



POINT RUSTON, LLC
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FOR IMMEDIATE RELEASE
August 14, 2014

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**POINT RUSTON DEVELOPMENT FILES \$150 MILLION NOTICE OF CLAIM
AGAINST CITY OF RUSTON**

Environmental Claims against City of Ruston for Violations of Environmental Cleanup Laws

TACOMA, WA – On Thursday, August 14th, 2014 Point Ruston, LLC filed a series of claim notices against the City of Ruston, Washington totaling more than \$150,000,000. These notices seek monetary contribution and treble damages related to environmental cleanup at the former Asarco Smelter Superfund Site.

Michael Cohen, managing partner of the construction and development firm behind the redevelopment of the former Asarco Superfund Site, stated “Most of our government partners have stepped up to the plate to help move the cleanup of this site forward – from our \$31 Million public-private partnership with the City of Tacoma to re-build the public road and utilities at this site, to the State of Washington’s multi-million dollar investment in the cleanup on the tidelands and sediments along the shorelines of this site – not to mention the oversight and supervision offered by the US Environmental Protection Agency. Unfortunately the City of Ruston’s contribution has been to add to the pollution at this site and stand in the way of finalizing our work on this project.” The claims filed by Point Ruston LLC point to a history of the City of Ruston government’s environmental malfeasance at the site – including that the City of Ruston has hindered the cleanup and caused the further spread of contaminants.

Point Ruston is represented by Rodney Brown, Jr. of Cascadia Law Group, a boutique Seattle law firm that has been Point Ruston’s lead environmental counsel since the project’s inception in 2005. For questions regarding these filings please direct questions to Mr. Brown.

About Point Ruston LLC

Point Ruston is a mixed-use real estate development project taking shape on the site of the former Asarco Smelter site. Located on nearly one-mile of Puget Sound shoreline, Point Ruston includes plans for a mixed-use shopping center featuring more than 250,000 square feet of retail space with restaurants and boutique shopping, and anchored by a 25,000 square foot organic grocer, four-star 175-room Silver Cloud Hotel, and 9-screen Century Theatre cinema, along with a range of housing choices for nearly 3,000 residents. Michael Cohen is Point Ruston LLC’s Manager and Majority Member of the Company. With a four decade career in real estate spanning the West Coast, Mr. Cohen has successfully built and developed dozens of residential and commercial projects including hotels, casinos and golf course related projects.

About Cascadia Law Group PLLC

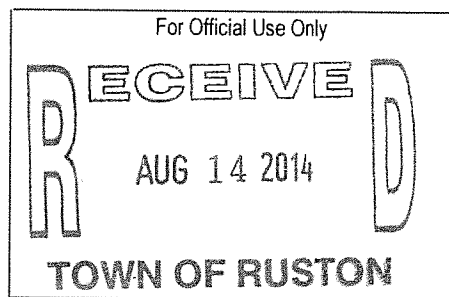
Cascadia Law represents clients in litigation and regulatory matters that include complex environmental, land use, and natural resource issues. Chambers USA, Best Lawyers in America, and other leading research firms and publications recognize Cascadia Law as a top regional firm whose clients include Fortune 100 companies, small businesses, government agencies, and environmental groups. Rodney Brown, Partner in Cascadia Law, is reported by Chambers USA 2014 as “the premier environmental lawyer in the state.” Amongst many other posts, Mr. Brown is Co-Chair of Governor Inslee’s Carbon Emissions Reduction Taskforce.

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STANDARD TORT CLAIM FORM

General Liability Claim Form #SF 210

Pursuant to Chapter 4.92 RCW, this form is for filing a tort claim against the state of Washington. Some of the information requested on this form is required by RCW 4.92.100 and may be subject to public disclosure.



PLEASE TYPE OR PRINT CLEARLY IN INK

Mail or deliver original claim to Department of Enterprise Services
Office of Risk Management
1500 Jefferson Street SE
MS 41466
Olympia, Washington 98504-1466
Fax: 360-407-8022
Email: WashingtonStateTortClaimE-Filing@des.wa.gov

Business Hours: Monday – Friday 8:00 a.m. – 5:00 p.m.
Closed on weekends and official state holidays.

