CAROLYN "LINA" TANNER, ESQ.

[redacted]

July 8, 2013

Via E-Mail (dskau@puc.nv.gov) & Hand Delivery

Ms. Donna Skau
Commission Secretary/Personnel Officer
Public Utilities Commission of Nevada
1150 E. William Street
Carson City, NV 89701

Re: Chief Attorney/General Counsel Position

Dear Ms. Skau:

I am writing to you to express my interest in the position of Chief Attorney/General Counsel of the Public Utilities Commission of Nevada. I am a native of Northern Nevada, with a strong dedication to the field of energy and natural resources, and I would excel in such a position. I enclose the following documents for your consideration: my resume, supplemental questionnaire, professional references, writing sample and an executed Open Public Meeting Notice Acknowledgement form.

In my tenure as Senior Deputy Attorney General, I have represented the Nevada Division of Environmental Protection for four years. Recently, I have been assigned to represent the Division of Water Resources. I have shown commendable performance and commitment to my clients in complex litigation and appellate matters in state and federal court, and contested matters before the State Environmental Commission and the Board to Review Claims (Petroleum Fund Board). I have assisted my clients in drafting of proposed regulations and statutes to better serve their needs. I served as lead counsel in the bankruptcy case of *In re Tronox, Inc. et. al.*, wherein the company sought to discharge its liability for one of the largest sites of environmental contamination in the State of Nevada, and thereby endangering the drinking water supply for the people of Southern Nevada, Arizona, and Southern California. The recognition of my work in successfully resolving this important case lead to an invitation to speak at Water Law Institute's 13th Annual Conference – Law of the Colorado River. For my work on the remediation of the Rio Tinto Mine Site in Elko County, I was a co-recipient of the Enforcement Team of the Year Award, Superfund Site Remediation Enforcement of Region IX,

United States Environmental Protection Agency's Office of Solid Waste and Emergency Response.

Since my employment with the Office of Attorney General, I have gained extensive knowledge in federal and state environmental laws and regulations, state land, mining and water law, personnel, open meeting law, and general agency matters. I also provide transactional services for my clients, including the negotiation and drafting of consent decrees, administrative enforcement orders, access agreements, and environmental covenants. I have completed many of the supervisory courses offered through the State of Nevada, and I have supervised up to four deputy attorneys general at a time. In 2012, I was awarded the L.E.A.D.E.R of the Year award by Attorney General Cortez Masto in recognition of my service to this office.

I have been an attorney licensed in Nevada for the past nineteen years, and I have spent most of my career as a trial lawyer in both the criminal and civil arenas. I have an impressive ability to negotiate, advocate and litigate on behalf of my clients. I am skilled at public speaking, and I am able to marshal the fast moving dynamics of court room proceedings, legislative hearings, and commission meetings. Prior to my employment with the Attorney General's Office, I successfully ran my own law firm, supervising staff and contract attorneys, and only closed my practice due to a catastrophic family illness. When I returned to work as Director of Land Protection for the Nature Conservancy, I conducted land acquisition transactions, including negotiating with landowners, writing grants for acquisition funding and drafting transaction documents. I was also tasked with improving and maintaining valuable relationships with diverse groups such as federal and state agency partners, nonprofit partners, agricultural producers and sportsmen. As a senior research analyst for the Nevada Legislature, I assisted legislators by preparing in-depth research memoranda, draft testimony and bill presentations.

These are just a few of my accomplishments. I hope that you will find that this brief description, and the enclosed documents, describes a dedicated attorney with the experience, knowledge and skills to excel as the Chief Attorney/General Counsel of the Public Utilities Commission. If I can provide you with any additional information, please do not hesitate to contact me. I look forward to meeting with you. Thank you for your consideration.

Sincerely,

Carolyn "Lina" Tanner, Esq.

Enc.

CAROLYN "LINA" TANNER, ESQ.

[redacted]

PROFESSIONAL EXPERIENCE

July, 2009 to Present – Office of the Nevada Attorney General, Reno, NV
Senior Deputy Attorney General

- Represent the Nevada Division of Water Resources (NDWR) by defending the decisions of the State Engineer in appeals before federal and state courts.
- Represent the Nevada Division of Environmental Protection (NDEP) in complex litigation and appellate matters in federal and state courts, including bankruptcy court; as well as enforcement, permitting and regulatory matters before the State Environmental Commission and the Board to Review Claims.
- Supervise a team of four Deputy Attorneys General to provide exemplary legal representation to NDEP, NDWR, and to the Department of Conservation and Natural Resources.
- Handle transactional matters including the negotiation and drafting of consent decrees, administrative orders on consent, environmental covenants, and contracts.
- Provide counsel regarding agency policy and general matters.
- Proficient in environmental law and regulations at both the state and federal level, including CERCLA (response actions and NRDA), RCRA, SDWA and CWA, and their respective state analogs.
- Effectuated a successful resolution, as lead counsel, in the bankruptcy matter of *In re Tronox, Inc. et. al.* - a significant contributor to perchlorate and chromium impacted groundwater in the Lower Colorado Basin.
- Recipient of the Attorney General's L.E.A.D.E.R. of the Year Award for 2012.
- Co-Recipient of the Enforcement Team of the Year Award, Superfund Site Remediation Enforcement of Region IX, United States Environmental Protection Agency's Office of Solid Waste and Emergency Response, for the Rio Tinto Mine Site, Elko County, Nevada.

December, 2008 to June, 2009 – Nevada Legislative Counsel Bureau, Carson City, NV
Senior Research Analyst

- Provided the members and committees of the Nevada Legislature with exceptional research and assistance concerning public policy, including proposed legislation, and national, state, and local issues of interest to the State of Nevada and its political subdivisions.
- Composed persuasive and effective speeches and presentations for members of the Legislature to help ensure passage of their proposed legislation.

January, 2007 to November, 2008 – The Nature Conservancy, Reno, NV
Director of Land Protection

- Conducted land acquisition transactions for The Nature Conservancy, including landowner negotiations, grant writing, and drafting of transaction documents.
- Fostered working relationships with public and private partners to improve access to public funding for conservation programs and ecosystem scale restoration projects in Nevada, including federal and state land, wildlife and agricultural agencies, Nevada Cattlemen's Association, Nevada Farm Bureau, Nevada Mining Association, Nevada Wilderness Project, Friends of Nevada Wilderness, and private landowners.
- Served as the representative on the Technical Advisory Group of State Lands Question 1 Bond program, the Intermountain West Joint Venture, the Nevada League of Conservation Voters' Conservation Priorities Initiative, and the University of Nevada's Great Basin Environmental Program initiative.

