

MANAGEMENT MEMO #90- 11

PROGRAM MANAGEMENT MANUAL VOLUME: Site Mitigation

TITLE: RP – Ownership of Property Over Contaminated Ground Water

Determining Whether to Pursue Cost Recovery or Enforcement Actions Against Property Owners Whose Land Overlies Contaminated Ground Water Solely on the Basis of Land Ownership

AFFECTED PROGRAMS:

Site Mitigation, Cost Recovery, Toxics Legal Office

BACKGRO UND:

State and federal laws regarding site mitigation (Comprehensive Environmental Response, Compensation and Liability Act of 1980/Superfund Amendments and Reauthorization Act (42 United States Code 9607 (a) (1)) and Chapter 6.8 of the Health and Safety Code (H&SC)) provide that persons owning property where "...hazardous substances have come to be located..." may be liable for response costs and may be subject to various orders. This definition *is* clear, and is without regard to the origin of the hazardous substance. Thus such land owners, according to the law, are responsible parties. The statutes also provide certain defenses to liability. In some cases, ground water flow carries contaminants in the subsurface under property owned by a person having no relationship to the original release, except ownership of property over contaminated ground water.

POLICY:

As a general policy, the Toxic Substances Control Program will not pursue or enforce action against a person who is a responsible party solely on the basis of ownership of land overlying contaminated ground water. Exceptions to the general policy may be made, however, if approved by the Deputy Director. If, however, the person has caused or contributed to the release in some way, or if the person's activities significantly spread the contamination or exacerbate the problem, then this policy does not apply. The following are examples of activities to consider under this policy: (1) extraction, injection, and other operations that affect ground water hydraulics; (2) improper construction or operation of wells connecting contaminated and uncontaminated aquifers; and (3) pumping from a well that increases the rate of flow of contaminated ground water.

An example of where this policy should be applied is in the case of a person who owns a residence lying over contaminated ground water. If the owner has not caused or contributed to the contamination in any way, the Department of Health Services (Department) will not pursue cost recovery against the owner or issue any order to the owner requiring the owner to undertake remedial action.

Another example is a water company owning land and/or wells that extract water from a contaminated aquifer. If the water company has not caused or contributed to the contamination in any way, and its drilling and pumping activities have not and will not exacerbate the problem or interfere with remedial action, the Department will not pursue cost recovery against the water company or issue any order to the water company requiring it to undertake remedial action. If, however, the water company has drilled a well improperly, connected a contaminated aquifer with an uncontaminated aquifer, or if the water company's pumping from a well causes the plume of contaminated ground water to spread significantly more rapidly, then the Department will consider cost recovery or enforcement action against the water company to the extent necessary under the circumstances within the law.

Generally, cost recovery or enforcement action will be taken only when actions to exacerbate the ground water are implemented or continued after the discovery of the ground water contamination, and notification by the Department that such actions should be terminated or curtailed has been given.

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