1. Claimant's name: Point Ruston, LLC
Last name First Middle Date of birth (mm/dd/yyyy)
2. Inmate DOC number (if applicable): N/A
3. Current residential address: N/A
4. Mailing address (if different): 5219 N. Shirley St. #100, Ruston WA 98407
5. Residential address at the time of the incident: N/A
(if different from current address)
6. Claimant's daytime telephone number: _____
Home Business or Cell (253) 752-2185
7. Claimant's e-mail address: rbrown@cascadialaw.com
8. Date of the incident: _____ Time: _____ a.m. p.m. (check one)
(mm/dd/yyyy)
9. If the incident occurred over a period of time, date of first and last occurrences:
from 11/10/1906 Time: _____ a.m. p.m.
(mm/dd/yyyy) (mm/dd/yyyy)
to ongoing Time: _____ a.m. p.m.
(mm/dd/yyyy) (mm/dd/yyyy)
10. Location of incident: Pierce County, WA Ruston ASARCO Superfund Site
State and county City, if applicable Place where occurred

11. If the incident occurred on a street or highway:

N/A

Name of street or highway	Milepost number	At the intersection with or nearest intersecting street
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12. State agency or department alleged responsible for damage/injury:

City of Ruston, Washington

13. Names, addresses and telephone numbers of all persons involved in or witness to this incident:

Unknown.

14. Names, addresses and telephone numbers of all state employees having knowledge about this incident:

Unknown.

15. Names, addresses and telephone numbers of all individuals not already identified in #13 and #14 above that have knowledge regarding the liability issues involved in this incident, or knowledge of the Claimant's resulting damages. Please include a brief description as to the nature and extent of each person's knowledge. Attach additional sheets if necessary.

Employees and representatives of Claimant have knowledge of the Claimant's damages, including the nature and extent of contamination caused by these incidents, and of the City's failure to control disturbed soils. 253-752-2185.

Representatives of Hydrometrics, Inc., have knowledge of the nature and extent of contamination caused by these incidents, of the remediation undertaken, and of the location and condition of the City's storm sewer. 406-443-4150.

16. Describe the cause of the injury or damages. Explain the extent of property loss or medical, physical or mental injuries. Attach additional sheets if necessary.

See attached sheets and attached compact disc containing referenced exhibits.

16. Describe the cause of the injury or damages. Explain the extent of property loss or medical, physical or mental injuries.

The Commencement Bay Nearshore/Tideflats Superfund Site is located in the cities of Tacoma and Ruston, Washington. Portions of the Superfund Site known as Operable Unit 2, the Asarco Tacoma Smelter Facility, and Operable Unit 6, the Asarco Sediments/Groundwater Site (collectively, the Asarco Site) are heavily contaminated with arsenic, copper, cadmium, lead, and other hazardous substances originally discharged from the Asarco Smelter. These substances have contaminated soil, groundwater, surface water, and sediments at the Asarco Site.

The City of Ruston was established as a company town. It was named in honor of the Smelter's founder, W.R. Rust. Throughout the years of the Smelter's operation, the City had a very close relationship with Asarco and its predecessors, and it benefitted enormously from that relationship. Before the City of Ruston was even incorporated, Asarco's predecessor had agreed to pay up to 95% of the City's taxes. For decades, tax payments made by Asarco and its predecessors covered the cost of most city services. They also allowed the City to provide services to its citizens, such as trash collection, free of charge.

In 2006, Claimant Point Ruston, LLC acquired upland property located within Operable Unit 2, and aquatic lands located within Operable Unit 6.