2003 – 2007 Law Office of Carolyn Tanner Jensen, Ltd., Reno, NV
Owner/Practitioner

- Sole practitioner practicing throughout Northern Nevada in the areas of criminal defense, family law, real estate, estate planning and general civil practice.
- Provided skillful defense for both private and court appointed clients in all levels of crimes from arraignment through trial and sentencing.
- Gained experience in all areas of running an office, including marketing, advanced office and computer skills, financial responsibility, and supervising staff for all projects within the firm.

2001 - 2002 Kern & Rosenauer, Ltd., Reno, NV

Associate Attorney

- Assisted individual and corporate creditors in proceedings before the United States Bankruptcy Court, District of Nevada.
- Assisted in litigation of cases involving real estate, homeowner association, and general civil matters.

1997 - 2001 Washoe County Public Defender, Reno, NV

Deputy Public Defender

- Handled an extensive case load involving all levels of state crimes, from high profile homicide cases to misdemeanor and juvenile matters.
- Gained extensive experience in criminal litigation before all courts of Washoe County, Nevada.
- Graduate of the National Criminal Defense College, Trial Practice Institute, Mercer Law School, 1999.

1996 – 1997 Reno City Attorney , Criminal Division, Reno, NV

Deputy City Attorney

1995 – 1996 Nevada State Public Defender, Ely, NV

Deputy Public Defender

1994 – 1995 Second Judicial District Court, Family Division, Reno, NV

Law Clerk to Hon. Scott T. Jordan

EDUCATION

- **1991 – 1994 University of Denver, College of Law, Denver, CO**
  - Juris Doctor, 1994
  - American Jurisprudence Award, Family Law.
  - University of Denver Moot Court Appellate Competition – Best Brief Award.
- **1986 - 1990 Occidental College, Los Angeles, CA**
  - Bachelor of Arts for History, 1990.

PROFESSIONAL PRESENTATIONS & TRAININGS

- Panelist - Law of the Colorado River Conference, "Perchlorate Contamination in the Lower Colorado River Basin." March, 2011.
- Speaker – National Business Institute's Mastering Land Use & Planning Seminar, "Environmental Issues in Property Development." November, 2011.
- Speaker – Nevada State Bar CLE Hot Topics in Environmental Law Seminar, "Environmental Law and Bankruptcy." November, 2012.

PROFESSIONAL ASSOCIATIONS

- Nevada State Bar Association – Member since 1994.
  - Environmental & Natural Resources Law Section, Member At Large.
  - Public Utility Law Section.
- United States District Court, District of Nevada – Member since 2002.
- Ninth Circuit Court of Appeals – Member since 2012.
- Oregon State Bar Association - Member since 2004.
- Land Trust Alliance - Member since 2006.
- Environmental Law Institute – Member since 2011.
- Nevada Civil Enforcement Representative, Western States Project.

COMMUNITY CONTRIBUTIONS

- SCRAP Domestic Violence, Board Member.
- Northern Nevada Children's Cancer Foundation, Advisory Board Member.
- Ranch Open Space of Nevada Agricultural Land Trust, Board Member.

CAROLYN "LINA" TANNER

[redacted]

REFERENCES:

1) [redacted]

2) [redacted]

3) [redacted]

4) [redacted]

CAROLYN "LINA" TANNER, ESQ.

SUPPLEMENTAL QUESTIONNAIRE

1. **Describe your regulatory experience.** As a senior deputy attorney general representing the Nevada Division of Environmental Protection (NDEP) and the Division of Water Resources (NDWR), I have spent the last four years of my career handling regulatory enforcement matters, permitting issues, and defending regulatory agencies' decisions before state and federal courts, and the State Environmental Commission (SEC).

2. **Describe your administrative law experience.** The NDEP and the SEC are subject to the Nevada Administrative Procedure Act. Accordingly, I am skilled in its requirements as to contested matters, as well as to procedures required to properly propose and adopt agency regulations.

3. **Describe your employment law experience.** Although my focus as a Senior Deputy Attorney General has been on regulatory matters, as their assigned attorney, clients often ask general personnel questions. To ensure I am sufficiently equipped to respond to these questions, I have taken several supervisory courses offered by the State of Nevada addressing personnel issues such as hiring, discipline, etc... Additionally, in my private practice, I represented employees in contested matters before on the administrative level.

4. **Describe your experience with Nevada's Open Meeting Law and Public Records Law.** I have completed the Attorney General's training on Open Meeting Law. I have appeared numerous times before the SEC, and the Board to Review Claims (Petroleum Fund Board) in contested matters. I have monitored meetings before the Wildlife Commission and the Sagebrush Ecosystem Council. In addition, I served on the Technical Advisory Group of the State Lands Question 1 Bond Program. I have assisted colleagues in preparing agendas to comply with Nevada's Open Meeting Law. I am also tasked with reviewing

public records requests that are received by the NDEP's Bureau of Corrective Actions.

5. **Describe your litigation experience.** My litigation experience is extensive. For the majority of my nineteen year career, I have served as a litigator in both the criminal and civil arenas. I have litigated matters ranging from high profile homicide cases to civil disputes in justice court. This experience has been invaluable on many levels: I am able to speak clearly and convincingly to people of all walks of life; I am able to think on my feet in times of high stress; and I have learned the art of persuasion despite the often unfortunate facts of a case.

6. **Describe your Legislative experience in the following areas:**
   a. **Developing BDRs.** I have assisted my clients in reviewing and analyzing existing laws and regulations in an effort to seek necessary amendments.
   b. **Analysis of a Bill's impact on Department/Agency.** I have analyzed bills on behalf of my agency clients and on behalf of my office on many occasions. In addition, my work as a Senior Research Analyst at the Nevada Legislature often involved the analysis of bills pending before the Legislature as well as comparisons with bills from sister states.
   c. **Testifying before the Legislature.** I have not testified before the Legislature. However, I have prepared testimony for legislators in my role as Senior Research Analyst for the Nevada Legislative Counsel Bureau. Further, my experience as a litigator has more than prepared me for persuasive public presentations and testimony.

7. **Describe your administrative and supervisory experience of attorneys.** I am a Supervising Senior Deputy Attorney General. As team leader for the NDEP, I supervised four deputy attorneys general. In my current role as team leader for NDWR, I supervise one senior deputy attorney general. I have completed the mandatory supervisor trainings provided by the State of Nevada, and I am in the process of completing the discretionary trainings.

8. **Describe how hiring you for this position would add value to the Commission.** I believe I am well qualified to assist the Commission as General Counsel. The

last six years of my career have been dedicated to natural resources. I believe this dedication and my unique skill set is quite complementary to much of the Commission's work. Through my work with NDEP, I have experience with drinking water systems and pipeline issues. I am an ethical, energetic and hard working attorney with a particular interest in the work of the Commission. As a supervisor, I encourage a collegial atmosphere for the good of the employees and the organization as a whole. I believe these qualities would add significant value to the Commission.

