

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No.
)	
v.)	<u>COMPLAINT</u>
)	
CHARLES A. DIDONATO,)	
)	
Defendant.)	
)	

The United States of America, by authority of the Attorney General of the United States and through the undersigned attorney, acting at the request of the Director of the Superfund and Emergency Management Division of the United States Environmental Protection Agency (“EPA”) for Region I, files this complaint and alleges as follows:

NATURE OF THE ACTION

1. This is a civil action brought pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, (“CERCLA”), 42 U.S.C. § 9607. In this action, the United States seeks the recovery of certain costs incurred in response to releases or threatened releases of hazardous substances into the environment at or from the New Hampshire Dioxane Site (“Site”), which includes a contaminated residential well field located in Atkinson, New Hampshire and a facility located in Hampstead and Atkinson, New Hampshire that is the source of releases or threatened releases of hazardous substances to the well field.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action and over the parties under 28 U.S.C. §§ 1331 and 1345 and Sections 107 and 113(b) of CERCLA, 42 U.S.C. §§ 9607 & 9613(b).

3. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(2) and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), because the releases or threatened releases of hazardous substances that gave rise to this claim occurred in this district, and because the Site is located in this district.

DEFENDANT

4. Charles A. DiDonato (“DiDonato”) is an individual who resides in or has resided in Massachusetts. DiDonato is a “person” as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

STATUTORY BACKGROUND

5. CERCLA was enacted in 1980 to provide a comprehensive governmental mechanism for abating releases and threatened releases of hazardous substances and other pollutants and contaminants, and for funding the costs of such abatement and related enforcement activities, which are known as “response” actions, 42 U.S.C. §§ 9604(a), 9601(25).

6. Under Section 104(a)(1) of CERCLA, 42 U.S.C. § 9604(a)(1):

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

7. For CERCLA response actions and enforcement purposes, the Administrator of EPA is the President's delegate, as provided in operative Executive Orders, and, within certain limits, the Regional Administrators of EPA have been re-delegated this authority. The Regional Administrator for EPA Region I further re-delegated this authority to the Director of the Superfund and Emergency Management Division of EPA Region I.

8. "Facility" is defined in CERCLA Section 101(9) to include "any building, structure, installation, equipment, pipe or pipeline" or "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed" 42 U.S.C. § 9601(9).

9. "Release" is defined in CERCLA Section 101(22) as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)" 42 U.S.C. § 9601(22).

10. "Disposal" is defined in CERCLA Section 101(29) by reference to the Solid Waste Disposal Act (SWDA). 42 U.S.C. § 9601(29). The SWDA defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3).

11. "Environment" is defined in CERCLA Section 101(8) as "(A) the navigable waters, . . . and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States." 42 U.S.C. § 9601(8).

12. "Hazardous substance" is defined in CERCLA Section 101(14) by reference to other federal statutes and by reference to a list of substances published by EPA at 40 C.F.R. § 302.4. 42 U.S.C. § 9601(14).

13. "Response," as defined in CERCLA Section 101(25), includes "removal" actions and enforcement activities related thereto. 42 U.S.C. § 9601(25).

14. "Removal" actions, as defined in CERCLA Section 101(23), include "provision of alternative water supplies." 42 U.S.C. § 9601(23).

15. "Person" is defined in CERCLA Section 101(21) as "an individual, firm, corporation, association, partnership" 42 U.S.C. § 9601(21).

16. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides in pertinent part:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this Section –

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

* * *

from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance,

shall be liable for –

(A) all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the National Contingency Plan . . .

GENERAL ALLEGATIONS

17. Defendant DiDonato was a general partner of the DiJohn Realty Company, a New Hampshire general partnership, between 1983 and 1993. An individual who is or was a general

partner of a New Hampshire partnership is liable for the liabilities of the partnership engendered during the period that the individual is or was a general partner.

18. At relevant times, including between 1983 and 1993, the DiJohn Realty Company owned a facility with an address of 130 Route 111, Hampstead, New Hampshire (the “DiJohn Property”). The DiJohn Property included buildings and structures and areas where barrels were stored outside.

19. At relevant times, including between 1984 and 1993, the DiJohn Realty Company leased the DiJohn Property to Johnson and Johnston Associates, Inc. (“JJA”). The application for incorporation of JJA in 1984 listed James A. Johnston and Charles A. DiDonato as the incorporators and directors of JJA. At relevant times, including between 1984 and 1993, JJA operated a manufacturing facility at the DiJohn Property (a/k/a the “JJA facility”), where it manufactured, among other things, copper and aluminum foils.

20. During the time period that Mr. DiDonato was a general partner of DiJohn Realty Company (and during the time period when DiJohn Realty Company owned the DiJohn Property), disposal of hazardous substances at the DiJohn Property occurred, including a discharge of 1,1,1 trichloroethane (“TCA”) down a storm drain on the east side of the property in 1989 and disposal resulting from storage of drums of hazardous substances outside, exposed to the weather, for long durations on the north side of the property. Rain and snow was observed on drums with open bungs in this storage area.

