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BEFORE THE

STATE OF WISCONSIN

DIVISION OF HEARINGS AND APPEALS

In the Matter of the Alleged Discharge of a Hazardous Substance on Property Owned by Roger and Mildred Brettingen, Located in the City of Beaver Dam, Dodge County, Wisconsin	)))))	Case No. IH-95-16

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 18, 1994, the Department of Natural Resources (Department) issued order No. 94-SDEE-045 to Roger A. and Mildred I. Brettingen (Brettingens) requiring them to take the actions necessary to investigate and remediate the alleged discharge of a hazardous substance from property they own in Beaver Dam, Wisconsin. The Department received a request for hearing dated December 16, 1994, filed on behalf of the Brettingens. By letter dated January 4, 1995 the Department granted the request for hearing. On November 15, 1995, the Department of Natural Resources submitted a request for hearing to the Division of Hearings and Appeals.

Pursuant to due notice a hearing was held in Madison, Wisconsin on March 4, 1996. The parties filed written arguments after the hearing. The Department's initial brief was filed on April 8, 1996, the respondent's response brief was filed on May 6, 1996, and the Department's reply brief was filed on May 20, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the parties to this proceeding are certified as follows:

Roger and Mildred Brettingen, by

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Wisconsin Department of Natural Resources, by

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APPLICABLE LAW

Sec. 144.76(3), Stats., provides:

Responsibility. A person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state.

FINDINGS OF FACT

1. In 1984, Roger A. and Mildred I. Brettingen (Brettingens) purchased a building and dry cleaning business from Ken and Ruth Doyle. The dry cleaning business is known as ABC Cleaners (ABC). The building (ABC building) is located at 324 South Spring Street in Beaver Dam, Wisconsin.

2. At the time the Brettingens purchased the property, a business known as Schmitty's Gas Station (Schmittys) was located at 326 South Spring Street (the lot immediately south of the ABC building). Schmittys sold gasoline and performed motor vehicle repairs. Schmittys closed in October of 1990. Six underground petroleum storage tanks on the site were removed in July, 1991, and two hydraulic hoists were removed in September, 1992.

3. In 1992, Schmittys was the site of an investigation under the Petroleum Environmental Cleanup Fund Act (PECFA). The investigation conducted pursuant to PECFA found contamination resulting from the presence of petroleum-based products on the Schmitty site. The phase I investigation of the Schmitty site conducted by Woodward-Clyde detected the presence of a chlorinated hydrocarbon, tetrachloroethylene or perchloroethylene[1], in the groundwater of monitoring well 2 on the Schmitty site. Monitoring well 2 is located on the eastern edge of the Schmitty site. The perchloroethylene was measured at a concentration of 3900 parts per billion (ppb). The preventative action limit (PAL) for perchloroethylene was 0.1 ppb.

4. In its Phase II investigation, completed in October, 1993, Woodward-Clyde consultants drilled additional monitoring wells on the Schmitty site and tested groundwater

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[1]In their reports (exhibits 2 and 3), the Woodward-Clyde consultants identify the chlorinated hydrocarbon as tetrachloroethene, abbreviated as TCE. The Department witnesses testified this is a misidentification and should be perchloroethylene, abbreviated as PCE.

samples from the monitoring wells. The test results (in ppb) for the substances at issue as reported by Woodward-Clyde in exhibit 3 are as follows:

	ES/*	MW-1	MW-2	MW-3	MW-4	MW-5	MW-6	MW-7	MW-8
Tetrachloroethene***	1/.1	2500	240	<200	<500	10	2100	<1	<1
Trichloroethene***	5/.18	<100	3.7	<200	<500	9	23	<1	<1
cis-1,2-dichloroethene	100/10	<100	<1	<200	<500	<5	18	<1	<1

* ES is an abbreviation for "enforcement standard." The ES and PAL values listed are those at the time the report was completed These values have been modified effective September 1, 1995.

*** At the hearing Department witnesses testified that tetrachloroethene was actually perchloroethylene and trichloroethene was actually trichloroethylene.