BRIAN SANDOVAL
Governor

STATE OF NEVADA

PUBLIC UTILITIES COMMISSION

OPEN PUBLIC MEETING NOTICE

I, Carolyn E. Tanner, hereby acknowledge that I have received actual notice of the Public Utilities Commission, or selection committee thereof, intent to consider my resume and required information for the position of Chief Attorney / General Counsel.

Date and Time:	Tuesday, July 16, 2013 at 9:30 a.m.
Place of Meeting:	Public Utilities Commission Hearing Room B 1150 E. William Street Carson City, Nevada 89701
Video Conference To:	Public Utilities Commission Hearing Room B 9075 W. Diablo Way, Suite 250 Las Vegas, Nevada 89148

I further acknowledge that the consideration of my resume and required information may be conducted in an open, public meeting and that my resume and required information related thereto may become a part of the public record.

Carolyn E. Tanner
Printed Name of Applicant

Carolyn E. Tanner
Signature of Applicant

July 7, 2013
Date

NORTHERN NEVADA OFFICE
1150 East William Street
Carson City, Nevada 89701-3109
(775) 684-6101 • Fax (775) 684-6110

http://puc.nv.gov

SOUTHERN NEVADA OFFICE
9075 West Diablo Drive, Suite 250
Las Vegas, Nevada 89148
(702) 486-7210 • Fax (702) 486-7206

Docket No. 12-16409

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETER J. VOGGENTHALER; *et al., Plaintiffs,* and
STATE OF NEVADA, DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES, DIVISION OF ENVIRONMENTAL
PROTECTION, *Plaintiff-Appellee*

v.

MARYLAND SQUARE SHOPPING CENTER LLC, *et al. Defendants,* and
SHAPIRO BROTHERS INVESTMENT CO., *Defendant- Appellant.*

On Appeal from the United States District Court for the District of Nevada,
Case No. 2:08-CV-01618-RCJ (Las Vegas)

NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S ANSWERING BRIEF

CATHERINE CORTEZ MASTO
Attorney General
CAROLYN E. TANNER
Senior Deputy Attorney General
Nevada State Bar No. 5520
JASMINE K. MEHTA
Deputy Attorney General
Nevada State Bar No. 8188
100 North Carson Street
Carson City, Nevada 89701-4717
Telephone: (775) [redacted]

Attorneys for Plaintiff-Appellee Nevada Division of Environmental Protection

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I. STATEMENT OF JURISDICTION

The State of Nevada Department of Conservation and Natural Resources, Division of Environmental Protection, (hereinafter "NDEP"), by and through counsel, Nevada Attorney General Catherine Cortez Masto; Carolyn E. Tanner, Senior Deputy Attorney General; and Jasmine K. Mehta, Deputy Attorney General, respectfully submits its Answering Brief. The NDEP agrees with Appellants' Jurisdictional Statement.

II. ISSUES PRESENTED FOR REVIEW

Issue No. 1: Whether the District Court properly awarded relief under CERCLA and state law to the NDEP on summary judgment because SBIC failed to produce or present evidence that SBIC did not release or threaten to release PCE into the environment when it operated the Site?

Issue No. 2: Whether the District Court properly asserted jurisdiction to adjudicate NDEP's CERCLA claims against SBIC notwithstanding SBIC's appeal pending for alleged procedural defects relative to the Homeowner Plaintiffs' RCRA Injunction?[1]

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[1] All applicable statutes and rules are contained in SBIC's Appellate Brief dated October 9, 2012.

III. STATEMENT OF CASE AND MATERIAL FACTS

This case stems from the discovery of perchloroethylene ("PCE"), emanating from a former dry cleaning facility located in a strip mall, known as the Maryland Square Shopping Center, in Las Vegas, Nevada (the "Site" or the "Shopping Center").

A. Owners of the Site.

The Shopping Center was formerly owned by the Kishner Defendants.[2] The Shopping Center is located at 3651 through 3681 South Maryland Parkway in Las Vegas, Nevada. II ER 270. In 1968, Herman Kishner owned the Shopping Center. II ER 270. In 1969, he transferred title to The Herman Kishner Trust, created in 1969. II ER 270. Maryland Square Shopping Center LLC is a Nevada company and successor-in-interest to the Herman Kishner Trust with respect to the Shopping Center. II ER 270.

In 2002, Clark County School District purchased the Shopping Center from

[2] The Kishner Defendants include Maryland Square Shopping Center, LLC, the Herman Kishner Trust d/b/a Maryland Square Shopping Center, and Irwin Kishner, Jerry Engel and Bank of America, N.A. as Trustees for The Herman Kishner Trust (the "Kishner Defendants").

Maryland Square Shopping Center LLC. II ER 271. In 2005, an entity named Maryland Square, LLC ("MSLLC") purchased the Shopping Center from Clark County School District and is the current owner of the Shopping Center. II ER 271.

B. Operators of the Site.

From approximately 1968 through August 31, 1984, under a lease from the owner, SBIC operated a dry cleaning facility at the Site. II ER 271. The dry cleaning facility was constructed by the Kishner Defendants to the specifications of SBIC, and specifically a "sewage drain adequate for Lessee's business..." SER 39, and SER 38, 40 at (e). These specifications included concrete flooring, with trench drains running the length of the building and leading to a floor drain. In 2003, Converse Consultants, a certified environmental manager for the Kishner Defendants, noted that the releases to groundwater from the Site came through this trench style drain. II EC at 226. SBIC used PCE in their dry cleaning operations. II ER 271. PCE is a solvent commonly used in dry cleaning operations. II ER 272. It is a hazardous substance as defined by CERCLA and Nevada Administrative Code ("NEV. ADMIN. CODE") 445A.3454. II ER 272. SBIC admits

to spilling and releasing PCE at the Site. III ER 481. In 1984, SBIC sold the dry cleaning operation to Johnson Group, Inc., and the Johnson Group, Inc. and/or its successor DCI USA, Inc. operated the facility until 2000. II ER 272.

C. Discovery of Contamination On and Emanating From the Site.

The PCE discharge at the Site was first discovered on November 29, 2000, during an environmental inspection done as part of the pre-purchase investigation by Clark County School District. II ER 272. The NDEP received an initial report on July 21, 2001. II ER 272. Through oversight of NDEP, the Kishner Defendants have conducted an investigation of the Site. II ER 272. This investigation has revealed the presence of PCE in the soil and groundwater in and around the Site. II ER 272. The highest concentrations of PCE were found in the soils in and around the floor drain and drain pipes underneath the facility. IV ER 552 – 553; SER 50.

Further sampling indicated that a plume of PCE in the groundwater was migrating eastward from the Site (the "Plume"). II ER 272. The Plume has extended into a residential Las Vegas neighborhood (the "Neighborhood"). II ER 272. The Plume has volatized into soil gas beneath the Neighborhood, thereby presenting a threat to the indoor air of the residents of the Neighborhood. II ER

. . . .

