

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA; SOUTH
CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL, AND
SOUTH CAROLINA DEPARTMENT OF
NATURAL RESOURCES, AS AGENCIES OF
THE STATE OF SOUTH CAROLINA AND AS
TRUSTEES FOR NATURAL RESOURCES,

Plaintiffs,

v.

BEAZER EAST, INC.,

Defendant.

CIVIL NO. 2:18-cv-3051-DCN

COMPLAINT

The United States of America, by the authority of the Attorney General of the United States, acting at the request of National Oceanic and Atmospheric Administration (“NOAA”) and the Department of the Interior (“DOI”), and the Office of the Governor of the State of South Carolina, through the South Carolina Department of Health and Environmental Control (“SCDHEC”) and the South Carolina Department of Natural Resources (“SCDNR”) (collectively, the “State Trustees”), through the undersigned attorneys, file this complaint and allege as follows:

NATURE OF ACTION

1. This is a civil action, brought against Beazer East, Inc. (“Defendant”), formerly known as Koppers Company, Inc., for recovery of damages for injury to, loss of, or destruction of natural resources under the trusteeship of NOAA, DOI, SCDHEC and SCDNR (collectively, “Plaintiffs” or “Trustees”), under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9607. The State Trustees also seek relief pursuant to the SC Hazardous Waste Management Act, South Carolina Code of Laws, Ann.,

Section 44-56-200 (Rev. 2018). Plaintiffs seek damages in order to compensate for injury to, destruction of, loss of, or loss of use of certain natural resources resulting from the release of hazardous substances, including, but not limited to, polycyclic aromatic hydrocarbons (“PAHs”), arsenic, copper, chromium, lead and zinc, into the soils, sediments, surface water and groundwater at and near the National Priorities List (“NPL”) Superfund site known as the *Koppers Co., Inc. (Charleston Plant) NPL Site* (the “Site”) in Charleston, South Carolina. Plaintiffs also seek to recover unreimbursed costs of assessing such damages and planning related restoration.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1345, and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b). This Court has jurisdiction over the subject matter of the State Trustees’ claims based on state law under 28 U.S.C. § 1367(a) because the State Trustees’ claims based on state law are so related to the claims based on federal law that they form part of the same case or controversy. The United States and each State Trustee are authorized to bring this action pursuant to 42 U.S.C. § 9607(f).

3. Venue lies in this District pursuant to 28 U.S.C. §§ 1391(b), and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), because it is the judicial district in which the releases, threats of releases, or discharges of hazardous substances giving rise to these claims occurred.

DEFENDANT

4. Defendant Beazer East, Inc. is a Delaware corporation that, through its predecessor in interest Koppers Company, Inc., formerly owned and operated a wood treatment facility at the Site from approximately 1940 to 1978.

5. Defendant is a “person” within the meaning of Section 101 of CERCLA, 42 U.S.C. § 9601(21), because Defendant is a corporation.

6. The Pollution Control Act, S.C. Code of Laws Ann. § 48-1-90(a) (Cum. Supp, 2017) (PCA), provides that “[i]t is unlawful for a person, directly or indirectly, to throw, drain, run, allow to seep or otherwise discharge into the environment of the State organic or inorganic matter, including sewage, industrial wastes and other wastes, except in compliance with a permit issued by [SCDHEC].”

7. Section 48-1-10(1) of the PCA defines “person” to include a corporation.

8. Section 48-1-10(20) of the PCA defines “environment” to include “waters.”

9. Section 48-1-10(2) of the PCA defines “waters” to include “rivers . . . and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially within or bordering the State or within its jurisdiction.”

10. Section 48-1-10(6) of the PCA defines “other wastes” to include chemicals.

11. Section 48-1-90(B)(1) of the PCA provides that “[A] person who discharges organic or inorganic matter into the waters of this State as described in subsection A [Section 48-1-90(A)] to the extent that the fish, shellfish, aquatic animals, wildlife or plant life indigenous to or dependent upon the receiving waters or property is damaged or destroyed is liable to the State for the damages.”

