



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL
89 KINGS HIGHWAY
DOVER, DELAWARE 19901

Office of the
Secretary

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SECRETARY'S ORDER

Pursuant to 7 Del. C. § 9109

Order No. 2017-WH- 0027

***PERSONALLY SERVED BY
AN ENVIRONMENTAL CRIMES
UNIT OFFICER AND VIA ELECTRONIC MAIL***

Issued To:

Thoro-Kleen, Inc. and
Mr. and Mrs. Joseph Booth
200 Garden Street
Georgetown, Delaware 19947

The Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") has found Mr. and Mrs. Joseph W. Booth ("Respondents") to be in violation of Delaware's Hazardous Substance Cleanup Act, 7 Del. C. Chapter 91 ("HSCA"), and of 7 DE Admin. Code 1375, Delaware's *Regulations Governing Hazardous Substance Cleanup* ("Regulations"). Accordingly, the Department is issuing this Notice of the Secretary's Order pursuant to 7 Del. C. § 9109(a) (3).

BACKGROUND

On November 18, 1985, following a conversation between Mr. Joe Booth and a DNREC staff member, DNREC sent a written information request in the form of a letter to Mr. Booth regarding the operations at the Thoro-Kleen Dry Cleaning and Laundry Site ("Site"), located at 11 Railroad Avenue in Georgetown, Delaware. The letter sought information as part of an investigation of potential sources of releases and/or disposal of hazardous substances, in this case perchloroethylene ("PCE" or "PERC").

Mr. William Booth, Joseph Booth's father, was the owner of both the land where the business was located and the owner of Thoro-Kleen, Inc. He replied to DNREC's letter and stated in his response that "PERC", a common term for PCE, was used on the premises as part of the dry-cleaning operations.

Between early 1985 and September 2, 1986, Joseph W. Booth was an employee and operator of Thoro-Kleen, Inc., business at the Site, under the supervision of his parents, William and Iva Booth.

On September 2, 1986, Respondents took title to the real estate upon which the Site is located and assumed ownership and operation of Thoro-Kleen, Inc. at the Site.

On February 16, 2010, DNREC sent another information request letter to Respondents as a result of an investigation of groundwater in Georgetown that showed contamination by PCE and trichloroethylene ("TCE"), often a degradation product of PCE or a solvent used in dry cleaning. Mr. Joseph Booth responded on March 16, 2010 and described the storage and use of "PERC" on the premises.

Respondents operated Thoro-Kleen, Inc. until approximately September 30, 2010. The Booths continue to own the land where the business is located.

On January 8, 2014, DNREC sent a notice of liability to Respondents regarding their liability as owners and operators at the Site because DNREC had "documented the release or threatened release of hazardous substances, pollutants, or contaminants" at the Site. The letter offered Respondents the opportunity to enter into DNREC's Voluntary Cleanup Program.

After completing testing following a release of a petroleum product at the Site, DNREC's Tank Management Section determined on November 14, 2014, that PCE and TCE exceeded the levels of the Environmental Protection Agency's Maximum Contaminant Levels in groundwater at the Site.

On March 9, 2015, Mr. and Mrs. Booth submitted a Voluntary Cleanup Program Application and a check for \$5,000.00 to DNREC to participate in the Voluntary Cleanup Program.

In May 2016, Tetra Tech submitted a Phase II Environmental Investigation to DNREC which revealed the presence of PCE and TCE in the Site's groundwater.

In letters sent on behalf of Respondents and dated January 16, 2017 and February 27, 2017, F. Michael Parkowski, Esq., contended that his clients were not Potentially Responsible Parties as a result of being "innocent purchasers" of the Thoro-Kleen property.

On February 1, 2017, DNREC's attorney, Deputy Attorney General Robert F. Phillips, disputed the "innocent landowner" defense for several reasons, including Respondents' failure to conduct an "all appropriate inquiry" as defined in 7 *Del. C.* § 9105 (c) (2)b.2 prior to their acquisition of the property and also disputed the claim that Respondents had no knowledge or reason to know of any release or imminent threat of release at the Site since Mr. Booth had worked as an employee of Thoro-Kleen, Inc. prior to the acquisition of the property. Indeed, the documentary evidence strongly suggests that Respondent Joseph Booth spoke

with a DNREC employee and received written correspondence in November 1985 regarding the operation of Thoro-Kleen, Inc. and use of a hazardous substance, PCE, at Thoro-Kleen, Inc.