272. Consultants for both the Kishner Defendants and for the Homeowner Plaintiffs determined that the PCE concentration in the Plume is above the maximum contaminant level, or federal drinking water standard, for PCE. II EC at 223; VI ER 554. A soil gas report was submitted to NDEP in April, 2007. II ER 273. Computer simulations based on that data indicated a potential for vapor intrusion into the homes of the Neighborhood. I ER 273. Based on the NDEP's evaluation, the NDEP determined that the potential existed for PCE vapor intrusion from shallow groundwater into the Neighborhood residences, at concentrations that could increase the probability of exposed individuals contracting cancer to higher than 1×10^{-4}, or 1 in 10,000, based on the U.S. Environmental Protection Agency's residential exposure scenario. II ER 273.

To mitigate the potential public health risk, the NDEP offered to install subslab depressurization systems ("SSD systems") in homes that tested above 32 $\mu g/m^3$ PCE in indoor air to vent the PCE vapors outside of the homes. II ER 273. Beginning in August 2007 and continuing into early 2008, NDEP also notified residents, property owners, and local government officials of the PCE contamination in groundwater under the Neighborhood and possible long-term health effects. I ER 273 - 274. In 2008, NDEP notified the current and former

owners and operators of the site (the "Maryland Square Defendants"), that it had expended approximately $160,000 to determine whether the PCE posed "a potential human exposure" in the Neighborhood, that it intended to expend additional state funds to address human exposures to PCE, and that it would seek recovery of its expenses from the responsible parties. II ER 274.

D. Claims Before the District Court.

In 2008, several residents located down gradient of the Plume (the "Homeowner Plaintiffs"), the Maryland Square Defendants, including SBIC, under the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. § 6972 for injunctive relief to effectuate the remediation of the soil and groundwater contamination. II ER 274. In 2009, NDEP separately asserted claims under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et. seq.* and state law. IV ER 625. The District Court consolidated the two cases. IV ER 527.

In response to certain discovery requests, SBIC admits knowledge of PCE spills and releases "to the extent the time frame is from 1969 to August 31, 1984, and to the extent certain quantities of PCE spilled onto the concrete floor over the

25 year period of 1969 to 1984, including a spill in 1982 resulting from a filter change." III ER 470. SBIC further clarified the extent of these spills and releases when it later admitted that "occasionally a button trap would clog and amounts of PCE would spill onto the concrete floor.... also...in 1982... a filter change resulted in the spill of PCE onto the concrete floor. Steve Yuddleson, a former employee of [SBIC] estimates that 100 gallons of PCE spilled during the course of that filter change in 1982..." III ER 481.

On October 20, 2009, the Homeowner Plaintiffs moved for summary judgment on their RCRA claim. IV ER 662. On July 22, 2010, the Court granted their motion. IV ER 527. On December 27, 2010, the Court issued an injunction based upon their claim (the "RCRA Injunction") against the defendants. III ER 496. The Kishner Defendants, MSLLC, and SBIC each filed notices of appeal of this decision. IV ER 721.

On December 7, 2011, the NDEP moved for summary judgment against all of the defendants, including SBIC. III ER 412. On May 17, 2012, the District Court granted summary judgment to NDEP and against SBIC. On June 14, 2012, SBIC filed its Notice of Appeal of the Order. II ER 25.

At the time of the District Court's decision of NDEP's motion for summary

judgment, an appeal by SBIC of the RCRA Injunction was pending before this Court. That appeal, filed as Case No. 11-15174, presents two procedural issues for review: (1) whether the District Court erred in entering the RCRA Injunction when no party to the action ever moved for injunctive relief against SBIC; and (2) whether the District Court had jurisdiction to issue the RCRA Injunction against SBIC when an appeal was pending on the issue of whether the District Court should have granted injunctive relief to the Homeowner Plaintiffs under RCRA. SER at 20 (Appeal No. 11-15174, Doc. 19).

IV. SUMMARY OF ARGUMENT

The District Court properly granted the NDEP's motion for summary judgment against SBIC because SBIC failed to produce any evidence to refute or controvert the NDEP's evidence that SBIC repeatedly released PCE to the environment during the course of its lease of the Site. The dry cleaning facility, built to SBIC's specifications, included concrete floors with trench drains that ran fluids spilled onto the floor into a floor drain. The soils beneath the concrete floor surrounding floor drain and drain pipes underneath the facility had the highest concentrations of PCE at the Site. SBIC failed to present any evidence to

controvert the obvious: that an approximate 100 gallons of PCE, or enough liquid to fill a volume of 13.37 cubic feet, disposed onto the concrete floor is a release to the environment, and that this catastrophic release of PCE went anywhere but down the drain. Further, SBIC failed to present any evidence of how SBIC addressed repeated spills of PCE resulting from clogged button traps.

This undisputed evidence establishes as a matter of law that SBIC's violated CERCLA and is therefore responsible for the past and future response costs of the NDEP, as well as for injunctive relief under NRS 445A.695. SBIC repeatedly misstates its own burden under the standard the District Court must apply in determining whether to grant summary judgment. Moreover, SBIC's focus on the competing expert opinions regarding the age of the initial release of PCE to groundwater are immaterial to the determination of SBIC's liability.

The District Court had jurisdiction to adjudicate the NDEP's motion for summary judgment on its CERCLA and state law claims when the only appeal pending at the time of the decision was one by SBIC for alleged procedural defects that arose during the District Court's previous determination of the Homeowner's RCRA claim for injunctive relief.

V. ARGUMENT

A. Standard of Review.

The district court's decision to grant summary judgment in favor of the NDEP is subject to de novo review by this Court. *Szajer v. City of Los Angeles,* 632 F.3d 607, 610 (9th Cir. 2011). A court should grant summary judgment when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56. "When the underlying facts are not in dispute, the court's only function is to determine whether the district court correctly applied the law." *Szajer*, 632 F.3d at 610. This Court may affirm the grant of summary judgment to the NDEP on any ground supported by the record. *Video Software Dealers Ass'n v. Schwarzenegger,* 556 F.3d 950, 956 (9th Cir. 2009).

The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*

Corp v. Catrett, 477 U.S. 317, 323 (1986). Thus, a well-pled motion for summary judgment then shifts the burden to the non-moving party to show the existence of specific facts that demonstrate there is a genuine issue of material fact requiring a trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The non-moving party's evidence cannot be merely colorable but must be significantly probative and sufficient to allow a reasonable jury to enter a verdict in its favor. *Id.* at 249. In opposing a motion for summary judgment the non-moving party "may not rest upon the mere allegations or denials of his pleading, but...must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 248 (quoting *First National Bank v. Cities Serv. Co.*, 391 U.S. 253, 288-289 (1968)). A mere scintilla of evidence or bare assumptions are not sufficient to withstand the motion. *Id.* at 252.

