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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH	
UNITED STATES OF AMERICA, Plaintiff, v. SMITH AND EDWARDS COMPANY AND THE OGDEN CITY REDEVELOPMENT AGENCY, Defendants.	COMPLAINT Case No. 23-cv-681 1:23- cv-00108

Plaintiff, the United States of America, by authority of the Attorney General of the United States and acting at the request of the Administrator of the United States Environmental Protection Agency (“EPA”), files this Complaint and alleges as follows:

NATURE OF ACTION

1. This is a civil environmental action under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), as amended, 42 U.S.C. § 9607, for the recovery of costs incurred or to be incurred by the United States in response to the release or threatened release of hazardous substances at the Ogden Swift Building Superfund Site located in Ogden, Utah (the “Site”).

2. Ogden City Redevelopment Agency (“RDA”) purchased the Site in 2017 and has owned it since then.

3. Over a period of many years, Smith and Edwards operated at the Site and arranged for the disposal of hazardous substances at the Site.

JURISDICTION AND VENUE

4. This court has jurisdiction over this action and the parties hereto pursuant to Sections 107(a) and 113(b) of CERCLA, 42 U.S.C. §§ 9607(a) and 9613(b); 28 U.S.C. §§ 1331 and 1345.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c), and 42 U.S.C. §§ 9607(a) and 9613(b), because the releases or threatened releases of hazardous substances that gave rise to the claim in this action occurred in this district, and because the Site is located in this district.

SITE DESCRIPTION AND BACKGROUND

6. The Site encompasses approximately 7.22 acres and is located along the banks of the Weber River at 390 West Exchange Street in Ogden, Weber County, Utah.

7. At the time of EPA's response work, the Site property included four buildings ranging from one to five stories each. The buildings were structurally deteriorating. Considerable amounts of trash, debris and abandoned containers storing hazardous materials were located throughout the Site property. While the Site property was fenced, it was regularly accessed by trespassers and vandalized.

8. Contaminants of concern stored in the abandoned containers at the Site included benzene, mercury, hydrofluoric acid, hydrochloric acid, sulfuric acid, ammonium hydroxide, calcium hydride, rat poison, isopropyl alcohol, cesium 137 (a radiological source), and other containers of unknown constituents labeled flammable, corrosive, or explosive.

9. Benzene, mercury, hydrofluoric acid, hydrochloric acid and ammonium hydroxide are hazardous substances, as defined by Section 101(14) of CERCLA, 42 U.S.C. §9601 et seq., and listed in 40 C.F.R. § 302.4.

10. Flammable, corrosive, or explosive materials that exhibit characteristics of ignitability, corrosivity, and/or reactivity are a RCRA hazardous waste, as defined in 40 C.F.R. §§ 261.20 - 261.24. RCRA hazardous wastes are CERCLA hazardous substances, as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601 et seq.

11. In the 1930s, the Site property was first developed as a meat processing facility associated with the Historic Ogden Stock Yard. The Site was later used to store large quantities of surplus military items, including numerous containers of hazardous substances. A portion of

the Site was also leased out to a chemical manufacturer, Industrial Research, which is believed to have been voluntarily dissolved. The vacant Site property is currently owned by RDA.

12. Starting in 1975, the Site is believed to have been owned by entities associated with Bert Smith, also known as Albert Newell Smith, who died in 2016. Some time prior to 2009, the Site was owned by Swift Port Inc. and other entities associated with Mr. Smith. In 2009, the Site was owned by National Federal Lands Conference, which also appears to be a Bert Smith entity. From 2010 until the sale in 2017, the Site was owned by Utah-Smith LC, a single member liability company owned by Bert Smith or his heirs.

13. During the ownership by the Bert Smith entities, the buildings located on the Site property were used to store military surplus inventory that Smith and Edwards, a company specializing in surplus military items, purchased from the Defense Logistics Agency (“DLA”) and some of the items, such as ammunition boxes, were marketed for sale by Smith and Edwards. Between 1965 through 1990, Smith & Edward entered into at least 88 purchase contracts with DLA for the acquisition of military surplus materials. Included in these materials were a large number of containers of hazardous substances that were found abandoned at the Site by EPA.