GENERAL ALLEGATIONS

12. The Site consists of 102 acres located in the neck area of northern Charleston, South Carolina on the west side of the peninsula formed by the Ashley and Cooper Rivers. The Site includes particularly the Koppers Company wood treatment facility, which was located on an approximately 45-acre portion of the Site that is generally bounded on the north by Milford Street, on the south by Braswell Street, on the east by the King Street Extension, and on the west by the Ashley River.

13. The Secretary of the Interior (hereinafter included in “DOI”) has been designated as a natural resource trustee for federal trust resources at and near the Site pursuant to 42 U.S.C. § 9607(f)(2)(A), 40 C.F.R. § 300.600, and Exec. Ord. No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987). DOI acts on behalf of the public as a trustee for natural resources, including threatened or endangered species, migratory birds, other fish and aquatic life, and their supporting ecosystems, belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States. *See, e.g.*, 40 C.F.R. § 300.600.

14. The Administrator of NOAA (hereafter included in “NOAA”) has been designated as a natural resource trustee for federal trust resources at and near the Site pursuant to 42 U.S.C. § 9607(f)(2)(A), 40 C.F.R. § 300.600, and Exec. Ord. No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987). NOAA acts on behalf of the public as a trustee for natural resources, including threatened or endangered species, other fish and aquatic life, and their supporting ecosystems, belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States. *See, e.g.*, 40 C.F.R. § 300.600.

15. The State Trustees are acting in their capacity as Trustees for natural resources which have been affected by the releases of hazardous substances. 40 C.F.R. § 300.605.

16. Federal trusteeship over natural resources may overlap with that of States or Tribes or both. The National Contingency Plan (“NCP”) directs that, where there are multiple trustees, the trustees should coordinate and cooperate in carrying out their responsibilities. 40 C.F.R. § 300.615(a).

17. Damages for injury to natural resources includes the costs of actions to restore, replace, or acquire the equivalent of the injured natural resources and the reasonable costs of assessing the injury and the associated damages. Damages may also include compensation for

interim losses to the public attributable to natural resource injuries from the onset of the injury through their repair or recovery to an uninjured state, adjusted for any mitigation of those injuries by response actions or early restoration actions, and any increase in injuries that may have occurred as a result of response actions.

18. As required by CERCLA Section 301(c), 42 U.S.C. § 9651(c), DOI has promulgated regulations respecting the assessment of injuries to natural resources resulting from the release of hazardous substances and associated restoration activities. Those regulations are codified at 43 C.F.R. Part 11.

19. Under their respective authorities, and on behalf of the public, the Trustees implemented a natural resource damage assessment (“NRDA”) to evaluate the injury, loss or destruction of natural resources and resource services at and near the Site due to releases of hazardous substances at or from the Defendant’s wood treatment facility. The results of the NRDA were published by the Trustees in a “Damage Assessment and Restoration Plan and Environmental Assessment For The Koppers Site, Charleston, South Carolina” released on July 13, 2017.

FIRST CLAIM FOR RELIEF
Natural Resource Damages under CERCLA

20. Paragraphs 1 through 19 are realleged and incorporated herein by reference.

21. Defendant is liable as successor to a “person who at the time of disposal of hazardous substances owned or operated” the Site, under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

22. The Site is a “Facility” within the meaning of section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

23. Defendant is a past “owner and operator” of the Site within the meaning of section 101(20) of CERCLA, 42 U.S.C. § 9601(20).

24. There have been “releases” and “threatened releases” within the meaning of Sections 101(22) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(22), 9607(a), at and from the Site, including, but not limited to, releases of PAHs, arsenic, copper, chromium, lead and zinc.

25. “Hazardous substances” within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and 40 C.F.R. § 302.4, including PAHs, arsenic, copper, chromium, lead and zinc, have been released at and from the Site.