Inferences may be drawn from the facts that are placed before the court in favor of the opposing party. *Matsushita Electric Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574,587 (1986), 106 S.Ct. 1348 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from

which the inference may be drawn. *Richards v. Nielsen Freight Lines,* 602 F.Supp. 1224, 1244-45 (E.D.Cal.1985), *aff'd,* 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita,* 475 U.S. at 586 (citations omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* at 587 (citations omitted).

B. The District Court Properly Awarded NDEP Relief Under CERCLA for Cost Recovery and Declaratory Relief.

CERCLA, as amended, was enacted "in response to the serious environmental and health risks posed by industrial pollution." *Burlington Northern and Santa Fe Railway Company v. United States*, 129 S. Ct. 1870, 1874 (2009), citing *United States v. Bestfoods*, 524 U.S. 51, 55, 118 S. Ct. 1876 (1998). "The Act was designed to promote the 'timely cleanup of hazardous waste sites' and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Burlington Northern*, 129 S. Ct. at 1874 (quoting *Consolidated Edison Co. of N.Y. v. UGI Util., Inc.*, 423 F.3d 90, 94 (2nd Cir. 2005)). The Court of Appeals construes CERCLA liberally to achieve these

goals. *Carson Harbour Village, Ltd. v. Unocal Corp.* 270 F.3d 863, 881 (9th Cir. 2001) (citing *Kaiser Aluminum & Chemical Corp. v. Cattellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992)).

The Act imposes strict liability for environmental contamination upon the owner or operator of a facility or upon the person who was the owner or operator at the time of hazardous waste disposal. 42 U.S.C. § 9607(a). A person or entity identified as a potentially responsible party ("PRP") "may be compelled to clean up a contaminated area or reimburse the Government for its past and future response costs." *Burlington Northern*, 129 S. Ct. at 1878.

Under CERCLA, PRPs are liable for:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Burlington Northern, 129 S. Ct. at 1878, n. 6 (quoting 42 U.S.C. § 9607(a)(4)).

In *Pakootas v. Teck Cominco Metals*, 452 F.3d 1066 (9th Cir. 2006), this Court succinctly stated the conditions that must be satisfied to find a PRP liable under CERCLA:

> Unlike other environmental laws such as the Clean Air Act, 42 U.S.C._§§ 7401-7671q, Clean Water Act, 33 U.S.C. §§ 1251-1387, and Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k, CERCLA is not a regulatory statute. Rather, CERCLA imposes liability for the cleanup of sites where there is a release or threatened release of hazardous substances into the environment. *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 881 (9th Cir.2001) (en banc) ("CERCLA holds a PRP liable for a disposal that 'releases or threatens to release' hazardous substances into the environment."). CERCLA liability attaches when three conditions are satisfied: (1) the site at which there is an actual or threatened release of hazardous substances is a "facility" under § 9601(9); (2) a "release" or "threatened release" of a hazardous substance from the facility has occurred, § 9607(a)(4); and (3) the party is within one of the four classes of persons subject to liability under § 9607(a).

452 F.3d at 1073 – 1074. See also *3550 Stevens Creek Associates v. Barclays Bank*, 915 F.2d 1355, 1358 (9th Cir. 1990); *Gregory Village Partners, L.P. v.*

Chevron USA, Inc., 805 F. Supp.2d 888, 2011 WL 3359928 (N.D. Cal., 2011). [3] SBIC asserts that it is not liable under CERCLA based upon two primary points. First, without authority or argument, SBIC claims that its admissions of both occasional spills of "amounts" of PCE and at least one catastrophic discharge of approximately 100 gallons of PCE during its operation of the Site do not meet the definition of a "release" under CERCLA; therefore, NDEP cannot show that SBIC was an entity that "*at the time of disposal* of any hazardous substance owned or operated [the] facility at which such hazardous substances were disposed of..." 42 U.S.C. §9607 (a) (2) (emphasis added). See Appeal at 16.

Then, the thrust of SBIC's appeal turns to the immaterial battle of expert

[3] CERCLA 107 (a) specifies these four classes of persons as:
(1) the owner and operator of a vessel or a facility,
(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance ...." Only (2) is at issue in this case.

opinions as to the date of the initial release of PCE. As to its first theory, SBIC's argument lacks merit, and a close look at the definitions of key terms of CERCLA make this clear. The second theory, rejected outright by the District Court, thereafter warrants little discussion.

i. SBIC's Repeated Spills of PCE were Releases or Threatened Releases to the Environment under CERCLA.

It is undisputed that SBIC operated the facility and owned the machinery that utilized PCE from 1968 to August 31, 1984. It is undisputed that the dry cleaning facility was constructed with concrete flooring that included trench style drains, leading to a floor drain and piping to the sewer. It is undisputed that SBIC used PCE to dry clean its customers' clothes. It is undisputed that SBIC spilled or disposed of PCE. It is undisputed that the highest concentrations of PCE at the Site were in the soils beneath the floor drain and the drain pipes. SBIC contends that its limited admission of spilling or disposing of PCE onto the concrete floor is not an admission that it "released" or "threatened to release" PCE *into the environment* as required by CERCLA § 107 (a) (4); 42 U.S.C. § 9607(a)(4).

CERCLA § 101 (8) defines "environment" as follows:

> The term "environment" means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.], and (B) *any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.*

42 U.S.C. § 9601 (8) (emphasis added). CERCLA §101 (22) defines "release" in relevant part as follows:

> The term "release" means *any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment* (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons...

42 U.S.C. § 9601 22) (emphasis added). CERCLA utilizes the RCRA definition of "disposal". See 42 U.S.C. § 9601 (29). Disposal is defined as:

> ...the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste *into or on any land* or water *so that such solid waste or hazardous waste or any constituent thereof may enter the*

> *environment or be emitted into the air or discharged into any waters, including ground waters.*

42 U.S.C. § 6903 (3) (emphasis added).

SBIC failed to provide any authority to the District Court, or to this Court on appeal, as to why it believes that spilling or releasing PCE onto a concrete floor equipped with trenches leading to a floor drain is not in and of itself a release, or at minimum a threatened release, to the environment. SBIC provides no authority to distinguish a concrete surface from any other "land surface" (42 U.S.C. 9601 (8)) or "any land" (42 U.S.C. § 6903 (3)) as those terms are used in CERCLA.[4]

Courts have interpreted the terms "release" and "threatened release" broadly. See *Amland Properties Corp. v. Aluminum Co. of America,* 711 F.Supp. 784, 793 (D. N.J.1989); see also *Amoco Oil Co. v. Borden. Inc.,* 889 F.2d 664, 669 (5th Cir.1989). The presence of hazardous substances in the soil, surface water, or groundwater of a site demonstrates a "release." *U.S. v. Hardage,* 761

[4] Of note, SBIC does not attempt to argue that its admitted spills fall within exclusion specified in CERCLA §101 (22) regarding tort claims by persons exposed to hazardous materials solely within a workplace building, and nor could it. Upon information and belief, there have been no tort claims by employees of SBIC, and Courts have thus far primarily applied this exclusion to the presence of asbestos within a building. *See 3550 Stevens Creek Associates v. Barclays Bank of California,* 915 F.2d 1355 (9th Cir. 1990).