5. Perchloroethylene (PCE or perc), trichloroethylene (TCE), cis-1, 2-dichloroethene (DCE) are hazardous substances as defined at sec. 144.01(4m), Stats. PCE, TCE, and DCE are considered volatile organic compounds. Soil borings disclosed no significant levels of volatile organic compounds in the unsaturated soil above the watertable in the vicinity of the Schmitty site.

6. PCE is a chlorinated hydrocarbon which is used as a solvent. Its most common usage is in dry cleaning. TCE and DCE are breakdown products of PCE.

7. Groundwater flow at the Schmitty site is to the west with a slight southerly component. In other words, groundwater flows from Spring Street, across the Schmitty site towards the Beaver Dam River.

8. The building owned by the Brettingens has been used for a dry cleaning business since at least 1975. Perc has been used as a dry cleaning agent at this site for many years. Perc is brought to ABC by a delivery service and stored in a bulk storage tank located in the basement of the building. The storage tank holds between 75 and 100 gallons of perc. Perc is pumped from the storage tank to the dry cleaning machines located on the first floor of the building.

9. When the Brettingens purchased the building and dry cleaning business, the dry cleaning machines used were "transfer machines." Transfer machines allow PCE vapors to escape into the air. In 1985, the Brettingens replaced the transfer machines with "dry to dry" machines. Dry to dry machines are a closed system which does not allow PCE vapors to escape. The Brettingens estimate their business currently uses approximately twenty gallons of perc per year.

The dry cleaning machine used by the Brettingens recycle perc through use of a "distiller" connected to the back of the machine. The recycling process leaves a "muck" or "still bottoms." The Brettingens drain the still bottoms into a container which is hauled away by a disposal company.

10. For their dry cleaning machines, the Brettingens have three banks of perc filters, a total of fifteen filters. Roger Brettingen changes one bank of filters every six months. Used perc filters are wrapped in plastic bags and placed in a box. The box is placed a barrel which is hauled away by a disposal company. Mr. Brettingen also does repairs and maintenance to the perc pump and the dry cleaning machines. While making repairs and performing maintenance, Mr. Brettingen testified that he places the pump in a five gallon pail so no perc is spilled.

The Brettingens testified that they have never spilled any perc which has run down a drain since they have operated the business. Department employees inspected the ABC building on April 22, 1994. As a result of the inspection, they concluded the Brettingens' "facility appeared to be operating in compliance with Chapter NR 600, Wis. Adm. Code."

11. The basement of the ABC building has three floor drains. The floor drains are connected to an underground lateral, which in turn is connected to the city's sanitary sewer. The city sanitary sewer is located beneath Spring Street. The sanitary sewer is an "old" ten inch vitreous clay sewer composed of three foot sections. The composition of the lateral serving the ABC building is unclear.[2]

12. On July 30, 1993, the Department of Natural Resources (Department) sent a "responsible party" letter to Roger and Mildred Brettingen, advising them that the Department believed them to be responsible for the PCE discharge found on the Schmitty site.

13. On January 4, 1994, the Department issued a notice of violation to the Brettingens. On November 18, 1994, the Department issued the order which is the subject of this hearing to the Brettingens.

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[2]At paragraph 13 of the Department's order (exhibit 26), the Department indicates that this sewer is also composed of vitreous clay; however, the basis of this finding is not in the hearing record. Mark Putra, in his testimony at the hearing and in his memo dated March 23, 1994, (exhibit 22) only described the composition of the city sanitary sewer.

DISCUSSION

The Department's case can be summarized as follows. Chlorinated hydrocarbons are present in the groundwater at the Schmitty site. One particular chlorinated hydrocarbon, PCE, is found at relatively high concentrations levels in the monitoring wells. PCE is commonly used for dry cleaning and is used by the Brettingens in their dry cleaning business. The Department's theory in the instant case is that PCE was discharged down a floor drain in the basement of the ABC building into the lateral beneath the ABC building and the city sanitary sewer. The PCE then leaked out of joints in the sanitary sewer into the underlying soil and into the groundwater. This theory is plausible; however, the testimony of the Department's witnesses contains no evidence of this particular scenario having ever occurred anywhere, let alone reliable evidence that it occurred in the instant case.