26. “Natural resources” within the meaning of Section 101(16) of CERCLA, 42 U.S.C. § 9601(16), have been or are being injured, lost, or destroyed as a result of the releases of hazardous substances at and from the Site. Such natural resources include, but are not limited to, the soils, sediments, surface water and groundwater at, near or below the Site and the adjacent Ashley River, biological organisms (e.g., finfish, shrimp, crabs, mollusks, invertebrates and microbes) at or near the Site, and the services provided by, the bottom sediment, or benthic, community at or near the Site.

27. Plaintiffs have incurred costs and continue to incur costs in assessing damages to natural resources resulting from the releases and planning related restoration.

28. Pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), Defendant is liable to the Plaintiffs for damages for injury to, destruction of, or loss of natural resources resulting from releases of hazardous substances at and from the Site, including the reasonable costs of assessing such injury, destruction, or loss and planning related restoration.

SECOND CLAIM FOR RELIEF
Natural Resources Damages under Section 48-1-90 of the PCA

29. Paragraphs 1 through 19 are realleged and incorporated herein by reference. Defendant is a “person” as defined in the PCA, S.C. Code of Laws Ann. § 48-1-10(1), because it is a corporation.

30. PAHs, arsenic, copper, chromium, lead and zinc are “other waste” as defined in the PCA, S.C. Code of Laws Ann. Section 48-1-10(6) because they are chemicals.

31. The Ashley River and groundwater below the Site are bodies of water wholly or partially within or bordering the State of South Carolina.

32. The Ashley River and groundwater below the Site are “waters” within the definition of S.C. Code of Laws Ann. § 48-1-10(2).

33. The release of PAHs, arsenic, copper, chromium, lead and zinc into waters of the Ashley River and groundwater was not in compliance with any permit issued by SCDHEC.

34. The release of PAHs, arsenic, copper, chromium, lead and zinc into waters of the Ashley River and groundwater was an unlawful discharge of waste into the environment, including waters, of the State of South Carolina in violation of the PCA, S.C. Ann. Section 48-1-90(a).

35. The release of PAHs, arsenic, copper, chromium, lead and zinc damaged or destroyed fish, shellfish, aquatic animals, wildlife, or plant life indigenous to or dependent upon the waters of the Ashley River and groundwater below the Site.

36. Pursuant to S.C. Code of Laws, Section 48-1-90(b) of the PCA, Defendant is liable to the State Trustees for damages resulting from the unlawful discharge of waste from the release as alleged herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court enter judgment:

1. In favor of Plaintiffs and against Defendants, pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and S.C. Code of Laws Ann. 48-1-90(b) for all damages for injury to, destruction of, or loss of natural resources at or near the Site and in or near the Ashley River, including the unreimbursed past, present and future costs of assessing such injury, destruction, or

loss, the costs of restoring, replacing, rehabilitating, and/or acquiring the equivalent of those injured resources, and the past, present, and future diminution in value of those resources pending restoration or replacement, due to the release of hazardous substances at and from Defendant's facility;

2. Awarding the Plaintiffs their costs of this action; and,
3. Granting Plaintiffs such other relief as this Court may deem appropriate.

Respectfully submitted,

FOR THE UNITED STATES OF AMERICA

SHERRI A. LYDON
UNITED STATES ATTORNEY

November 9, 2018
Dated

s/ Barbara M. Bowens
BARBARA M. BOWENS (#4004)
Assistant United States Attorney
1441 Main Street, Suite 500
Columbia, South Carolina 29201
Telephone: (803) 929-3000

ELLEN M. MAHAN
Deputy Section Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

ANDREW W. INGERSOLL
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611

FOR THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL:

November 9, 2018
Dated

s/ Susan Lake
SUSAN A. LAKE
Federal Bar No. 2583
Chief Counsel, Compliance and
Environmental Health
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29201

**FOR THE SOUTH CAROLINA DEPARTMENT
OF NATURAL RESOURCES:**

November 9, 2018

Dated

s/ Shannon Furr Bobertz

SHANNON FURR BOBERTZ

Federal Bar No. 9399

Chief Counsel

South Carolina Department of Natural
Resources

P.O. Box 167

Columbia, SC 29202