F.Supp. 1501, 1510 (W.D. Okl.1990). There is no minimum quantity or concentration threshold to determine whether there has been a "release" of a hazardous substance. See *A & W Smelter and Refiners, Inc. v. Clinton,* 146 F.3d 1107, 1110 (9th Cir.1998); *Burlington Northern R. Co. v. Woods Industries, Inc.* 815 F.Supp. 1384, 1390 (E.D. Wash. 1993); *United States v. Western Processing Co.,* 734 F.Supp. 930, 936 (W.D.Wash.1990). There is no requirement that a release be made directly to soil or water. See *Lincoln Properties, Ltd. v. Higgins,* 1993 WL 217429, 19 - 20 (E.D.Cal. 1993) (not reported in F.Supp.)[5]; cited by *Elf Atochem North America, Inc. v. U.S.,* 868 F.Supp. 707 (E.D. Pa. 1994) (court found there was no doubt that once hazardous waste was disposed into drain pipes it would reach the environment); and *Differential Development-1994, Ltd. v. Harkrider Distributing Co.*, 470 F.Supp.2d 727 (S.D. Texas 2007) (release to a sewer or other container or facility that subsequently leasks or spills its contents is considered a release to the environment.) Even passive conduct such as leaking, leaching and escaping is within the definition of a "release." See *Westfarm*

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[5] The District Court relied heavily on this case in the decision to grant the Homeowner Plaintiffs' permanent injunction under RCRA. IV ER 547, 553-554, 556, 557.

Associates Ltd. Partnership v. Washington Suburban Sanitary Com'n, 66 F.3d 669, 680 - 681 (4th Cir. 1995), certiorari denied 116 S.Ct. 1318, 517 U.S. 1103, 134 L.Ed.2d 471.

In *Amland Properties Corp. v. Aluminum Co. of America, supra*, the court addressed the definitions of "disposal", "release" and "threatened release" under CERCLA as applied to PCB contamination that occurred within an industrial plant. First, the court found that the spilling of PCB's onto the floor of the plant is a disposal "into or on any land or water" within the meaning of CERCLA. 711 F.Supp. at 791 (citing 42 U.S.C. § 6903 (3), incorporated at 42 U.S.C. § 9601 (29)). The court relied on *BCW Associates Ltd. v. Occidental Chemical Corp.*, 1988 WL 102641 at 17 (E.D.Pa. Sept. 29, 1988) (not reported in F.Supp.) (court rejected the argument that lead dust found throughout a warehouse was not a disposal under CERCLA as unduly narrow, noting that "it is clear that Congress intended the term 'land' to encompass buildings and other types of real estate"), as well as *Emhart Indus., Inc. v. Duracell Int'l, Inc.*, 665 F.Supp. 549, 574 (M.D.Tenn.1987) (spilling of a hazardous substance during its use in a manufacturing process constitutes a disposal). The *Amland* court appropriately noted that the term "disposal" only requires that the hazardous waste be handled

such that it "may" enter the environment, and that it does not in fact have to reach it.

Similarly, the *Amland* court found that the PCB contamination within the plant constituted a "release" or "threatened release" into the environment. Noting the broad reading of these terms by sister courts, the court found that PCBs in concrete flooring

> ...if left unremedied, could eventually leach through to the soil under the ... plant. I note that there is no requirement that an actual release have already occurred or be imminent; a threatened release, on its own, is sufficient under CERCLA. *See BCW Associates,* slip op. at 44 (even though there was no documented evidence of an actual release, evidence regarding dust in warehouse "showed that there was a threatened release of the lead dust on goods being shipped to [plaintiff's] customers and on the shoes and clothing of workers leaving the warehouse"). The presence of PCBs in the concrete flooring at the ... plant constitutes a threatened release within the meaning of CERCLA.

Id. at 793. The *Amland* court's findings that a release or threatened release may occur within a building is certainly consistent with those of the courts within the Ninth Circuit. See e.g. *Castaic Lake Water Agency v. Whittaker Corp.*, 272 F.Supp.2d 1053, 1061 - 1062 (C.D. Cal. 2003) (testimony of employee that perchlorate was delivered to site, that perchlorate waste was disposed of in burn

pits, and that perchlorate periodically spilled on the ground, coupled with tests revealing existence of perchlorate at the site, was a sufficient prima facie case for cost recovery and contribution under CERCLA); see also *Lincoln Properties, Ltd. v. Higgins, supra,* (court found no authority in either the CERCLA statutes or in the case law to support a finding that a release must be "direct" to soil or groundwater. Dry cleaners' release of PCE to floor drain was a "release" under CERCLA.)

In this case, SBIC did more than dispose of PCE "onto the concrete floor". While SBIC admitted to the repeated disposal of unspecified amounts of PCE over the course of its sixteen-year lease of the Site, its admission of a catastrophic disposal of approximately 100 gallons of hazardous waste is most telling and disturbing. Evidence of the trench style drain system in the floor of the Site was before the District Court, and it was of pivotal importance in determining liability. SBIC has had multiple opportunities to provide evidence of a plausible alternative if one existed. First, in the hearing wherein the District Court granted the Homeowner Plaintiffs the RCRA Injunction, the District Court came to this logical conclusion:

> THE COURT: And any leaks, what everybody is telling me, leaks go into the trench drain. ... Or, in a permeable fashion, through the concrete floor, one of the two... The only other thing that it could be is somebody mops it up at night and pours it down the toilet. Those are the three ways it could get into the water table... I'm not speculating, I'm asking aren't those the only three ways, and haven't they carried their burden to show there's no material fact in dispute.