MTCA

Before acquiring property within the Asarco site, Claimant entered into a Consent Decree with the United States pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). See Exhibit 1, *United States v. Asarco Inc. and Point Ruston LLC*, Civ. No. C91-5528 B (W.D. Wash.) (Consent Decree dated Jan. 3, 1997 and Second Amendment to Consent Decree dated Oct. 23, 2006). The Consent Decree obligates Point Ruston to undertake certain remedial actions in Operable Units 2 and 6 of the Asarco Site. The remedial actions required by EPA's Records of Decision for Operable Units 2 and 6 include, but are not limited to, excavating and disposing of contaminated soils, dredging contaminated marine sediments, installing a cap over contaminated soils and marine sediments, building demolition, replacing the entire storm water drainage system and other utility systems, installing shoreline armoring, sampling and monitoring surface water and ground water, sampling marine sediments, implementing a program of institutional controls to ensure long term effectiveness of the selected remedies, and performing additional remedial action work as may be required by EPA (herein, the "Work"). See Exhibits 1 through 6 (Consent Decree and Second Amendment; OU2 ROD; OU6 ROD; SOW; all approved CMPs, including Phase 1, Phase 2, Sediments, Waterwalk, Master Infrastructure, and Shoreline Armoring; all approved Construction Reports).

The Records of Decision for Operable Units 2 and 6 estimate the total remedial action costs to be in excess of \$50,000,000.00 (Fifty Million Dollars). Claimant's remedial action costs include but are not limited to the costs of designing, entitling, constructing, implementing, administering, and monitoring the Work described in the Consent Decree, Scope of Work, Records of Decisions, and EPA-approved Construction Management Plans; as well the costs associated with governmental oversight and permitting of the Work. The Work is the substantial equivalent of a remedial action conducted or supervised by the Department of Ecology.

Washington's Model Toxics Control Act (MTCA) creates a private right of action for the recovery of remedial action costs. RCW 70.105D.080 provides that a person

may bring a private right of action, including a claim for contribution or for declaratory relief, against any other person liable under RCW 70.105D.040 for the recovery of remedial action costs.... Remedial action costs shall include reasonable attorneys' fees and expenses.

Remedial action costs incurred pursuant to a CERCLA consent decree may be recovered under a MTCA private right of action. See, e.g., *Pacific Sound Resources v. Burlington Northern Santa Fe Railway Corp.*, 130 Wn. App. 926 (2005).

Among the categories of persons liable for remedial action costs at a facility are those who own or operate the facility, and those who arrange for disposal of hazardous substances at the facility.

Owner Liability

The City of Ruston owns property within the Asarco Site: the Ruston Way Tunnel, the retaining walls and the east and west portals of the tunnel, and the vacated portion of Dock Street between blocks 3 and 5 of Bay View Addition (collectively referred to herein as the "Ruston Way Tunnel" or the "tunnel"). The City affirmatively requested that the tunnel be built, and later awarded a contract for the tunnel's construction. See Exhibit 7 (news articles from 9/13/1910 and 1/1/1912). In addition to arrangers, owners and operators of contaminated property are liable under MTCA for the costs of remediating the contamination. As the owner of the Ruston Way Tunnel property, which is being remediated under the Consent Decree, the City of Ruston is therefore liable for the costs of abandoning, filling, and capping the Ruston Way Tunnel.

Under MTCA, both current and former "owners" are liable with respect to releases of hazardous substances. See RCW 70.105D.040(1) (liable persons include the owner of the facility, and "any person who owned the facility at the

time of disposal or release of the hazardous substances”) and *Dash Point Village Associates v. Exxon Corp.*, 86 Wn. App. 596, 599 (1997) (“Under the MTCA, a past or present property owner is liable for the cleanup and damages to the environment caused by the release of toxic substances”). MTCA defines “owner or operator” to mean “any person with any ownership interest in the property or who exercises any control over the facility.” See RCW 70.105D.020(17). Thus, any person with a current ownership interest in the property, and any person who had an ownership interest in the property at the time hazardous substances were released there, is liable.

