

From: [Reisch, Scott H.](#)
To: [Lahontan](#)
Cc: Grey, Brian@Waterboards
Subject: Cleanup and Abatement Order R6T – 2022 – (Proposed) for Lake Tahoe Laundry Works Site, 1024 Lake Tahoe Boulevard, South Lake Tahoe, California/Supplemental Comment from Fox Capital Management Corporation
Date: Monday, November 14, 2022 10:45:37 PM
Attachments: [Letter to Katrina Fleshman 11.14.2022.pdf](#)

EXTERNAL:

Ms. Fleshman:

On behalf of Fox Capital Management Corporation, please see the attached letter.

Regards,

Scott

Scott Reisch

Partner

1601 Wewatta Street

Suite 900
Denver, CO 80202

Tel: +1 303 899 7300

Direct: +1 303 899 7355

Fax: +1 303 899 7333

Email: scott.reisch@hoganlovells.com

Hogan Lovells US LLP

www.hoganlovells.com

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November 14, 2022

By Electronic Mail

Katrina Fleshman, Executive Assistant
Lahontan Regional Water Quality Control Board
2501 Lake Tahoe Boulevard
South Lake Tahoe, California 96150
lahontan@waterboards.ca.gov

**Re: Cleanup and Abatement Order R6T – 2022 – (Proposed) for Lake Tahoe
Laundry Works Site, 1024 Lake Tahoe Boulevard, South Lake Tahoe,
California/Supplemental Comment from Fox Capital Management
Corporation**

Dear Ms. Fleshman:

As a follow-up to Fox Capital Management Corporation's comments on the above-referenced proposed Cleanup and Abatement Order ("Proposed Order"), submitted on September 19, 2022 ("Fox 2022 Comments"), I am writing to call the Regional Board's attention to an important development in *City of Modesto v. Dow Chemical Company*, Case Nos. CGC-98-999345 and CGC-98-999643 (consolidated) (Cal. Super. Ct., San Francisco Cty.). As the Regional Board knows, the Proposed Order relied heavily on the record in the *City of Modesto* case to support its position that a landlord of a retail drycleaner in the 1970s should have known of the reasonable possibility of a PCE discharge that would result in a groundwater contamination nuisance. See Staff Report Supporting Cleanup and Abatement Order No. R6T 2022 (Proposed) ("Staff Report") at 3-15, 76-79. Indeed, in introducing the evidentiary record, the Staff Report stated that "[t]he following evidence, largely from the *City of Modesto* litigation, corroborates that Fox knew or should have known of the use of PCE and associated risks of discharges at the Site." Staff Report 5. The Staff Report then went on to cite 33 separate exhibits and the deposition testimony of 14 individual witnesses from the *City of Modesto* litigation. Nearly three-quarters of the references listed in the Staff Report's Discharger Liability References were to documents or testimony from the *City of Modesto* litigation. See Staff Report at 76-79.

On October 20, 2022, the jury in *City of Modesto* issued its verdict finding defendant manufacturers of PCE liable for having failed to warn downstream users of PCE of the product's risks. In particular, the jury found that "**ordinary drycleaners would not**

have recognized the potential risks,” and that the **manufacturers “failed to adequately warn or instruct regarding potential risks” and “knew or reasonably should have known that users would not realize the danger,”** among other things. Verdict Form, *City of Modesto*, Case No. CGC-98-999345 (filed Oct. 24, 2022), at 9, 12 (attached as Exhibit A) (emphasis added). Notably, the evidentiary record before the jury included at least nine of the same exhibits and testimony from five of the same witnesses whose depositions the Regional Board cites in the Proposed Order.

The jury’s verdict completely undermines the Regional Board’s interpretation of the record in *City of Modesto* and makes it impossible for the Regional Board to continue to claim that the evidence from that case proves that retail drycleaners in the 1970s knew or should have known of the risks of PCE groundwater contamination from drycleaners. Without its avowed evidentiary foundation, the Regional Board cannot support its even more expansive claim that the owner of a shopping center in the 1970s (or its general partner) would have had the requisite knowledge of the risk of PCE discharges from a coin-operated drycleaner unit. See *United Artists Theatre Circuit, Inc. v. Reg’l Water Quality Control Bd.*, 42 Cal. App. 5th 851 (2019). Accordingly, Fox urges the Regional Board to reconsider its analysis of Fox’s liability with respect to the Lake Tahoe Laundry Works site and requests that the Regional Board withdraw the Proposed Order as it relates to Fox.

