

Municipality Potentially Liable for Release of Hazardous Substances Illegally Discharged into Leaky Sewer Line

By Tom Kilbane and Robert Zeinemann, Short Cressman & Burgess PLLC

A federal district court in California recently held that public sewer system owners and operators may be held liable for hazardous substances that leak from their sewer lines, even though a third-party illegally discharged the hazardous substances into the sewer. *Adobe Lumber, Inc. v. Hellman*, 658 F. Supp. 2d 1188 (E.D. Cal., 2009) ("*Adobe Lumber*"). The trial court's decision was based on: (1) its ruling that public sewers fall within the definition of "facility" in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"); and (2) its finding that the sewer owner/operator failed to show that it exercised due care and took reasonable precautions in maintaining the sewer.

The relevant facts are straightforward. In 1998, Adobe Lumber purchased a shopping center property in Woodland, California. One store in the shopping center was leased to a dry cleaning business, which had been operating there for years. From 1974 until about 1991, the dry cleaner illegally used a floor drain to dispose of wastewater containing the dry cleaning solvent perchloroethylene ("PCE"), considered a "hazardous substance" under CERCLA. The floor drain connected through a lateral pipe to a sewer owned and operated by the City of Woodland ("the City"). In 2001, Adobe Lumber discovered PCE contamination on its shopping center property.

Adobe Lumber brought an action seeking cost recovery and contribution from the City under CERCLA (as well as under California law). It alleged that PCE leaked from the

City sewer and contaminated the subsurface of its property. The City moved for summary judgment, contending that it could not be held liable under CERCLA on these alleged facts.

Under CERCLA, owners and operators of a "facility" are potentially liable for releases of hazardous substances from the facility. In *Adobe Lumber*, the City took the position that its sewer did not fall within CERCLA's definition of "facility." The court held that the City's sewer was a "facility" for purposes of CERCLA. Because CERCLA imposes strict liability on facility owners/operators for releases, the City could be held liable under CERCLA unless it had a valid defense.

The City asserted CERCLA's "third-party" defense, contending that the dry cleaner's actions were the sole cause of the release and that the City exercised due care and took reasonable precautions. The City argued that it could not reasonably foresee that the dry cleaner would pour PCE into a drain connected to the City sewer, because that conduct violated state and local law. The City further argued that, absent notice of the presence of PCE, no inspection or maintenance of the sewer was required.

The court ruled that the illegality of the dry cleaner's conduct did not mean that it was unforeseeable. The City was aware of both the location of the sewer and the presence of the dry cleaning operation using dry cleaning solvents on the adjacent property. The court also relied on the City's inability

to provide any evidence that, even absent notice of the PCE, its maintenance of the sewer was appropriate. Although the sewer dated from 1928, the City had no records pertaining to the sewer's construction, inspection, or repair prior to the early 1990's. The City took no steps to remedy the leaks in its sewer until 2004, when, after being sued over the contamination, the City sleeved the sewer to prevent further leakage.

The court found that the City's actions or omissions could have caused or contributed to the contamination and that the City failed to show that it exercised due care and took reasonable precautions. The court accordingly allowed the property owner's CERCLA action against the City to proceed.

Adobe Lumber is believed to be the first decision by a federal district court in the Ninth Circuit allowing a CERCLA action to proceed against a public sewer owner for illegal third-party discharges into and releases from its sewer. It remains to be seen whether its rationale will be followed by federal district courts in Washington or upheld by the U.S. Court of Appeals for the Ninth Circuit. But it is fair to say that *Adobe*

Lumber has increased the potential CERCLA exposure of Washington's public sewer system owners and operators.

Adobe Lumber may also have implications for potential liability under Washington's Model Toxics Control Act ("MTCA"), a/k/a the state Superfund law. Because CERCLA was the model for MTCA, the court's reasoning in *Adobe Lumber* potentially could be extended to contribution actions under MTCA. Successfully defending any such MTCA claim would be even more difficult because MTCA's third-party defense requires defendants to establish that they exercised "utmost care" rather than ordinary "due care."

To minimize their potential exposure under CERCLA and MTCA, public sewer owners and operators ought to take steps to establish, comply with, and document their compliance with reasonable and appropriate standards, plans, and programs for sewer construction, inspection, maintenance, and repair, wherever hazardous substances may be discharged—legally or illegally—into their sewer systems.