring grid and install monitoring wells **at the previously shown locations**.
- Drill additional MIP borings **(Locations to be determined based on results of work to be completed).**

Regarding subsequent work on the Mayhew Center site:

**(This work is not scheduled yet and a brief proposal is being prepared)**

- Explore the extent of the Source Area 1 groundwater plume to the north **as per previously approved workplan.**

The work recommended is in accordance with the dynamic Work Plan dated March 14, 2011. Therefore, it is the opinion of SCHUTZE & Associates, Inc. that amendments to the Workplan are not required.

With regards,  
Jan Schutze

CC: Burnham Brown

Att.: Eric R. Haas, Esq.



## **EXHIBIT D**

### **Factors Considered in Determining Administrative Civil Liability**

The specific required factors in Water Code section 13327 are the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, and the degree of toxicity of the discharge and, with respect to the violator, the required factors are the ability to pay, the effect on the violator's ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of the violation, the degree of culpability, economic benefit or saving, if any, resulting from the violation and other matters that justice may require.

The Enforcement Policy sets forth an approach to determine liability using a methodology that considers the following: the potential harm to beneficial uses; the violation's deviation from requirements; and economic benefit from the avoidance or delay of implementing requirements. These factors address the statute-required factors and are used to calculate penalties consistent with both the Water Code and the Enforcement Policy.

Each factor in the Enforcement Policy methodology and its corresponding category, adjustment, and/or amount for the non-discharge violation alleged in ACL Complaint No. R2-2012-0022 is presented below:

#### **Alleged Violation: Failure to submit a Technical Report, acceptable to the Executive Officer of the Regional Water Board, by May 13, 2011**

Mayhew Center failed to submit a technical Membrane Interface Probe (MIP) investigation report by the May 13, 2011, deadline set forth in a 13267 Order issued on April 4, 2011 (13267 Order). Regional Water Board staff received a preliminary and partial report for the investigation on January 20, 2012, 253 days after the required deadline.

#### **Maximum Administrative Civil Liability that may be imposed**

Pursuant to Water Code section 13368, subdivision (b)(1), the total maximum administrative civil liability that may be imposed is \$1,000 per day. The maximum administrative liability for the violation alleged in this Complaint is \$253,000.

#### **Adjustments to Determination of Initial Liability**

- a) **Specific Factor:** Potential Harm to Beneficial Uses

**Category:** Moderate

**Discussion:** The potential for harm is moderate. PCE has been detected at the Mayhew Center property at concentrations up to 11 parts per million (ppm) in vadoze zone soils<sup>1</sup> and 7.3 ppm in groundwater.<sup>2</sup> This release of contaminants threatens groundwater beneficial uses and may threaten indoor air. The full extent of impacts is not known at this time. Late submittal of the technical MIP investigation report has delayed characterization of the nature and extent of contaminants and implementation of corrective actions.

b) **Specific Factor:** Deviation from requirement

**Category:** Moderate

**Discussion:** The deviation from requirement is “moderate” because the requirement to submit a report by a required deadline was partially compromised. The 13267 order issued on April 4, 2011, required the submittal of a summary report for the MIP investigation. Mayhew Center submitted preliminary data and findings for one of three borings targeted for the MIP investigation on January 20, 2012, 253 days after the May 13, 2011, deadline in the 13267 order. Therefore, the requirement was only moderately compromised because Mayhew Center did ultimately submit (though late) the required report, and the report contained some, but not all, of the required information.

c) **Specific Factor:** Days of Violation

**Amount:** 14 days

**Discussion:** The Enforcement Policy allows for a reduction in the total days of violation in some circumstances. A reduction in the number of days of violation is recommended because there was not a notable financial gain for Mayhew Center on a daily basis resulting from the violation. A reduction in days is permissible under the Multiple Day Violations factor when there is not an economic benefit from the violation measurable on a daily basis.

Mayhew Center submitted preliminary field findings 253 days late. Pursuant to the Enforcement Policy Multiple Day Violations provision, the total days of violations are reduced from 253 to 14 days.

d) **Initial Liability:** Initial amount of ACL assessed for this violation

**Amount:** \$4,900

**Discussion:** The maximum \$1,000 per day statutory requirement is multiplied by the reduced number of days—14 days—to calculate a new starting liability of \$14,000 for the

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<sup>1</sup> LFR. Conceptual Site Model and Data Gap Evaluation 3301-3341 Vincent Road Property, Pleasant Hill, California. Figure 5. May 16, 2007.

<sup>2</sup> Schutze & Associates, Inc. Preliminary Results for PCE (Soil Borings) Mayhew Center, Pleasant Hill, California. Figure 1. February 2012.

penalty methodology. Considering the specific factors (a) through (c) above, the \$14,000 liability is multiplied by a factor of 0.35 to determine an initial liability of \$4,900.

