

BRACEWELL

July 27, 2022

Via Certified Mail, Return Receipt Requested

Mr. Lance Fritz
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Re: 90-Day Notice of Intent to Sue under the Resource Conservation and Recovery Act

Dear Mr. Fritz,

Pursuant to the citizen suit provisions of the 1976 Amendments to the Solid Waste Disposal Act (hereinafter the "Resource Conservation and Recovery Act" or "RCRA"), 42 U.S.C. § 6972(a)(1)(B), the City of Houston hereby notifies you that on or after the 90th day from the date of your receipt of this notice, the City of Houston intends to initiate a citizen suit in Federal District Court for the Southern District of Texas against Union Pacific Railroad Company ("UPRR") regarding the storage and/or disposal of hazardous waste at the UPRR's Houston Wood Preserving Works facility (the "Facility") which presents or may present an imminent and substantial endangerment to health and the environment.

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Historical operations at the Facility, including creosote processing and waste disposal, have resulted in health and environmental effects to areas in and around the historically African-American Fifth Ward and Kashmere Gardens neighborhoods. As described further below, Southern Pacific Railroad—UPRR’s predecessor in interest—processed and disposed of creosote and other waste materials in on-site solid waste management units up to the mid-1980s. By the 1970s, contamination attributable to operations at the Facility had reached the groundwater and migrated to the Kashmere Gardens neighborhood and surrounding areas. That contamination has only continued to expand and affect the neighborhood. In 2019, the Texas Department of Health and Human Services concluded that lung and bronchus, esophagus, and larynx cancers were significantly greater than expected in the Fifth Ward, and other increased rates of cancer have also been identified. In addition to affecting the residents and families of one of Houston’s historic neighborhoods, the insufficiently addressed contamination affects the City of Houston properties, infrastructure and personnel, and has given rise to nuisance conditions.

Although it is clear that contamination from the Facility persists and continues to migrate throughout areas in and around the Fifth Ward and Kashmere Gardens, this contamination has been neither fully characterized nor properly abated to mitigate and prevent future health and environmental impacts. Therefore, the City intends to file suit under RCRA against UPRR to seek an order requiring, among other things, that contamination attributable to former Facility operations be fully characterized and addressed. The City recognizes that the costs of litigating this imminent and substantial endangerment to a final order will require significant resources from both UPRR and the City, and that those resources could be better directed towards addressing contamination plumes and making the residents of the affected Fifth Ward and Kashmere Gardens areas whole. The City therefore invites UPRR to engage in discussions on actions that will address the legacy of environmental contamination at the Facility and concrete steps to make environmental justice a reality for the Fifth Ward and Kashmere Gardens.

Historical Uses of the Facility Have Led to Off-Site Human Health & Environmental Endangerment

History of the Houston Wood Preserving Works

The Facility, located at 4910 Liberty Road, Houston, Texas, was established and operated by the Southern Pacific Railroad Company between 1911 and 1984 as a wood treatment facility. Consistent with that use, Southern Pacific treated railroad ties with creosote and possibly pentachlorophenol to prevent rotting. On information and belief, we further understand that the Facility handled and used “creosote extenders” composed of industrial chemical wastes, including chlorinated materials, received from providers such as Dixie Oil Processors and Motco. Other hazardous chemicals used at the Facility for wood treatment included naphtha, bunker C (a heavy fuel oil), styrene tar, and diesel fuel. Treatment processes generated a waste stream consisting of liquid creosote wastes and potentially other solid and hazardous wastes. This waste stream was initially managed in two solid waste management units until the mid-1970s, when Southern Pacific began to manage the stream first in a wood-lined drainage ditch and then in a surface impoundment. Other solid waste management units may have been used historically to manage these and other wastes.

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In addition to wood preservation operations, UPRR and its predecessor entities used the Englewood Intermodal Yard for activities that gave rise to contamination.

Through a series of mergers, UPRR acquired Southern Pacific Transportation Company in the late 1990s. Through that merger, UPRR succeeds to liabilities stemming from Southern Pacific's prior operations, in addition to its own direct liability for ongoing contamination as owner and operator of the Facility. UPRR represents that Southern Pacific began and UPRR continues to implement cleanup operations according to site remediation programs administered by the Texas Commission on Environmental Quality ("TCEQ").