14. A small portions of the containers addressed by EPA were likely from the chemical company, Industrial Research.

15. On April 10, 2017, RDA purchased the Site from Utah-Smith LC. The RDA purchased the Site property for a discounted price due to known environmental contamination.

DEFENDANTS

16. Smith & Edward is a Utah corporation that was incorporated on June 16, 1959.

17. RDA is a political subdivision of the City of Ogden, Utah created to encourage private investment in blighted areas within the City of Ogden. RDA is the current owner of the Site.

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

19. RDA is an “owner” of the Site within the meaning of CERCLA Section 101(20)(A), 42 U.S.C. § 9601(20)(A).

20. Smith and Edwards is an “operator” and an “arranger” within the meaning of CERCLA Sections 101(20)(A) and 107(a)(3), 42 U.S.C. § 9601(20)(A) and 42 U.S.C. § 9607(a)(3).

RESPONSE ACTIONS

21. Sections 104(a) and (b), and 107 of CERCLA, 42 U.S.C. §§ 9604(a) and (b), and 9607, authorize the President to determine the existence and extent of the release or threatened release of hazardous substances; take action to remove or remedy such releases in order to protect the public health or welfare or the environment; and recover the costs of these actions.

22. The corroded, leaking and damaged containers containing hazardous substances, including flammable and explosive materials, deteriorating conditions of the buildings, and trespassers or other visitors that risked exposure by accessing the Site where the contaminated containers were stored and otherwise located, constitute a release or threat of release into the environment of the container contaminants, including benzene, mercury, hydrofluoric acid, hydrochloric acid and ammonium hydroxide, which are “hazardous substances into the environment within the meaning of Sections 101(8), (14), and (22) and 107(a) of CERCLA, 42

U.S.C. §§ 9601(8), (14), and (22), and 9607(a). EPA regulations list these substances as hazardous at 40 C.F.R. § 302.4(a) and Table 302.4.

23. In 2018, EPA initiated a Targeted Brownfields Assessment (“TBA”) at the Site, where EPA contractors observed and documented more than 40,000 abandoned containers of hazardous substances located within the four buildings located on the Site property. These abandoned containers included potential explosives, compressed gases, flammable liquids and solids, oxidizers, poisons, radiological materials, corrosives, and other chemicals. During the TBA, EPA contractors were unable to access and evaluate the entire Site property due to safety concerns presented by the deteriorating conditions of the buildings.

24. On December 4, 2018, after notifying the Utah Department of Environmental Quality (“UDEQ”) of the concerning Site conditions observed by EPA contractors during the TBA, EPA conducted a Removal Site Inspection. Thousands of contaminated containers storing hazardous substances were observed by EPA inspectors and UDEQ representatives during the Site inspection. These containers were found to be in poor condition, stored in disarray, leaking or without lids, or showing chemical crystallization, indicating the potential to be shock-sensitive and possibly explosive. An elemental mercury spill in a storage room and the storing of calcium hydride, a water reactive material, in cardboard boxes exposed to weather elements through broken windows was also observed during the inspection.

25. A December 2018 Limited Phase II Environmental Assessment Report, completed by EPA contractor Weston Solutions Inc., further confirmed the presence of hazardous materials, including explosives, compressed gases, flammable fluids and solids, oxidizers, toxics, radiological and corrosives throughout the four buildings located on the Site.

26. EPA on-Site response actions began on March 27, 2019.

27. On April 18, 2019, EPA approved an emergency removal action for the Site, involving the cleanup and proper disposal of tens of thousands of abandoned containers of chemicals, including flammables, poisons, water reactives, corrosives, mercury, benzene, potential explosives, and more.

28. EPA disposed of approximately 59,593 containers containing hazardous substances and treated onsite an additional approximately 18,996 containers of hazardous substances.

29. On March 2, 2021, the United States sent to Smith and Edwards a general notice letter with respect to potential liability in connection with response costs incurred pursuant to CERCLA Section 107(a)(1), 42 U.S.C. § 9607(a)(1).

30. EPA issued a Final Pollution Report concluding the emergency removal action on January 16, 2020.

31. The United States has incurred costs of removal actions not inconsistent with the National Contingency Plan in responding to the release or threatened release of hazardous substances at and from the Site, within the meaning of CERCLA Sections 101(23), (24), and (25), 42 U.S.C. §§ 9601(23)-(25).