The City of Ruston is liable on both grounds. It currently holds fee title to the Ruston Way Tunnel. Moreover, it has held fee title since W.R. Rust and Asarco’s predecessor, Tacoma Smelting Company, conveyed the tunnel property to the City on December 23, 1915. See Exhibit 8 (Ruston Tunnel deed). During the 99 years of the City’s ownership, hazardous substances have been released at, on, and from the Ruston Way Tunnel. For these reasons, the City of Ruston is liable for remedial action required at the tunnel.

It is irrelevant to its liability as an owner/operator whether the City itself caused or contributed to any release of hazardous substances at the facility. Liability under MTCA is strict, joint, and several. See RCW 70.105D.040(2) and *Iron Partners, LLC v. Maritime Administration*, 2011 WL 4502139 (W.D. Wash. 2011) (“MTCA imposes strict, joint, and several liability for ‘all remedial action costs’ on current and past owners and operators of the facility at the time of either the release or disposal of hazardous substances”).

Arranger and Operator Liability

Arranger liability may be imposed on:

Any person who owned or possessed a hazardous substance and who by contract, agreement, or otherwise arranged for disposal or treatment of the hazardous substance at the facility, or arranged with a transporter for transport for disposal or treatment of the hazardous substances at the facility, or otherwise generated hazardous wastes disposed of or treated at the facility.

See RCW 70.105D.040(1)(c). For purposes of MTCA, “disposal” encompasses “putting, placing, transferring, distributing, discharging, discarding, delivering, abandoning, depositing, injecting, dumping, and spilling.” See *Modern Sewer Corp. v. Nelson Distributing, Inc.*, 125 Wn. App. 564, 571 (2005). Disposal need not be intentional to trigger liability under MTCA. *Id.*; see also *Pacificorp Environmental Remediation Co. v. Department of Transportation*, 162 Wn. App. 627, 663-64 (2011). Subsequent dispersal of preexisting contamination also constitutes “disposal.” See, e.g., *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1338, 1342 (9th Cir. 1992) (contractor that had excavated tainted soil and spread it over uncontaminated portions of the property

had disposed of hazardous substances). Furthermore, a person can arrange for disposal alone; there need not be a separate party involved in the arrangement. See *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006).

The City of Ruston has arranged for the disposal of hazardous substances throughout Operable Units 2 and 6 of the Asarco Site in numerous ways. Soils in the City of Ruston are contaminated with arsenic, copper, and other metals. In the course of maintenance, construction, and other municipal activities, the City of Ruston has disturbed soil containing these hazardous substances, resulting in the dispersal of the hazardous substances. See Exhibit 9 (photos taken 8/17/10, 2/8/12, 4/23/12, 7/31/12, and 9/12/12). For example, the City of Ruston's trucks have tracked soil containing these hazardous substances from its point of origin onto roadways, where the hazardous substances were further dispersed by wind and stormwater runoff. As a further example, the City of Ruston has excavated contaminated soil within the Asarco site and exposed it to stormwater, which then carried the contaminants into and throughout Operable Units 2 and 6. In addition, the City of Ruston has discharged stormwater containing arsenic, copper, and other hazardous substances to Operable Unit 6, contaminating sediments in that area. The concentrations of arsenic and copper in the City of Ruston's stormwater frequently have exceeded the State of Washington's surface water quality criteria. See Exhibit 10 (stormwater monitoring data).

Operator liability attaches to any person who currently operates any part of the facility, or who owned any part of the facility at the time that hazardous substances were disposed there. See RCW 70.105D.040(1). The facts described above also give rise to operator liability. See, e.g., *Kaiser Aluminum*, 976 F.2d at 1342 (person who excavated and dispersed contamination was liable as an operator because it exercised control over the activity causing pollution).

Claimant has incurred remedial action costs to clean up the areas in which the City of Ruston has operated and arranged for disposal of hazardous substances. Under RCW 70.105D.080, the City of Ruston is strictly, jointly, and severally liable to Claimant for all remedial action costs.