The Department directed its order at the Brettingens because their dry cleaning business is immediately adjacent to the Schmitty site and uses PCE. It is logical that the Department would investigate this potential source of PCE first; however, the record contains no reliable evidence that the ABC building is the source of the discharge. Because there is no contamination of the near surface soil, the Department concluded the contamination is not the result of a surface spill. Additionally, because the monitoring wells with the highest concentrations of PCE and its breakdown products are near the sanitary sewer, the Department concluded that it is likely the PCE is leaking from the sanitary sewer.

At page four of its initial brief, the Department states that "[a] search of records by Department employees did not document other sources or uses of PCE in the area of Schmitty's and the Brettingen property." At page one of its reply brief, the Department states that "[n]o businesses other than the Brettingens, existing or historical, were found in the area of Schmitt's that used PCE." The Department's investigation consisted of Mark Putra physically looking around the neighborhood and reviewing city directories at the library This is not sufficient evidence to make a finding that no other users of PCE exist or existed in the neighborhood. Department employees did not, for example, interview any other businesses in the area regarding possible use of PCE or interview PCE suppliers regarding any other customers in the area.

At page four of its initial brief, the Department also states that "[t]here is no record of PCE ever being used at Schmitty's and the owner of Schmitty's advised Woodward-Clyde that they did not use PCE." The only evidence to support this statement is a hearsay statement in a hearsay document. At page 6-1 of exhibit 2 (Woodward-Clyde's Phase I report for the Schmitty site), the consultant states "Mr. Schmitt, the site operator, stated that he was not aware of operations at the site which used or produced chlorinated solvents or wastes." This statement is only substantiated by the Department witnesses testimony that they are not aware of PCE being used by gasoline service stations.

The Department originally theorized that the PCE was leaking from the sanitary sewer in Spring Street which is up-gradient of the monitoring wells on the Schmitty site.[3] This means other businesses (another dry cleaner previously located at 110 South Spring Street (exhibits 11-13), for instance) connected to this sanitary sewer are the possible source of the PCE. This possibility was never considered by Mark Putra. When asked on cross-examination about possible PCE users connected to this sanitary sewer, Mr. Putra responded he did not know how the sewer ran other than past the ABC building and the Schmitty site.

Mr. Putra's failure to consider other possible PCE users connected to the sanitary sewer is partially explained by David Edwards' testimony that he believed the source of the PCE was "very close" to the Schmitty site because of the high concentration of PCE in the groundwater; however, one would suspect that PCE coming from the ABC lateral would be diluted when mixed with the other effluent in the sanitary sewer even if it only travelled a short distance. It should also be noted, that the PCE was only discovered on the Schmitty site because of a petroleum contamination problem. If additional monitoring wells were drilled, PCE may be found in the groundwater north of the ABC building.

At some point the Department began to allege that PCE was leaking from the lateral beneath the ABC building as well. Any PCE in the soil beneath the ABC building would not be carried by groundwater to the Schmitty site by its normal flow because the ABC building is side-gradient to the Schmitty site. The Department witnesses addressed this issue at the hearing by explaining that PCE could move in directions other than down-gradient. The two methods mentioned were by diffusion (movement on a molecular basis from an area of high concentration of PCE to areas of lower concentration). No estimation of the distance PCE would travel side-gradient or up-gradient was provided by the Department witnesses; therefore, it is impossible to determine whether this is a viable explanation. Additionally, by definition it would be expected that any PCE which moved side-gradient or up-gradient by diffusion would be relatively unconcentrated.