The Facility Is Contaminated as a Result of Prior Uses, and the Contamination has Migrated to Residential Areas

Due to prior uses of the Facility, including waste generation, management, and disposal, the Facility and surrounding properties are contaminated with a variety of hazardous substances. These substances include a variety of non-aqueous phase liquids ("NAPL") that remain present in the soils and groundwater at the facility above Texas Risk Reduction Program ("TRRP") Protective Concentration Levels ("PCLs"), the Texas state standards for environmental cleanups. Although certain cleanup plans exist for the site, the City of Houston believes that additional site investigation and characterization efforts are necessary to identify and remedy on- and off-site conditions. This belief is confirmed by the relatively recent appearance of tar-like seeps that have emerged from the asphalt cap overlaying the Englewood Intermodal Yard. UPRR has attempted to manage these seeps through weekly inspections and recovery efforts and attributes the emergence of this contamination to the former use of aboveground storage tanks and wastewater lagoons in the vicinity of the Englewood Intermodal Yard. Additional work should be performed to more fully characterize these contaminants and any other contaminants that may be present on the site and to remove all identified waste NAPL.

Despite cleanup efforts undertaken by UPRR and its predecessors, off-site migration of NAPL and other hazardous wastes has occurred and may still be occurring, resulting in adverse environmental and health effects in and around the Kashmere Gardens and Fifth Ward neighborhoods. Recent detections of dioxins in off-site soils near the facility add to these concerns. Plumes of NAPL, associated dissolved and/or chlorinated wastes, and possibly other groundwater contamination extend north and northeast of the Facility. Groundwater contamination has been insufficiently characterized off-site and it is not clear that proposed control measures will stem the flow or adequately remedy contaminated groundwater in and around Kashmere Gardens and the Fifth Ward.

Kashmere Gardens and Fifth Ward Area Residents Have Suffered Adverse Health Impacts Consistent with Contamination

As UPRR is aware, a cancer cluster has been identified in the area of Houston's Fifth Ward and Kashmere Gardens neighborhoods. In November of 2019, a cancer cluster analysis identified statistically significant

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greater-than-expected cancer rates. Existing information about cancer rates suggests that observed cancers are consistent with long-term exposure to the kinds of contaminants present at and emanating from the Facility.

The Contamination Also Harms the City's Properties and Infrastructure

Although the residents of the Fifth Ward and Kashmere Gardens area neighborhoods suffer the most significant harms resulting from the persistent contamination, contamination at the Facility continues to present serious compliance and logistical issues for the City's operation and maintenance of public parks, green spaces, and key municipal infrastructure adjacent to or in the immediate vicinity of the Facility. Many of these harms would be mitigated or eliminated through a court order requiring UPRR to fully assess and abate the existing contamination at and around the Facility.

The City notes specifically that the existing imminent and substantial endangerment presents significant challenges for the City's own compliance with laws intended to protect human health and the environment. City-owned storm sewer systems in the area already show signs of NAPL and creosote intrusion, and recently emergent tar-like seeps present significant ongoing stormwater concerns for City storm sewers and compliance with legal discharge limits associated therewith. Municipal personnel will be subject to additional planning, preparation, and personal protective equipment to prevent exposure while servicing City infrastructure in affected areas. Additional sampling and added soil and water management and disposal costs are likely to be incurred with maintenance and construction in affected corridors near the Facility. And when the City undertakes new improvement projects near the site—and the City notes that it has proposed to undertake major stormwater sewer improvements in the area—managing the contamination and minimizing personnel exposure will be costly.

TCEQ Permit Proceedings Are No Substitute for Prompt Action

The City of Houston has requested a contested case hearing in connection with UPRR's RCRA permit for the Houston Wood Preserving Works site, but the permit amendment process is unlikely to sufficiently address many of the key remedies the City seeks to obtain through the noticed citizen suit. As proposed, the RCRA permit amended would not require sufficient additional investigation of the Facility, appropriate efforts to verify a now-30-year-old document that UPRR relies on to characterize the Facility, or aggressive removal and treatment of on-site and off-site contamination and source control. The proposed permit also fails to propose any meaningful timeframe to obtain the completion of contamination removal activities.

The City of Houston Is an Appropriate Plaintiff to Bring This Suit

The continued presence of contamination in, under, and migrating from the Houston Wood Preservation Works site frustrates the City of Houston's fundamental municipal purposes and powers. Houston is a home-rule city and has adopted its own charter in order to "protect life, health, and property" of the

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residents of Houston.¹ To that end, the City has the power to “enact and enforce all ordinances” that preserve human life and property within the City’s municipal boundary.² Because historical contamination at the Houston Wood Preservation Works site continues to affect both the residents of Houston and the property, the City will commence a lawsuit “to exercise such [municipal powers] as conduce to the public welfare, happiness, and prosperity of said city and its inhabitants.”³

In addition to harming the health and property interests of the residents of Houston’s Fifth Ward and Kashmere Gardens areas, the contamination attributable to the Houston Wood Preservation Works site is already affecting many other municipal interests. As noted above, the City owns and maintains substantial park, road, street, sidewalk, drinking water, sanitary sewer, and stormwater assets and infrastructure adjacent to the Facility. City-owned storm sewer facilities have already been impacted by creosote-related compounds and NAPL. The presence of these contaminants in municipal facilities result in new exposure risks, expanded migration pathways, and concerns about discharge compliance. Municipal lands and rights-of-way are, in some cases, only feet away from observed tar-like seeps at the Facility.