21. Sampling at the DiJohn Property has identified ground water in the bedrock aquifer contaminated with TCA, trichloroethylene (“TCE”), 1,4 dioxane (“dioxane”), 1,1-dichloroethane (“DCA”), 1,1-dichloroethene (“DCE”), and methyl tert-butyl ether (“MTBE”), each of which is a CERCLA hazardous substance. DCA and DCE are breakdown products of TCA and TCE, respectively. Dioxane is a common additive to TCA. The sampling indicates

that ground water contamination is more pronounced on the east side of the DiJohn Property in the vicinity of the storm drain and on the north side of the DiJohn Property in the vicinity of the former drum storage area.

22. In 2002 and 2003, the New Hampshire Department of Environmental Services (“NH DES”) identified ground water contaminated with DCE, MTBE, and DCA in several residential wells drawing water from the bedrock aquifer in an area about 0.7 miles south/southwest of the DiJohn Property in the vicinity of Emery Drive and Belknap Drive in Atkinson, New Hampshire. NHDES installed point of entry (“POE”) water treatment systems at four residences with contaminated ground water.

23. In 2011, NH DES sampled water after treatment by POE treatment systems at the four residences for dioxane. After finding dioxane in some of those samples at elevated levels, NH DES sampled additional residential bedrock wells located near the initial four residences in 2011 and 2012 and found dioxane in 45 residential wells in the area. In addition to dioxane, TCA, DCA, DCE, and MTBE were found in the residential well sampling data.

24. In 2012, NH DES requested EPA to evaluate the residential well sampling data and assist it in addressing the contaminated residential drinking water wells.

25. In 2013, EPA approved an Action Memorandum, authorizing a removal action under CERCLA to provide an alternate water supply, in the form of a water line extension to the Hampstead Area Water Company (“HAWC”)’s water supply system, to connect certain residences to that water supply whose bedrock aquifer wells had contamination levels above the NH DES Ambient Groundwater Quality Standard (“AGQS”) for dioxane.

26. As indicated in the Action Memorandum, EPA authorized the removal action because a threat to the residents’ drinking water supply existed based on the existence of elevated dioxane levels in the residential wells (as well as DCE and DCA), which appeared to be

hydrologically linked to a likely contamination source, the DiJohn Property (which had high levels of dioxane, DCA, DCE, and TCA).

27. From 2013 to 2014, EPA installed water mains on Island Pond Road, Brookside Terrace, Belknap Drive, Emery Drive, Oak Ridge Drive, and Deer Run Road and connected designated residences with dioxane contamination over the NH DES AGQS to the HAWC system.

28. The DiJohn Property is a “facility” as that term is defined in Section 101 of CERCLA, 42 U.S. § 9601, as it includes buildings and structures and areas where hazardous substances have been deposited, stored, disposed of, or placed, or otherwise come to be located.

29. There was a “disposal” of “hazardous substances” at the DiJohn Property at relevant times, including between 1984 and 1993, as those terms are defined in Section 101(14) and (29) of CERCLA, 42 U.S.C. § 9601(14), (29).

30. There has been a “release” or threatened release of “hazardous substances” into the “environment,” including the bedrock aquifer, at or from the DiJohn Property, as those terms are defined in Section 101(8), (14), and (22) of CERCLA, 42 U.S.C. § 9601(8), (14), (22).

31. There has been a “release” or threatened release of “hazardous substances” at or from the bedrock aquifer residential well field centered around Emery Drive and Belknap Drive at the Site into the “environment,” as those terms are defined in Section 101(8), (14), and (22) of CERCLA, 42 U.S.C. § 9601(8), (14), (22).

32. The release or threatened release of hazardous substances from the DiJohn Property has resulted in the release or threatened release of hazardous substances to the bedrock aquifer residential well field centered around Emery Drive and Belknap Drive at the Site.

33. The release or threatened release of hazardous substances at the DiJohn Property into the environment has caused the incurrence of “response” costs, as defined in Section

101(25) of CERCLA, 42 U.S.C. § 9601(25), to address the contamination of the bedrock aquifer residential well field centered around Emery Drive and Belknap Drive at the Site.

34. In undertaking response actions to address the release or threatened release of hazardous substances into the environment from the DiJohn Property to the bedrock aquifer residential well field at the Site, including the provision of an alternate water supply to affected residents, EPA has incurred and will continue to incur response costs.

35. To date, EPA has incurred costs of approximately \$ 4 million in response to the Site, of which at least \$ 2.1 million has not been reimbursed.

36. The response costs incurred by EPA in connection with the Site were incurred in a manner not inconsistent with the National Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, and codified at 40 C.F.R. Part 300.

CLAIM FOR RELIEF

37. Paragraphs 1 through 36 are re-alleged and incorporated herein by reference.

38. As a general partner of the DiJohn Realty Company at a time of disposal of hazardous substances at the DiJohn Property, Charles A. DiDonato is liable under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a) (2), as a person who owned or operated a facility at a time of disposal of hazardous substances at the facility from which releases or threatened releases of hazardous substances have resulted in EPA's incurrence of response costs at the Site.

39. Pursuant to Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), Charles A. DiDonato is liable to the United States for all unreimbursed response costs incurred by the United States, including enforcement costs and interest, relating to the Site.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the United States of America, respectfully requests that this Court:

- a. Enter judgment in favor of the United States and against the Defendant for all unreimbursed response costs incurred by the United States relating to the Site, including enforcement costs and prejudgment interest, pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a);
- b. Enter a declaratory judgment on Defendants' liability that will be binding in any subsequent action for further response costs or for natural resource damages, pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2); and
- c. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

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