Respectfully submitted,



Scott H. Reisch
Counsel to Fox Capital Management Corporation

Enclosure

EXHIBIT A

FILED

San Francisco County Superior Court

OCT 24 2022

CLERK OF THE COURT
BY: *[Signature]*
Deputy Clerk

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SUPERIOR COURT OF CALIFORNIA
County of San Francisco

DEPARTMENT 504

CITY OF MODESTO

PLAINTIFF

VS.

DOW CHEMICAL COMPANY, ET AL.,

DEFENDANTS

Case No.: CGC-98-999345

VERDICT FORM

CITY OF MODESTO V. THE DOW CHEMICAL CO., ET AL.
Consolidated Case Nos. CGC-98-999345 and 999643

VERDICT FORM

SECTION A
NEGLIGENCE

Question No. 1: Has the City proved all of the following:

- A.** That Defendant negligently manufactured, distributed, or sold the product, used at the former Vogue Cleaners?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 1(A) is yes for a Defendant, then answer Question 1(B) for that Defendant. If your answer to Question 1(A) is no for a Defendant, stop here and proceed to Section B for that Defendant.

- B.** That the City was harmed?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 1(B) is yes for a Defendant, then answer Question 1(C) for that Defendant. If your answer to Question 1(B) is no for a Defendant, stop here and proceed to Section B for that Defendant.

C. That Defendant's negligence was a substantial factor in causing harm to the City?

Defendant	YES	NO
Dow	✓	
PPG	✓	

Proceed to Section B.

SECTION B (ALTERNATIVE TO SECTION C)

PRODUCT LIABILITY - DESIGN DEFECT
RISK-BENEFIT TEST

Question No. 2: Has the City proved all of the following:

- A.** That Defendant manufactured, distributed, or sold the product used at the former Vogue Cleaners?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 2(A) is yes for a Defendant, then answer Question 2(B) for that Defendant. If your answer to Question 2(A) is no for a Defendant, stop here and proceed to Section C for that Defendant.

- B.** That the City was harmed?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 2(B) is yes for a Defendant, then answer Question 2(C) for that Defendant. If your answer to Question 2(B) is no for a Defendant, stop here and proceed to Section C for that Defendant.

C. That the product's design was a substantial factor in causing harm to the City?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 2(C) is yes for a Defendant, then answer Question 3 for that Defendant. If your answer to Question 2(C) is no for a Defendant, stop here and proceed to Section C for that Defendant.

Question 3: Did the benefits of the product's design outweigh the risks of the design?

Defendant	YES	NO
Dow		✓
PPG		✓

Proceed to Section C.

SECTION C (ALTERNATIVE TO SECTION B)

PRODUCT LIABILITY - DESIGN DEFECT
CONSUMER EXPECTATIONS TEST

Question No. 4: Has the City proved all of the following:

- A.** That Defendant manufactured, distributed, or sold the product used at the former Vogue Cleaners?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 4(A) is yes for a Defendant, then answer Question 4(B) for that Defendant. If your answer to Question 4(A) is no for a Defendant, stop here and proceed to Section D for that Defendant.

- B.** That the product did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 4(B) is yes for a Defendant, then answer Question 4(C) for that Defendant. If your answer to Question 4(B) is no for a Defendant, stop here and proceed to Section D for that Defendant.

C. That the City was harmed?

Defendant	YES	NO
Dow	<input checked="" type="checkbox"/>	<input type="checkbox"/>
PPG	<input checked="" type="checkbox"/>	<input type="checkbox"/>

If your answer to Question 4(C) is yes for a Defendant, then answer Question 4(D) for that Defendant. If your answer to Question 4(C) is no for a Defendant, stop here and proceed to Section D for that Defendant.

D. That the product's failure to perform safely was a substantial factor in causing harm to the City?

Defendant	YES	NO
Dow	<input checked="" type="checkbox"/>	<input type="checkbox"/>
PPG	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Proceed to Section D.

SECTION D
PRODUCT MISUSE

Question 5:

- A. Was the product misused at the former Vogue Cleaners after it left the possession of Defendant?