MTCA provides that recovery of remedial action costs is to be based on such equitable factors as the court determines are appropriate. See RCW 70.105D.080. The court is likely to assign the largest share of liability for remedial action costs to Asarco, since it was the original source of the hazardous substances at the site. The court will assign the next largest share to the City of Ruston, since it was closely tied to the Smelter over many decades and its activities served to further disperse the contamination that Asarco initially caused. Any share assigned to Claimant would be very small or zero, because Claimant has owned the Property for a relatively short time, has not engaged in any activities that would cause or disperse existing contamination, and in fact has volunteered to complete the remediation through an EPA Consent Decree that provides legal protection to Claimant. Moreover, since Asarco has discharged its

liability for the Asarco Site through bankruptcy, its allocation share will be considered an orphan. The court therefore is likely to re-allocate Asarco's share largely or entirely to the City of Ruston and Claimant. See, e.g., *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1303 (9th Cir. 1997). This means that the City of Ruston will be responsible for most or all of Asarco's share of liability.

NUISANCE

As described above, the City of Ruston has disturbed soil containing arsenic, copper, and other hazardous substances, resulting in the dispersal of the hazardous substances onto both uplands and aquatic lands owned by Claimant. It is well known that soils in the vicinity of the former Asarco smelter contain high levels of arsenic, copper, and other hazardous substances, and that such substances are spread through exposure to wind, rainfall, and other natural forces. Although it knew that dispersal of the hazardous substances was substantially certain to result unless it took precautions when it disturbed contaminated soils, the City of Ruston failed to take such precautions.

In addition, the City of Ruston owns and operates a storm sewer system, a portion of which is located on Claimant's property. See Exhibit 11 (Hydrometrics storm sewer diagram). On information and belief, the City of Ruston's storm sewer pipes have leaked and discharged, and are continuing to leak and discharge, hazardous substances onto Claimant's property. In addition, the City of Ruston's storm sewer pipes have transported and conveyed hazardous substances, and continue to transport and convey hazardous substances, into Commencement Bay by directly discharging storm water containing such hazardous substances into the waters of the Puget Sound. It is well known that municipal storm sewers carry various hazardous substances, including copper and other metals. As noted above, the concentrations of arsenic and copper in the City of Ruston's stormwater frequently exceed the State of Washington's surface water quality criteria.

The presence of these hazardous substances on Claimant's upland and aquatic property substantially and unreasonably interferes with Claimant's use and enjoyment of its property. In order to remediate contamination resulting from the presence of these hazardous substances, Claimant has incurred significant costs associated with the Work consistent with the Record of Decision. Thus, Claimant has suffered significant harm as a result of this nuisance.

The Records of Decision for Operable Units 2 and 6 estimate the cost of Work to remediate the pollutants and hazardous substances resulting from the City's trespass to be in excess of \$50,000,000.00 (Fifty Million Dollars). Claimant's costs include but are not limited to the costs of designing, entitling, constructing, implementing, administering, and monitoring the Work described in the Consent Decree, Scope of Work, Records of Decision, and EPA-approved Construction

Management Plans; as well the costs associated with governmental oversight and permitting of the Work. The City of Ruston therefore is liable to Claimant for these damages, and should be enjoined from allowing any future deposit of hazardous substances on Claimant's property.

TRESPASS

Trespass by Dispersing Pollution

The acts described above constitute an intentional invasion by the City of Ruston of Claimant's interest in the exclusive possession of its property. The City of Ruston intentionally took the actions that resulted in the invasion, and it was reasonably foreseeable that the City of Ruston's actions would result in an invasion of Claimant's possessory interest. See *Bradley v. Asarco*, 104 Wn.2d 677 (1985) (Asarco could be held liable for contaminating plaintiff's land with cadmium, arsenic, and other metals because it acted on its own volition in allowing the metals to be emitted from a smokestack and "had to appreciate with substantial certainty that the law of gravity would visit the effluence upon someone, somewhere").