The other method by which PCE could be transported side-gradient or up-gradient is by being transported by groundwater which is affected by localized influences. Mr. Putra testified that under certain conditions the sanitary sewer would influence the flow of groundwater in the area. Mr. Putra testified that if the sewer is not water tight, groundwater

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[3]In a letter dated October 8, 1993 (exhibit 20), addressed to the Brettingens' attorney, Mark Putra and David Edwards stated "[w]hen we examined the plausible transport pathways for PCE ... we looked for a transport pathway in close proximity to the [monitoring] wells [with the highest contaminant concentrations]. This examination lead us to the utility lines <u>in the street</u>, which in turn lead us to your client's facility located next door." (emphasis added) At some point prior to issuing the order, the Department modified its theory and alleged PCE was also leaking from the lateral beneath the ABC building.

in the vicinity of the sewer line will flow to the sewer at times when the sewer line is not submerged in water. The size of the area affected depends on "how leaky" is the sewer line. The record contains no evidence as to whether these conditions exist with respect to the Spring Street sewer line.

The Department has put forth what it terms is a "plausible explanation for how PCE would leak out of old plumbing beneath a basement floor." (Mark Putra testimony at hearing) This explanation assumes that PCE was spilled or discharged into a floor drain in the ABC building. The record contains no reliable evidence that such a spill or discharge occurred. The Brettingens deny any spill or discharge of PCE into the floor drains at the ABC building. The Department presented no evidence of a spill or discharge occurring since the Brettingens purchased the building

The Department presented hearsay evidence of possible spills during the time the previous owner operated the dry cleaning business. Mark Putra testified that one of the previous owners, Ken Doyle, told him that no one was present in the basement when the perc tank was filled. Therefore, PCE may have been spilled when the tank was filled. Mr. Doyle also told Mr. Putra that there were no drip pans to catch perc underneath the self-service dry cleaning machines when he operated the business. Even if these hearsay statements were found to be reliable, at most they are a concession that spills <u>may</u> have occurred, not an admission that they did occur.

The other hearsay evidence presented by the Department is testimony that Dan Kenevan, a former member of the Beaver Dam Fire Department, told Mark Putra that in the early 1980's the fire department received complaints of the odor of dry cleaning solvent in the area of the ABC building. This testimony is double hearsay; however, even if it were found to be reliable, it only indicates that PCE was possibly mishandled, not that it was spilled or discharged into the basement floor drains. This testimony is also consistent with the Brettingens description of the difference between "transfer" dry cleaning machines, as opposed to the "dry-to-dry" dry cleaning machines.

The evidence of possible spills occurring when Ken Doyle owned the building raises another proof problem. Any spills occurring while Ken Doyle owned the building would have had to have occurred a minimum of eight years prior to the time PCE was discovered in the monitoring wells on the Schmitty site. The Department presented no evidence that PCE which leaked into the soil beneath the ABC building eight years prior to its discovery in the monitoring wells would be present in the groundwater on the Schmitty site at the concentration levels it was found.

In summary, the Department has developed a plausible theory of how PCE could have travelled from the ABC building to the groundwater on the Schmitty site. However, the Brettingens could be found to be responsible parties pursuant to sec. 144.76(3), Stats., only

if it were found that they had spilled or discharged PCE into the floor drains of the ABC building or if the PCE is in the soil beneath the ABC building and is seeping from there to the Schmitty site. The Department has failed to satisfy its burden of proof for either of these scenarios. No cost estimates were provided for the investigation and remediation the Department is seeking to order the Brettingens to do; however, it is not reasonable to order any work based solely on a plausible explanation.

CONCLUSIONS OF LAW

1. PCE, TCE and DCE are hazardous substances as defined by sec. 144 01(4m), Stats.

2. Pursuant to sec. NR 2.13(3)(a), Wis Adm. Code, the Department of Natural Resources has the burden to prove that Roger and Mildred Brettingen are responsible parties pursuant to sec. 144.76(3), Stats., with respect to the discharge of hazardous substances found on the Schmitty site. The Department has failed to satisfy this burden.

3. Pursuant to sec. 227.43, Stats., the Division of Hearings and Appeals has the authority to issue the following order.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, order No. 94-SDEE-045 is dismissed.

Dated at Madison, Wisconsin on July 5, 1996.

STATE OF WISCONSIN
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By Mark Kaiser
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

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NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.