Defendant	YES	NO
Dow		✓
PPG		✓

If your answer to Question 5(A) is yes for a Defendant, then answer Question 5(B) for that Defendant. If your answer to Question 5(A) is no for a Defendant, stop here and proceed to Section E for that Defendant.

- B. Was the misuse of the product so highly extraordinary that the misuse was not reasonably foreseeable to Defendant, and therefore the misuse should be considered as the sole cause of the City's harm?

Defendant	YES	NO
Dow		
PPG		

Proceed to Section E.

SECTION E
PRODUCT LIABILITY - FAILURE TO WARN

Question 6: Has the City proved all of the following:

- A.** That Defendant manufactured, distributed, or sold the product used at the former Vogue Cleaners?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 6(A) is yes for a Defendant, then answer Question 6(B) for that Defendant. If your answer to Question 6(A) is no for a Defendant, stop here and proceed to Section F for that Defendant.

- B.** That the product had potential risks that were known or knowable in light of the scientific knowledge that was generally accepted in the scientific community at the time of the manufacture, distribution, or sale?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 6(B) is yes for a Defendant, then answer Question 6(C) for that Defendant. If your answer to Question 6(B) is no for a Defendant, stop here and proceed to Section F for that Defendant.

- C. That the potential risks presented a substantial danger of harm if the product was used or misused in an intended or reasonably foreseeable way?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 6(C) is yes for a Defendant, then answer Question 6(D) for that Defendant. If your answer to Question 6(C) is no for a Defendant, stop here and proceed to Section F for that Defendant.

- D. That ordinary drycleaners would not have recognized the potential risks?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 6(D) is yes for a Defendant, then answer Question 6(E) for that Defendant. If your answer to Question 6(D) is no for a Defendant, stop here and proceed to Section F for that Defendant.

- E. That Defendant failed to adequately warn or instruct regarding potential risks?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 6(E) is yes, then answer Question 6(F). If your answer to Question 6(E) is no, stop here and proceed to Section F.

F. That the City was harmed?

Defendant	YES	NO
Dow	<input checked="" type="checkbox"/>	<input type="checkbox"/>
PPG	<input checked="" type="checkbox"/>	<input type="checkbox"/>

If your answer to Question 6(F) is yes for a Defendant, then answer Question 6(G) for that Defendant. If your answer to Question 6(F) is no for a Defendant, stop here and proceed to Section F for that Defendant.

G. That Defendant's lack of sufficient instructions or warnings were a substantial factor in causing harm to the City?

Defendant	YES	NO
Dow	<input checked="" type="checkbox"/>	<input type="checkbox"/>
PPG	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Proceed to Section F.

SECTION F
NEGLIGENT FAILURE TO WARN

Question No. 7: Has the City proved all of the following:

- A.** That Defendant manufactured, distributed, or sold the product used at the former Vogue Cleaners?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 7(A) is yes for a Defendant, then answer Question 7(B) for that Defendant. If your answer to Question 7(A) is no for a Defendant, stop here and proceed to Section G for that Defendant.

- B.** That Defendant knew or should reasonably have known that the product was dangerous or was likely to be dangerous when used or misused in a reasonably foreseeable manner?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 7(B) is yes for a Defendant, then answer Question 7(C) for that Defendant. If your answer to Question 7(B) is no for a Defendant, stop here and proceed to Section G for that Defendant.

- C. That Defendant knew or should reasonably have known that users would not realize the danger?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 7(C) is yes for a Defendant, then answer Question 7(D) for that Defendant. If your answer to Question 7(C) is no for a Defendant, stop here and proceed to Section G for that Defendant.

- D. That Defendant failed to adequately warn of the danger of the product, or instruct on the safe use of the product?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 7(D) is yes for a Defendant, then answer Question 7(E) for that Defendant. If your answer to Question 7(D) is no for a Defendant, stop here and proceed to Section G for that Defendant.

- E. That a reasonable manufacturer, distributor, or seller under the same or similar circumstances would have warned of the danger of the product, or instructed on the safe use of the product?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 7(E) is yes for a Defendant, then answer Question 7(F) for that Defendant. If your answer to Question 7(E) is no for a Defendant, stop here and proceed to Section G for that Defendant.