Moreover, as mentioned in Mr. Phillips' letter, it is undisputed that Respondents continued to operate the dry-cleaning business after they purchased the land from Mr. Booth's parents in 1986. Therefore, Respondents became liable for any releases of PCE, TCE or any other hazardous substances that occurred at the Site while they owned the property and/or operated the business. Thus, even if the facts establish that Respondents had "no knowledge or reason to know" of any releases of hazardous substances at the Site prior to purchasing the property, which they do not, pursuant to 7 *Del. C.* § 9105(a) (1), Respondents became liable independently as of the date they became owners and operators of the property and dry-cleaning business.

A meeting was held among the parties on May 17, 2017 at which time the Secretary stated that he agreed with his staff's findings and Mr. Phillips' legal advice to the effect that the Booths could not take advantage of the "innocent landowner" defense and that they should avail themselves of the "ability to pay" process.¹

As agreed upon at the earlier meeting, DNREC-SIRS' administrator, Timothy Ratsep, responded to Mr. Parkowski's February 27, 2017 letter on May 23, 2017 and again asserted that Respondents may not avail themselves of the "innocent landowner" defense created by 7 *Del. C.* § 9105 (c) (2). The Respondents were again invited to enter the VCP. They were also provided with the paperwork needed to complete an ability to pay analysis since they contended that they did not have the resources to pay for the investigation and cleanup at the Site.

On June 12, 2017, Mr. and Mrs. Booth appealed to the Environmental Appeals Board from the Secretary's verbal statement at the meeting that the Booths were not "innocent landowners". As the appeal was not filed within the time prescribed by law, DNREC moved for dismissal of the appeal by the Board. The Booths then amended their appeal, stating that they were appealing from Mr. Ratsep's May 23, 2017 letter. DNREC again moved for dismissal of the Booth's appeal on grounds that the letter did not constitute an action of the Secretary that could be appealed. The Booths assert that DNREC seeks dismissal of this appeal in order to delay resolution of this matter.

A hearing before the Environmental Appeals Board is scheduled for November 28, 2017.

¹ The letter was sent by mutual agreement following the meeting that included Shawn M. Garvin, the Secretary of DNREC; Marjorie Crofts, the Director of DNREC's Division of Waste and Hazardous Substance; Mr. Ratsep, manager of DNREC's Site Investigation and Restoration Section ("SIRS"); Mr. Robert Asreen, a hydrologist employed by SIRS; the Respondents; and Senator Brian Pettyjohn.

This Order is issued to definitively address the issue of Respondents' liability under HSCA and to simplify and expedite the EAB hearing by removing from consideration any ancillary arguments or questions as to whether the Secretary's statement or Mr. Ratsep's letter may be deemed a decision appealable to the Board.²

FINDINGS OF FACT AND VIOLATION

Mr. and Mrs. Joseph Booth have owned the land on which Thoro-Kleen Inc. is located and have owned Thoro-Kleen Inc. since September 2, 1986. Pursuant to § 9105 (a) (1) of HSCA, Mr. and Mrs. Joseph Booth are potentially responsible parties.

Mr. and Mrs. Joseph Booth, by their application for admission into DNREC's Voluntary Cleanup Program dated March 9, 2015, specifically acknowledged that a hazardous substance was used, generated, treated, stored, disposed or discharged on the Site as described by DNREC Notice of Liability dated January 8, 2014 and their resulting liability.

Mr. and Mrs. Joseph Booth are not innocent landowners pursuant to § 9105(c) (2) b. because prior to their purchase of the property where Thoro-Kleen is located they knew of the potential presence of PCE and TCE at the Site yet failed to conduct an appropriate inquiry as required by 7 Del. C. § 9105 (c) (2) b. 2 prior to the purchase of the Site.