### **Adjustments to Determination of Initial Liability for Conduct Factors**

e) **Specific Factor:** Culpability

**Adjustment:** 1.2

**Discussion:** Mayhew Center was actively negligent in failing to submit a technical report for the Property by the required deadline. Following the issuance of the April 4, 2011 13267 Order, Regional Water Board staff communicated with Mayhew Center to remind them of the late report submittal. Despite clear directives from Regional Water Board Staff “to avoid, or minimize enforcement action” in the NOV of July 27, 2011, Mayhew Center submitted the Technical report 253 days late.

f) **Specific Factor:** Cleanup and Cooperation

**Adjustment:** 1.2

**Discussion:** Mayhew Center did not cooperate with Regional Water Board staff in resolving the late report violation. The delayed submittal of the technical report has negatively impacted implementation of corrective measures. A Regional Water Board staff email, dated July 8, 2011, requested written confirmation that Mayhew Center had submitted the documents required in a court decision to gain access to the neighboring property.<sup>3</sup> As noted in the NOV of July 27, 2011, Regional Water Board staff did not receive documentation that Mayhew Center complied with the access requirements to a neighboring property to conduct the required investigation and emphasized to Mayhew Center that it should complete the investigation on its Property while waiting for approval to access the neighboring property.

g) **Specific Factor:** Prior History of Violations

**Adjustment:** 1.2

**Discussion:** Regional Water Board staff issued a Water Code section 13267 Order on July 29, 2005, requesting the submittal of a Technical Report to determine the source and extent of PCE in soils and groundwater at the Property. Mayhew Center failed to submit an acceptable Technical report by August 24, 2005, which led to the issuance of a Notice of Violation dated September 27, 2005. Regional Water Board staff repeated their request for a site characterization and site history report on December 13, 2006, July 22,

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<sup>3</sup> Appendix D of an October 28, 2010, court decision by Claudia Wilken required Mayhew Center to submit the following documentation to the neighboring property owner to obtain access to the property: sufficient proof of liability insurance, release of waiver of liens by vendors to undertake work relating to the required remediation, and certificate of worker’s compensation.

2010, September 30, 2010, and January 10, 2011. Mayhew Center received a total of six 13267 orders between January 2005 and April 2011 which consistently directed Mayhew Center to provide information about and investigate its property for PCE contaminants prior to being issued the May 13, 2011, deadline for the technical MIP investigation report. Mayhew Center has demonstrated a chronic pattern of violating Water Code section 13267 Order requirements

- h) **Specific Factor:** The adjusted ACL for the alleged violation considering conduct factors

**Amount:** \$8,467

**Discussion:** The initial liability (\$4,900) is multiplied by 1.2, 1.2, and 1.2 to adjust for specific conduct factors (e) through (g) above. The \$4,900 liability is increased to \$8,467.

- i) **Specific Factor:** Ability to Pay and to Continue in Business

**Adjustment:** 1

**Discussion:** Mayhew Center will be able to pay the proposed civil liability and continue in business. Mayhew Center receives rent from commercial leases of office space and has funds in a \$1.15 million escrow account established for groundwater remediation costs pursuant to ongoing litigation over the contamination at the site. According to an October 28, 2010, court decision issued by Claudia Wilken U.S. District Judge, "Disbursements shall be made only to pay the reasonable fees and expenses of the Escrow Agent and for remediation work that is reasonably necessary to accomplish CLEANUP AND ABATEMENT pursuant to the Injunction Order." According to the Contra Costa County Assessor's Office the Property is valued at \$1,432,349. Mayhew Center obtains rent from tenants leasing buildings on the property. As an example of the rent gained from these leases, a June 6, 2012 posting listed three vacancies that would generate a total monthly income of \$52,758. The Regional Water Board has no evidence that Mayhew Center would be unable to pay the proposed liability set forth in this Complaint or that the amount of the liability would cause undue financial hardship.

- j) **Specific Factor:** Other Factors as Justice May Require

**Discussion:** Regional Water Board enforcement staff time incurred to prepare this Complaint and supporting information is estimated to be 56.5 hours. Based on an average cost to the State of \$150 per hour, the total staff cost is estimated to be \$8,475. The Assistant Executive Officer intends to seek additional liability for staff costs incurred in bringing the matter to settlement or hearing.

- k) **Specific Factor:** Economic Benefit

**Discussion:** Mayhew Center obtained an estimated economic benefit of \$1,450 by delaying the submittal of a Technical Report for the Property. By not timely submitting an acceptable Technical Report, Mayhew Center deferred expenditures associated with

the required soil and groundwater cleanup at the Property. Staff estimated the economic benefit based on a one-time, non-depreciable expenditure of \$60,000, a conservative estimate for the initial field investigation and report writing. The U.S. Environmental Protection Agency BEN economic benefit model<sup>4</sup> was run and calculated an economic benefit of \$1,450.

l) **Civil Liability:** Minimum Liability Amount

**Amount:** \$1,595

**Discussion:** The Enforcement Policy requires that the adjusted Total Base Liability Amount be, at a minimum, 10 percent higher than the economic benefit received as a result of the alleged violation. Mayhew Center's estimated economic benefit plus 10 percent was calculated to be \$1,595 and is lower than the adjusted Total Base Liability. The economic benefit received does not exceed the Adjusted Total Base Liability of \$16,942.

m) **Civil Liability:** Maximum Liability Amount

**Amount:** \$253,000

**Discussion:** The maximum liability that may be imposed under Water Code section 13368, subdivision (b)(1) is \$253,000. This is based on the maximum liability of \$1,000 per day for 253 days of violation (from May 13, 2011, through January 20, 2012, the date Mayhew Center submitted a Technical Report for the Property).

### **Final Proposed Civil Liability**

The final liability proposed for the late report is \$16,942 (the total base liability plus staff costs) based on consideration discussed of the factors above.

The proposed liability is less than five percent of the maximum liability that the Regional Water Board has the discretion to impose.

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<sup>4</sup> <http://www.epa.gov/compliance/civil/econmodels/>