- F. That Defendant's failure to warn or instruct on the safe use of the product was a substantial factor in causing harm to the City?

Defendant	YES	NO
Dow	✓	
PPG	✓	

Proceed to Section G.

SECTION G
RELIANCE ON KNOWLEDGEABLE INTERMEDIARY

Question 8:

- A. Did Defendant sell the product to an intermediary purchaser?

Defendant	YES	NO
Dow	✓	
PPG	✓	

If your answer to Question 8(A) is yes for a Defendant, then answer Question 8(B) for that Defendant. If your answer to Question 8(A) is no for a Defendant, stop here and proceed to Section H for that Defendant.

- B. Did Defendant convey adequate warnings of the particular risks in the use of the product to the intermediary purchaser?

Defendant	YES	NO
Dow		✓
PPG		✓

If your answer to Question 8(B) is yes for a Defendant, then answer Question 8(C) for that Defendant. If your answer to Question 8(B) is no for a Defendant, stop here and proceed to Section H for that Defendant.

- C. Did Defendant actually and reasonably rely on the intermediary purchaser to convey adequate warnings of the particular risks in the use of the product to those which, like the former Vogue Cleaners, might encounter the risk of perchloroethylene?

Defendant	YES	NO
Dow		
PPG		

Proceed to Section H.

SECTION H
PUBLIC NUISANCE

Question No. 9: Has the City proved all of the following:

- A.** That Defendant's affirmative actions created a condition or permitted a condition to exist that was harmful to health, or was indecent or offensive to the senses, or obstructed the free use of public property so as to interfere with the comfortable enjoyment of life or property at the former Vogue Cleaners?

Defendant	YES	NO
Dow		✓
PPG		✓

If your answer to Question 9(A) is yes for a Defendant, then answer Question 9(B) for that Defendant. If your answer to Question 9(A) is no for a Defendant, stop here and proceed to Section I for that Defendant.

- B.** That the condition affected a substantial number of people at the same time?

Defendant	YES	NO
Dow		
PPG		

If your answer to Question 9(B) is yes for a Defendant, then answer Question 9(C) for that Defendant. If your answer to Question 9(B) is no for a Defendant, stop here and proceed to Section I for that Defendant.

- C. That an ordinary person would be reasonably annoyed or disturbed by the condition?

Defendant	YES	NO
Dow		
PPG		

If your answer to Question 9(C) is yes for a Defendant, then answer Question 9(D) for that Defendant. If your answer to Question 9(C) is no for a Defendant, stop here and proceed to Section I for that Defendant.

- D. That the seriousness of the harm outweighs the social utility of Defendant's conduct?

Defendant	YES	NO
Dow		
PPG		

If your answer to Question 9(D) is yes for a Defendant, then answer Question 9(E) for that Defendant. If your answer to Question 9(D) is no for a Defendant, stop here and proceed to Section I for that Defendant.

- E. That Defendant took affirmative steps that were a substantial factor in causing the City of Modesto's harm?

Defendant	YES	NO
Dow		
PPG		

If your answer to Question 9(E) is yes for a Defendant, then answer Question 9(F) for that Defendant. If your answer to Question 9(E) is no for a Defendant, stop here and proceed to Section I for that Defendant.

F. That the City did not consent to Defendant's conduct?

Defendant	YES	NO
Dow		
PPG		

If your answer to Question 9(F) is yes for a Defendant, then answer Question 9(G) for that Defendant. If your answer to Question 9(F) is no for a Defendant, stop here and proceed to Section I for that Defendant.

G. That the City suffered harm that was different than the type of harm suffered by the general public?

Defendant	YES	NO
Dow		
PPG		

If your answer to Question 9(G) is yes for a Defendant, then answer Question 9(H) for that Defendant. If your answer to Question 9(H) is no for a Defendant, stop here and proceed to Section I for that Defendant.

H. That the harm to the City was foreseeable by Defendant?

Defendant	YES	NO
Dow		
PPG		

Proceed to Section I.

SECTION I
STATUTE OF LIMITATIONS

Question No. 10(A): Has Defendant proved that the City's claimed harm occurred before December 3, 1995?