Thus, the City’s interests are already being harmed by contamination that is known to be connected to and caused by historical operations at the Facility. Although significant investigation work remains to be done at the Facility, it is beyond question that certain health and environmental impacts at the Facility and in the surrounding areas were caused by historical operations at the Facility. Given the lack of full characterization of both contamination at the Facility and contamination that may have already migrated from the Facility, the City notes that additional impacts may be discovered and observed as the result of further investigation.

Congress authorized federal courts to issue orders to abate imminent and substantial dangers to human health and the environment and these injuries may be redressed by judicial action. In an imminent and substantial endangerment RCRA citizen suit, courts have the power “to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person *to take such other action as may be necessary*, or both”⁴ The Supreme Court has recognized that Section (1)(B) of the RCRA citizen suit provision authorizes a private citizen to seek, and a court to order, “a mandatory injunction, *i.e.*, one that orders a responsible party to ‘take action’ by attending to the cleanup and proper disposal of toxic waste.”⁵ Thus, federal courts will have the discretion to craft an appropriate remedy that will help to relieve the burdens suffered by the residents of the Kashmere

¹ Hous., Tex., Code of Ordinances, Charter, Art. II, § 2(a) (1913).

² *Id.*

³ *Id.*

⁴ 42 U.S.C. § 6972(a).

⁵ *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996).

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Gardens neighborhood and the City, and alleviate other environmental and health impacts resulting from continued contamination at, under, and migrating from the Facility.

Facility-Related Contamination Is Presently an Imminent and Substantial Endangerment

As noted above, RCRA authorizes citizens to bring suit against “any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.”⁶ And, as noted, Congress assigned courts the role of crafting meaningful injunctive relief to require that responsible entities take action to eliminate these dangers.⁷

The contamination described in this notice of intent to sue (and several other documents available in connection with the regulatory and community engagement surrounding the Facility) meets the criteria of “imminent and substantial endangerment.” As the Fifth Circuit recognizes, the operative language in the statute is that solid or hazardous wastes “may present” an imminent and substantial endangerment.⁸ Although wood treatment activities at the Facility have ceased, legacy contamination continues to exist throughout the Facility and its surroundings—threats to human health and the environment thus are “present now, although the impact of the threat[s] may not be felt until later.”⁹ Finally, if those threats are “serious,” they qualify as “substantial.”¹⁰

The harms described in this notice, in EPA’s September 2021 letter to UPRR, and in other materials concerning the Houston Fifth Ward cancer cluster demonstrate that the contamination present at the Houston Wood Treatment Works facility may present an imminent and substantial endangerment to the residents of the Fifth Ward and Kashmere Gardens neighborhoods, to the City, and to the environment. To address that endangerment, and to obtain all lawful relief, the City intends to pursue its RCRA citizen suit after 90 days following your receipt of this letter.

Requested Relief

In its suit to abate the imminent and substantial endangerment posed by legacy contamination at the Facility, including contamination that has migrated into residential neighborhoods, the City of Houston intends to seek all relevant relief necessary to achieve environmental justice. As noted above, courts have broad discretion to issue mandatory injunctions to respond to environmental conditions that

⁶ 42 U.S.C. § 6972(a)(1)(B).

⁷ *Id.* § 6972(a). See also *Meghrig.*, 516 U.S. at 484.

⁸ See *Cox v. City of Dallas, Texas*, 256 F.3d 281, 299 (5th Cir. 2001).

⁹ *Id.*

¹⁰ *Id.*

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endanger human health and the environment. Therefore, the City of Houston will seek an order that, among other actions, requires UPRR to:

- Fully investigate, delineate, and characterize the on-site contamination attributable to the operation of the Houston Wood Preservation Works site;
- Fully investigate, delineate, and characterize off-site contaminants which have likely migrated from the Houston Wood Preservation Works site;
- Reexamine and validate the conceptual site model on which understandings of migration have been based to ensure investigation and remedial efforts are based on sound current science;
- Evaluate whether all Solid Waste Management Units associated with the Facility have been identified, defined, investigated, and closed including without limitation areas of impact at the Englewood Intermodal Yard;
- Fully investigate, remove, and properly dispose of NAPL, creosote, chlorinated compounds, and any NAPL-impacted and other contaminated soils in the Englewood Intermodal Yard and in other areas where soil contamination exceeds applicable cleanup standards – complete removal wherever technically feasible to better provide for source control;
- Complete risk assessments for all potentially affected residential areas including (a) expanded soil sampling at residential properties and (b) comprehensive soil gas surveys and actual indoor air monitoring, all of which shall be designed to detect the presence of any constituents potentially associated with the Facility including without limitation NAPL, dioxins, furans, mercury, hexavalent chromium, PCBs, arsenic, chlorinated compounds, PFAS, and any other creosote- or creosote extender-related materials;
- Ensure that all soil and groundwater sampling on- and off-site have been performed to include all potentially present parameters based on latest information;
- Provide for and agree to ongoing access to the Facility and UPRR property for purposes of any additional investigations the City may wish to perform;
- In light of comprehensive site data, evaluate the full range of potential remedial options and implement measures designed to provide maximum protection to the neighboring community and City assets;
- Provide a fully detailed engineering report related to the selection and implementation of any proposed final remedy;
- Design all technically practicable remediation and control measures, and fully implement such measures for remaining on-site contamination to prevent off-site migration of all contaminants discovered during the investigation phase including without limitation a properly designed slurry wall that will adequately contain all NAPL and other known contaminants and that provides for extraction of material from behind the wall;
- Provide for excavation and clean fill remedies and Texas Risk Reduction Program regulation Tier 1 residential cleanup standards for any areas of soil contamination identified off-site;

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- Provide for active groundwater remediation in areas of off-site impact to residential properties instead of engineering controls, institutional controls, or monitoring- or natural attenuation-based remedies;
- Fully fund the closure of the former City of Houston storm sewer infrastructure present on-site at the Facility and permanently prevent discharges from that infrastructure to existing City utilities;
- Fully assess City utilities and utility corridors adjacent to the Facility or near identified areas of contamination and clean, repair, and protect City storm sewers and other utilities and actively remediate or remove contaminated media from utility corridors to facilitate future maintenance work, construction, and expansions;
- Indemnify local governmental authorities for any investigatory, response, or preventive costs incurred in assessing, responding, or adapting to on- or off-site contamination originating at the Facility;
- Provide for appropriate dust suppression in connection with any remediation, excavation, or other activities at or about the Facility that may liberate contaminated soils or dusts;
- Provide for air monitoring in the neighboring community on a periodic basis and continuously during any remediation, excavation, or other activities that may cause the discharge of pollutants into the air;
- Create a fund to provide grants to community non-profit organizations including those that focus on education, health (air quality boxes similar to midtown, fitness center, water filtration devices), and beautification;
- Make aesthetic improvements in and around the site including a wooden fence with historic images of the Fifth Ward and Kashmere Gardens, landscaping, new sidewalks and streets, and noise reduction barriers near trains;
- Identify and implement any other relief necessary to fully address existing contamination including any previously unidentified contamination discovered during additional investigations;
- Provide access to health care and early diagnostic screening for any persons whose health may have been adversely affected by contamination from the Facility;
- Provide buyout and relocation funding and assistance in cooperation with relevant authorities to make whole residents of the Kashmere Gardens and Fifth Ward area neighborhoods whose properties have been affected by the off-site migration of contaminants from the Facility and who wish to move, with acquired properties being repurposed for community use and benefit; and
- Provide funding for temporary relocation of residents who wish to relocate during investigation and remediation activities.

In sum, the City of Houston intends to seek all relief available under RCRA to abate the imminent and substantial endangerment presented by the contamination at the Facility, including any additional responsive actions necessary to address conditions that are not known at the time of this notice of intent but may be discovered during efforts to fully investigate and characterize the site.

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Conclusion

It is beyond dispute that soils and groundwater at the Houston Wood Preservation Works site are contaminated, and the Facility has released contamination into the Kashmere Gardens and Fifth Ward area neighborhoods. It is also beyond dispute that contaminants at the Facility have exceeded state-based cleanup standards and that a complete characterization of on-site and off-site contamination has not yet occurred. Residents of areas in and around the Fifth Ward and Kashmere Gardens suffer from higher incidence of a variety of cancers consistent with exposure to contamination at the Facility, and the City of Houston bears and will continue to bear costs associated with this legacy contamination for which UPRR is responsible. This contamination presents an imminent and substantial endangerment to health and the environment, actionable under the citizen suit provision of RCRA.

For these reasons, the City of Houston intends to file suit 90 days after your receipt of this notice of intent. Although the City intends to pursue available remedies in court, the City is committed to achieving environmental justice for the residents of Kashmere Gardens and the Fifth Ward area—and protecting health, the environment, and infrastructure within the City—by the most effective means. Therefore, the City invites UPRR to propose concrete next steps that it guarantees will address historical contamination and make affected Houstonians whole.

Very truly yours,



Mr. Timothy A. Wilkins
Managing Partner, Austin / Counsel for the City of Houston