SER 44. Then, the District Court drew upon these comments and found SBIC liable in the Order granting the Kishner Defendants' motion for summary judgment of their counter-cross claims. The District Court stated:

> SBIC argues that it is not liable under the indemnification clauses because the Kishner Defendants have not provided any evidence that the PCE contamination occurred on the leased premises during either the term of the 1968 lease or the 1982 lease. The Court finds this argument without merit. As noted in the Order (#390) granting Plaintiffs' motion for summary judgment on their RCRA cause of action against the Kishner Defendants and MSLLC, the Court found that there was sufficient evidence to conclude that the PCE plume at issue in this case stemmed from the operation of the dry cleaning facility at the Shopping Center. SBIC was the owner and operator of that dry cleaning facility until 1984. In addition, the Kishner Defendants have provided evidence that PCE spills occurred at the dry cleaning facility during SBIC's lease terms... Specifically, SBIC stated that it had been informed "that occasionally a button trap would clog and amounts of PCE would spill onto the concrete floor." ... SBIC stated

> that it had "also been informed that there may have been a time when a filter change resulted in the spill of some PCE onto the concrete floor."... Moreover, during the underlying RCRA cause of action, the Court noted that the drain pipes beneath the dry cleaning facility contained the highest concentrations of PCE. Thus, based upon the foregoing, the Court finds that there is sufficient evidence, on summary judgment, to hold SBIC liable for PCE contamination at the site for purposes of contractual indemnity as to the Kishner Defendants.

SER 29-30. In the underlying litigation of NDEP's motion for summary judgment. SBIC had yet another opportunity to provide sufficient evidence that a material fact remained warranting a trial. SBIC failed to do so, despite the urging of the District Court. SER 6, 7, 8, 11,12,13. Ultimately, the District Court's order granting summary judgment to NDEP found that NDEP met its burden of establishing a prima facie case for liability of SBIC based upon the findings of the previous Order granting summary judgment to the Kishner Defendants. I ER 14.

NDEP presented a well-pled motion for summary judgment based upon its position that the disposals of PCE by SBIC went immediately into the trenches and down the floor drain as designed. When presented with this logical conclusion in NDEP's motion for summary judgment, the burden shifted to SBIC to present specific facts showing a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*,

477 U.S. at 248. SBIC failed to do so. SBIC gave no explanation of how it handled a release of some 100 gallons of PCE onto the concrete floor with trench drains. Mere common sense tells us that it would be impossible to stop at least a significant portion of that amount of liquid from immediately escaping down the drain – the location of the highest concentrations of PCE on the Site. NDEP has no burden to quantify the amount of PCE released. NDEP therefore presented a prima facie case that an actual release of PCE occurred, and that SBIC is liable under CERCLA.

Moreover, NDEP also presented a prima facie case of a "threatened release" of PCE. The express language of CERCLA allows the State to respond to threatened releases, as well as releases themselves, and to recover response costs incurred. *Dedham Water Co. v. Cumberland Farms, Inc.*, 889 F.2d 1146, 1152 (1st Cir. 1989). (While other environmental statutes, *e.g.* the Clean Water Act, make parties liable only for actual releases, CERCLA expressly expanded liability to cover threatened releases). In this case, SBIC's admitted spill of approximately 100 gallons of PCE, enough liquid to fill a volume of 13.37 cubic feet, onto a floor with trenches constructed to divert spills to a floor drain leading to the sewer, is certainly a "threatened release" into the environment as defined by CERLA. A

rational trier of fact could not come to any other conclusion. SBIC's claim that the District Court could not draw *any* inference against it as the nonmoving party is simply an incorrect statement of the law. The District Court did not have to suspend disbelief in order to properly rule on NDEP's motion. SBIC is liable under CERCLA for both releases and threatened releases of PCE into the environment.

ii. SBIC's Expert Declarations Dispute is an Immaterial Fact That has no Bearing on Summary Judgment.

SBIC spent the bulk of its time in the underlying litigation, and again on appeal, attempting to present a dispute of material fact around the competing declarations of Dr. Mary Siders of NDEP and SBIC's witness Mr. Steven Henshaw. The declarations of Dr. Siders opined on the timing of the initial PCE release from the Site. While the declaration of Dr. Siders as to the age of the plume is additional evidence of SBIC's liability, given the analysis in Section B. i. above, it is not dispositive, and therefore immaterial. "A fact is material when, under the governing substantive law, it could affect the outcome of the case." *Thrifty Oil Co. v. Bank of America National Trust and Savings Association*, 322 F.3d 1039, 1045 (9th Cir. 2002) (citations omitted). Disputes as to immaterial

issues of fact do "not preclude summary judgment."

Lynn v. Sheet Metal Workers' International Association, 804 F.2d 1472, 1483 (9th Cir. 1986) (quoting 10A C. Wright, A. Miller & M. K. Kane, Federal Practice and Procedure § 2725 at 89 (2d Ed 1983). Whether SBIC continually released PCE into the environment from 1968 to 1984, or whether they did it only once in 1982, is immaterial as to whether they are liable under CERCLA in light of the undisputable evidence that they did in fact release or threaten to release PCE into the environment when they owned and/or operated the facility.

In the underlying litigation, the District Court repeatedly noted that the issue of the competing declarations of Dr. Siders and Mr. Henshaw were immaterial and queried counsel for SBIC for an explanation, but SBIC repeated the same mantra that it has here in its appeal: that the Court cannot draw *any* inference against the non-moving party, even after the movant has put forth a prima facie case that no material fact exists.

> THE COURT: So what does your expert offer that -- not a jury but the judge would find as a basis at trial to conclude, even on a preponderance standard, no, this did not occur in this time frame nor could it have come from this location? What does your expert offer by way of evidence on which I could aim a reasonable inference that it was to the contrary?

MR. GILMAN: Well, I think the answer to that, there are two declarations of Steven Hinshaw (sic), both of which are on file, both of which spell out in rather technical terms the issues that he had with the methodology utilized by Dr. Siders.

THE COURT: So he threw questions at Dr. Sider's report.

MR. GILMAN: He raised I think not only questions but challenges to the methodology used. For example -- I'm sorry, your Honor.

THE COURT: Well, go ahead, but I was going to repeat my question.

MR. GILMAN: Please.

THE COURT: What does he have to offer affirmatively that would allow me to hang my hat on a contrary conclusion?

MR. GILMAN: Well, your Honor, with all due respect, I think at the summary judgment stage –

THE COURT: Okay. I get it. If that's your answer, that's your answer.

MR. GILMAN: Well, the issue -- I mean, that's the context in which this is being presented as to whether or not Dr. Sider's –

> THE COURT: The context for summary judgment, sir, I think you've got it wrong, is, is there anything that I need to go to trial on.
>
> MR. GILMAN: Well, yes.
>
> THE COURT: That's the context.
>
> MR. GILMAN: I believe with respect to Dr. –
>
> THE COURT: It's not enough for you simply to say there's questions about ninety-five percent affirmation rate per statistical finding. It's not enough for you to do that. You have to tell me, Judge, there really is an alternative inference. You know, there's water on the sidewalk in the morning, Judge, you can't conclude it rained last night because there are sprinkler systems in the area.

SER 12-13.