Answer "Yes" or "No":

Defendant	YES	NO
Dow		✓
PPG		✓

If your answer to Question 10(A) is yes for either Defendant, then answer Question 10(B). If your answer to Question 10(A) is no for both Defendants, stop here and proceed to Section I for that Defendant.

Question No. 10(B): Has the City proved that, before December 3, 1995, the City did not know, and could not reasonably have known, of PCE contamination at the former Vogue Cleaners.

YES _____

NO _____

Proceed to Section J.

SECTION J
COMPARATIVE FAULT

Question No. 11:

A. Was the City negligent?

YES _____ NO _____

If your answer to Question 11(A) is yes, then answer Question 11(B). If your answer to Question 11(A) is no, stop here and proceed to Section J.

B. Was the City's negligence a substantial factor in causing the City's harm?

YES _____ NO _____

If you answered "yes" to Question 11(B), complete question 11(C). Otherwise, proceed to Section J.

C. What percentage of responsibility for the City's harm do you assign to the following?

<i>The City of Modesto</i>	_____ %
<i>City of Modesto Sewer District No. 1</i>	_____ %
TOTAL	_____ %

Proceed to Section K.

SECTION K
DAMAGES

Instructions: *Only answer Question No. 12 if:*

You answered YES to all of Question 10 in Section H for either Defendant.

If the foregoing does not apply, skip Question No. 12, and read the instructions below to determine whether you should answer Question No. 13.

Question No. 12: What do you find to be the total amount of reasonable costs the City incurred between December 3, 1995 and December 3, 1998 to investigate and remediate PCE contamination at the former Vogue Cleaners?

Enter one amount, in dollars:

\$ _____
**TOTAL OF REASONABLE COSTS FROM
DECEMBER 3, 1995 TO DECEMBER 3, 1998**

Instructions: *Only answer Question No. 13 if:*

- You answered YES to all of Question 1 in Section A for a Defendant; and/or
- You answered YES to all of Question 2 and NO to Question 3 in Section B for a Defendant;
and/or
- You answered YES to all of Question 4 Section C for a Defendant; and/or
- You answered YES to all of Question 6 Section E for a Defendant; and/or
- You answered YES to all of Question 7 Section F for a Defendant;

If NONE of the above apply, and you did not award reasonable costs on Question 12, stop here, answer no further questions, and have your presiding juror sign and date this form at the end of this form. If NONE of the above apply, and you did award reasonable costs on Question 12, proceed to Section L.

Question No. 13: What do you find to be the total amount of damages, if any, suffered by the City?

Enter one amount, in dollars:

\$ 4,000,000
TOTAL/OF ALL DAMAGES

Proceed to Section L.

SECTION L
PUNITIVE DAMAGES FINDING

Instructions: If you have awarded damages against a Defendant to the City in Section K above, answer Question 14. If you have not awarded damages against a Defendant to the City in Section K, stop here, answer no further questions as to that Defendant, and have your presiding juror sign and date this form at the end of the form.

Question 14:

- A. Do you find, by clear and convincing evidence, that conduct for which you awarded damages against Defendant to the City in Section K above constituted malice?

Defendant	YES	NO
Dow	✓	
PPG		✓

If your answer to Question 14(A) is yes for a Defendant, then answer Question 14(B) for that Defendant. If your answer to Question 14(A) is no for a Defendant, stop here for that Defendant, proceed to end of this form and have your presiding juror sign and date it.

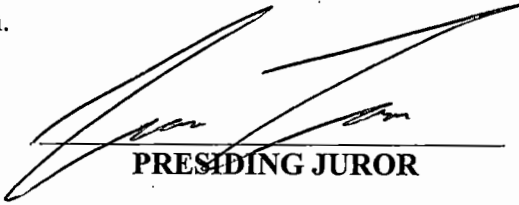
- B. Do you find, by clear and convincing evidence, that malicious conduct for which you awarded damages against Defendant to the City in Section K above was committed by one or more officers, directors, or managing agents of Defendant?

Defendant	YES	NO
Dow	✓	
PPG		

Please proceed to the end of this form and have your presiding juror sign and date it.

Have your presiding juror sign and date this form.

Dated: October 20, 2022



PRESIDING JUROR

After this verdict form has been signed, notify the clerk, bailiff or court attendant that you are ready to present your verdict in the courtroom.