32. Through June 30, 2022, EPA incurred a total of \$5,089,033.60 in response costs at the Site.

CLAIM FOR RELIEF

33. The allegations contained in Paragraphs 1 through 32 are realleged and incorporated herein by reference.

34. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides that, inter alia, the following persons shall be liable under CERCLA for the costs incurred by the United States and

the State in responding to the release or threatened release of hazardous substances: any person who owns a facility, any person who owned or operated any facility at the time hazardous substances were disposed of; and any person who arranged for disposal or treatment of hazardous substances at any facility.

35. The Site is a “facility” within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

36. RDA is an “owner” within the meaning of Section 101(20) of CERCLA, 42 U.S.C. § 9601(20).

37. Smith and Edwards is an “operator” and/or “arranger” within the meaning of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), at the time of disposal of containers of hazardous substances at the Site.

38. Section 101(29) of CERCLA, 41 U.S.C. § 9601(29), provides that the term “disposal” shall have the meaning provided in Section 1004 of the Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act, or “RCRA”), 42 U.S.C. § 6903. Section 1004(3) of RCRA, 42 U.S.C. § 6903(3), provides, inter alia, that the term “disposal” includes the “discharge, deposit, . . . dumping, spilling, leaking or placing of any solid or hazardous waste into or any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment . . .”.

39. Benzene, Mercury, hydrofluoric acid, hydrochloric acid, sulfuric and ammonium hydroxide are “hazardous substances” within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14). EPA regulations list these substances as hazardous at 40 C.F.R. § 302.4(a) and Table 302.4.

40. Flammable, corrosive, or explosive materials that exhibit characteristics of ignitability, corrosivity, and/or reactivity are a RCRA hazardous waste, as defined in 40 C.F.R. §§ 261.20 - 261.24. RCRA hazardous wastes are CERCLA hazardous substances, as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601 et seq.

41. There were “release[s]” or threatened “release[s] of hazardous substances at or from the Site, within the meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

42. The actions taken by the EPA in connection with the Site constitute “response” actions within the meaning of Section 101(25) of CERCLA, 42 U.S.C. § 9601(25). As a result of EPA’s response actions, the United States has incurred unreimbursed response costs, as referenced in Sections 101 and 107(a) of CERCLA, 42 U.S.C. §§ 9601(25), 9607(a).

43. Such costs include the costs of all activities taken at the Site pursuant to Section 104(b) and (e) of CERCLA, 42 U.S.C. § 9604(b) and (e), including but not limited to the costs of performance of the removal action at the Site, together with prejudgment interest, as provided for by Section 107 of CERCLA, 42 U.S.C. § 9607. These costs also include enforcement costs incurred and to be incurred in connection with the Plaintiff’s efforts to recover its response costs from liable parties.

44. Through June 30, 2022, EPA incurred a total of \$5,089,033.60 in unreimbursed response costs associated with the Site.

45. Pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, responsible parties are liable for “all costs of removal or remedial action incurred by the United States Government or a State . . . not inconsistent with the national contingency plan [40 C.F.R. Part 300].” 42 U.S.C. § 9607(a)(4)(A).

46. The response actions taken by EPA with respect to the Site, and the costs incurred in connection with those response actions, are not inconsistent with the National Contingency Plan, 40 C.F.R. Part 300.

47. Pursuant to Sections 107(a)(1) - (3) and 113(g)(2) of CERCLA, 42 U.S.C. §§ 9607(a)(1) - (3) and 9613(g)(2). Defendants are jointly and severally liable to the United States for all unreimbursed costs, including administrative, investigative, and enforcement costs that the United States has incurred in connection with the response actions taken at the Site.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff the United States prays that this Court:

A. Enter judgment in favor of the United States and against Defendants pursuant to Section 107(a)(2), 42 U.S.C. § 9607(a)(2), for all unreimbursed response costs EPA has incurred in connection with response actions relating to the Site, including prejudgment interest on those sums;

B. Award the United States its costs and expenses for this action, including the costs of attorney time; and

C. Grant such other and further relief as the Court deems appropriate.

Respectfully submitted,

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September 29, 2023

Dated

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