Even if the facts established that Mr. and Mrs. Booth were unaware of the environmental conditions at the Site when they purchased the land in 1986, once they became owners and operators of the property and the business they became liable for any and all releases of hazardous substances at or from the Site in accordance with 7 Del. C. § 9105 (a) (1).

² DNREC by no means concedes that the appeal from either is valid.

CONCLUSIONS

Based on the foregoing, the Department has concluded that Respondents are potentially responsible parties and that they have violated HSCA and *the Regulations*. The Respondents are hereby ordered to:

1. Submit to DNREC, within sixty (60) days from the date of this order, the name and qualifications of the consultant who will be performing the remedial investigation and study of the facility required by Section 9.4 of the *Delaware Regulations Governing Hazardous Substance Cleanup* and 7 Del. C. § 9106. A copy of the Department's policy for Minimum Qualification Requirements for Consultants can be found at DNREC's website at the following link: http://www.dnrec.delaware.gov/dwhs/SIRB/Pages/SIRB_Consultant_Lab_Qualifications.aspx
2. Submit to DNREC, within forty-five (45) days of DNREC's approval of your consultant, a draft work plan.
3. Submit a completed Remedial Investigation and Feasibility Study for DNREC's review within one year from the date of this order.
4. Pay SIRS the outstanding response cost billed through the date of the Secretary's Order and agree to pay any reasonably incurred response cost.
5. Implement the approved Final Plan of Remedial Action upon issuance; and
6. Notify DNREC of circumstances beyond your reasonable control which will prevent you from complying with any time frames established during this negotiation process within seven (7) days of such circumstances coming to your attention.

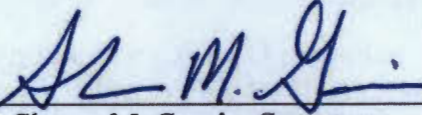
PUBLIC HEARING

This Order shall become effective and final 21 days from the receipt of this Order unless the Department receives from Respondent within 21 days of receipt of this Order a written statement indicating they do not wish their appeal to be heard by the Delaware Environmental Appeals Board on November 28, 2017. Absent an objection by Respondents and subject to approval by the EAB, DNREC will consider the hearing on that date to concern only the question whether the Respondents are Potentially Responsible Parties who are not liable by virtue of the "innocent purchaser" defense.

If you have any questions, please contact Timothy Ratsep at (302) 395-2600.

Date

10/31/17



Shawn M. Garvin, Secretary

cc: Robert F. Phillips, Deputy Attorney General
Marjorie A. Crofts, WHS Director
Timothy Ratsep, SIRS Program Administrator
Susan Baker, Enforcement Coordinator
SIRS File-DE-0207 H3

WAIVER OF STATUTORY RIGHT TO A HEARING

The Respondents, Mr. Joseph W. Booth, Mrs. Margaret Booth, and Thoro-Kleen, Inc. hereby waive their right to a hearing and their opportunity to appeal or contest this Order and agree to the following:

1. Submit to DNREC, within sixty (60) days from the date of this order, the name and qualifications of the consultant who will be performing the remedial investigation and study of the facility required by Section 9.4 of the *Delaware Regulations Governing Hazardous Substance Cleanup* and 7 Del. C. § 9106; and,
2. Submit to DNREC, within forty-five (45) days of DNREC's approval of your consultant, a draft work plan; and,
3. Submit a completed Remedial Investigation and Feasibility Study for DNREC's review within one year from the date of this order; and,
4. Pay SIRS the outstanding response cost billed through the date of the Secretary's Order and agree to pay any reasonably incurred response cost; and,
5. Implement the approved Final Plan of Remedial Action upon issuance; and,
6. Notify DNREC of circumstances beyond your reasonable control which will prevent you from complying with any time frames established during this negotiation process within seven (7) days of such circumstances coming to your attention.

Thoro-Kleen, Inc.

Date: _____ By: _____

Title: _____

Date: _____ By: _____

Title: _____

Date: _____ _____

Joseph Booth

Date: _____ _____

Margaret Booth