In order to remediate contamination resulting from the presence of these hazardous substances, Claimant has incurred significant costs. The Records of Decision for Operable Units 2 and 6 estimate the cost of Work to remediate the pollutants and hazardous substances resulting from the City's trespass to be in excess of \$50,000,000.00 (Fifty Million Dollars). Claimant's costs include but are not limited to the costs of designing, entitling, constructing, implementing, administering, and monitoring the Work described in the Consent Decree, Scope of Work, Records of Decision, and EPA-approved Construction Management Plans; as well the costs associated with governmental oversight and permitting of the Work. The City of Ruston is liable to Claimant for these damages.

Trespass on Claimant's Stormwater System

In addition, the City of Ruston's storm sewer discharges through the North Outfall, which Claimant owns. The City of Ruston does not have permission to locate its storm sewer pipes on Claimant's property; to convey hazardous substances through the storm sewer pipes on Claimant's property; nor to use Claimant's North Outfall. The presence of the City of Ruston's storm sewer pipes, and of hazardous substances within those pipes, on Claimant's property, and the use of the North Outfall without permission, constitute a negligent or intentional invasion by the City of Ruston of Claimant's interest in the exclusive possession of its property. In addition to the City of Ruston's liability for damages resulting from these acts of trespass, the continued presence on Claimant's property of the City of Ruston's storm sewer pipes, including the hazardous substances contained within the pipes, and the City of Ruston's use of the North Outfall should be enjoined and Claimant should be compensated for this

intentional trespass.

RCW 4.24.630 (Treble Damages)

The City of Ruston committed the acts described above intentionally and unreasonably, while knowing or having reason to know that it lacked authorization to so act. Furthermore, the actions described above caused waste or injury to Claimant's land, and Claimant has incurred and will continue to incur damages to conduct the Work, which is necessary to repair the waste or injury to its land. As discussed above, the Records of Decision for Operable Units 2 and 6 estimate the total cost of the Work to exceed \$50,000,000.00 (Fifty Million Dollars). These costs include but are not limited to the costs associated with designing, entitling, constructing, implementing, administering, and monitoring the Work described in the Consent Decree, Scope of Work, Records of Decision, and EPA-approved Construction Management Plans; as well the costs associated with governmental oversight of the Work. The City of Ruston is therefore liable to Claimant under RCW 4.24.630 for treble the amount of the damages caused by the waste or injury described above, or \$150,000,000.00 (One Hundred Fifty Million Dollars), together with investigative costs, reasonable attorneys' fees and other litigation-related costs.

Negligence

The acts described above constitute negligence on the part of the City of Ruston. The City of Ruston owed Claimant a duty to Claimant individually not to pollute Claimant's property, but breached that duty by taking the actions described above. *See Gaines v. Pierce County*, 66 Wn. App. 715 (1992) (county owed duty to plaintiff individually to avoid trespassing on its land). In addition, the City of Ruston had a duty under RCW 90.48.162 to obtain and ensure that its stormwater discharge complied with the terms of a waste disposal permit. The City of Ruston also had a duty under RCW 90.48.080 not to discharge into waters of the state any organic or inorganic matter that causes or tends to cause pollution of such waters. The City of Ruston breached these duties by discharging stormwater without having obtained or complied with a waste disposal permit, and by discharging stormwater that contains copper and arsenic at concentrations exceeding the State of Washington's surface water quality criteria. This constitutes negligence per se.

The City of Ruston's negligent conduct resulted in the contamination of Claimant's property, which in turn caused Claimant to incur damages to remediate the contamination by performing the Work. As discussed above, the Records of Decision for Operable Units 2 and 6 estimate the total cost of the Work to exceed \$50,000,000.00 (Fifty Million Dollars). These costs include but are not limited to the costs associated with designing, entitling, constructing, implementing, administering, and monitoring the Work described in the Consent Decree, Scope of Work, Records of Decision, and EPA-approved Construction

Management Plans; as well the costs associated with governmental oversight of the Work. The City of Ruston is liable to Claimant for negligence in this amount.

Reservation of Rights

Claimant reserves all rights to assert additional legal and factual claims related to the City of Ruston's actions described herein.