



 Association of Bay Area Governments

November 26, 2012

Heather McLaughlin
City Attorney
City of Benicia
250 East L Street
Benicia, CA 94510

Re: Notice of Claim – Draft Remedial Order

Dear Heather,

ABAG PLAN acknowledges receipt of a notice of claim filed on behalf of the City of Benicia by Mark O'Brien of Environmental Risk Services Corporation. The notice of claim includes a copy of the Draft Remedial Action Order received from the California Environmental Protection Agency, Department of Toxic Substances Control dated September 15, 2010.

Overview

The order applies to property known as the former Benicia Arsenal. The Benicia Arsenal has been closed since 1964 and was converted to civilian use via a transfer to the City of Benicia. The City of Benicia sold certain areas of the property which were then converted to private use. The City still owns a portion of the property. The order applies to the property, known as the Former Benicia Arsenal. The City of Benicia has been notified by letter dated September 15, 2010, of the existence of contamination at this location. The order is seeking remediation of the site and the claim is seeking recovery of cost associated with the remediation project.

Coverage Analysis

The City of Benicia has been provided coverage under ABAG PLAN Liability MOC since July 1, 1986. The City of Benicia is a covered party under all applicable MOCs (1986-2010), as defined by Section II – Who is a Covered Party. The referenced claim relates to a pollution condition which occurred prior to coverage inception (1964) and which is further limited under the terms and conditions of each referenced MOC:

Section III – Coverages, specifies that the MOC applies to “Damages” that the “Covered Party” becomes legally obligated to pay because of:

- A. Bodily Injury
- B. Property Damage
- C. Personal Injury
- D. Public Officials Errors and Omissions Injury, or
- E. Employee Benefit Plan Administration Liability

.....caused by an “Occurrence”, and which are not excluded.

Section I.G of the MOC defines the damages that the ABAG PLAN program is obligated to indemnify. Damages do not include:

“Any monetary sum paid or awarded as of for any loss, cost or expense arising out of any:

- a. Request, demand or order that any “Covered Party” or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to or assess the effects of “Pollutants; or
- b. Claim or suit by or on behalf of a government authority because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to or assessing the effects of “Pollutants”.

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Further, Section IV – Exclusions, states that the Memorandum of Coverage does not apply to “Damages”:

B. Arising out of the actual, alleged, or threatened, exposure to, or discharge, dispersal, seepage, migration, release or escape of “Pollutants”:

1. At or from any premises, site or location which is or was at any time owned or occupied by, or loaned, rented, or leased to, any “Covered Party”;
2. At or from any premises, site, or location which is or was at any time used for the handling, storage, disposal, processing or treatment of waste;
3. Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any “Covered Party” or any person or organization for whom a “Covered Party may be legally responsible; or
4. At or from any premises, site, or location on which an “Covered Party” or any contractor or subcontractor working directly or indirectly on any “Covered Party’s” behalf is performing operations.

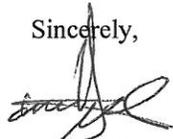
Section I.R of the MOC defines pollutants as:

“Pollutants” means without limitation any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes without limitation materials to be recycled, reconditions or reclaimed.....

After all of the applicable exclusions, definitions and limitations are taken into account, there is no duty or obligation for the ABAG PLAN program to either defend or indemnify the City of Benicia for this claim.

Heather, the City of Benicia may appeal this coverage determination by submitting a letter so stating directed to my attention within 60 days of receipt of this letter.

Sincerely,



James Hill
Risk Management Officer

Cc: Kenneth Moy, ABAG PLAN Counsel
Jim Nagal, Claims Examiner