Ultimately, and correctly so, the Order granting summary judgment to NDEP does not take the issue of the competing declarations into account at all. The District Court based its finding on the previous Order granting summary judgment to the Kishner Defendants. The District Court properly awarded past response costs to NDEP. Having established this right to recovery of past response costs, the District Court thus properly granted NDEP's claim for declaratory relief for future response costs. "[I]f a plaintiff successfully

establishes liability for the response costs sought in the initial cost-recovery action, it is entitled to a declaratory judgment on present liability that will be binding on future cost-recovery actions." *City of Colton v. American Promotional Events, Inc.*, 614 F.3d 998, 1007 (9th Cir. 2010).

C. The District Court Properly Awarded NDEP Relief Under State Law.

For the reasons set forth in Section B. herein, SBIC's appeal of the District Court's grant of summary judgment on NDEP's claim for injunctive relief under NRS 445A.695 must fail. SBIC again bases its argument on the timing of the release of PCE. As noted above, SBIC's admissions of releases of PCE, and the corresponding evidence that confirms the releases, renders the issue of timing irrelevant.

Injunctive relief is available "to prevent the continuance or occurrence of any act or practice which violates any provision of NRS 445A.300 to 445A.730, inclusive . . . ." NRS 445A.695. NRS 445A.465 provides, in relevant part:

> 1. Except as authorized by a permit issued by the Department pursuant to the provisions of NRS 445A.300 to 445A.730, inclusive, and regulations adopted by the Commission, it is unlawful for any person to . . . (d) Allow a pollutant discharged from a point source or

> fluids injected through a well to remain in a place where the pollutant or fluids *could be* carried into the waters of the State by any means.

(Emphasis added). There is no requirement that SBIC actively discharged the PCE. It is enough that its dry cleaning operations used PCE, that PCE was spilled onsite, and that the highest concentrations of PCE were found in the floor drain and the drain pipes underneath the dry cleaning facility. Thus, SBIC is liable under NRS 445A.465 and is therefore subject to injunctive relief under NRS 445A.695.[6]

D. The District Court Had Jurisdiction to Adjudicate NDEP's CERCLA Claim Against SBIC.

SBIC asserts that the District Court lacked jurisdiction to rule on NDEP's CERCLA claims given its pending appeal of the RCRA Injunction in appeal no. 11-15174. That appeal presents two issues for review. First, SBIC claims that the District Court erred in entering the RCRA Injunction against SBIC when "no party to this action ever moved for injunctive relief against SBIC, no dispositive motion seeking relief under RCRA was filed against SBIC, no evidentiary hearing or trial has occurred in this action, and the District Court added SBIC to the Permanent

Injunction after adjudicating other parties' liability under RCRA – but not SBIC's." SER 20. Second, SBIC claims that the District Court lacked jurisdiction to issue the RCRA Injunction against SBIC when an appeal was pending on the issue of whether this Court "should have granted injunctive relief to Plaintiffs under RCRA." SER 20. In *Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001), this Court held that "[w]hen a notice of appeal is filed, jurisdiction over *the matters being appealed* normally transfers from the district court to the appeals court." 258 F.3d at 935 (emphasis added). The matters on appeal before this Court address claims of procedural defects, jurisdiction, and RCRA related matters. They do not address CERCLA cost recovery and state law injunctive relief sought by NDEP, and thus the District Court was not divested of jurisdiction to address NDEP's motion for summary judgment. This statement of jurisdiction is not driven by a statutory requirement. Rather, it is a judge-made doctrine designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time. It should not be employed to defeat its purposes nor to induce needless paper shuffling.... Where an appeal is

[6] SBIC does not appeal the District Court's ruling that it is also liable for cost recovery under NRS 459.537.

taken from a judgment which does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters not involved in the appeal. 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 203.11, at 3-45 n. 1 (2d ed. 1987). This concept has been repeatedly approved by the Ninth Circuit. See e.g. *California Dept. of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1120–21 (9th Cir. 2002) (stating that the rule is "a rule of judicial economy and not one that strips the district court of subject matter jurisdiction"); *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 734 (9th Cir. 1988) (district court had jurisdiction to enter findings of fact after entry of judgment despite intervening notice of appeal). Similarly, in *Britton v. Co-Op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990), the Court held that "absent a stay, an appeal seeking review of collateral orders does not deprive the trial court of jurisdiction over other proceedings in the case, and an appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal."

SBIC's appeal of the RCRA Injunction is based purely on procedural issues. It contends that it was improperly named therein because the Homeowner Plaintiffs did not seek summary judgment against SBIC, and that the RCRA

Injunction could not be entered pending the Kishner Defendants' appeal of the summary judgment order. SBIC makes no substantive arguments regarding the factual issues of the Court's liability determination under RCRA. Therefore, the pendency of Case No. 11-15174 did not divest the District Court of jurisdiction to consider NDEP's CERCLA claims.

No ruling that this Court could make in case no. 11-15174 would affect NDEP's claim of recovery of past costs under CERCLA § 107 or for declaratory relief under CERCLA § 107 against SBIC. SBIC argues that the District Court issued the RCRA Injunction under CERCLA as well. This is not true, and even if it were, it would be irrelevant to the argument in light of the fact that SBIC's pending appeal does not address issues under CERCLA. The RCRA Injunction cites CERCLA one time, in defining the term "Hazardous Substance" under 42 U.S.C. 9601 (14), CERCLA § 101 (14), in combination with the definitions of "Hazardous Waste" and "Solid Waste" under RCRA. III ER 498. The definition's applicability is not the basis of any appeal. The District Court reiterated in the Order granting NDEP summary judgment that its order granting the RCRA Injunction was based upon RCRA and not CERCLA. I ER 007. Contrary to SBIC's assertions, NDEP is not treated as a "plaintiff" under the RCRA

Injunction, but rather as the regulatory agency charged with overseeing the remediation aspects of it. Accordingly, the District Court properly addressed the CERCLA issues raised in NDEP's motion for summary judgment.

VI. CONCLUSION

For the foregoing reasons, the district court's award of summary judgment to the NDEP as to the liability of SBIC under CERCLA and state law should be upheld.

VII. STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the Nevada Division of Environmental Protection makes the following statements:

Peter J. Voggenthaler, et al. v. Maryland Square, LLC, et al., Docket No. 10-17520, is a related case pending before this Circuit. The relationship between the present appeal and the Docket No. 10-17520 is that both arise out of the same case in the district court.

Peter J. Voggenthaler, et al. v. Maryland Square, LLC, et al., Docket No. 11-15174, is a related case pending before this Circuit. The relationship between the present appeal and the Docket No. 11-15174 is that both arise out of the same

case in the district court.

Peter J. Voggenthaler, et al. v. Maryland Square, LLC, et al., Docket No. 11-15176, is a related case pending before this Circuit. The relationship between the present appeal and the Docket No. 11-15176 is that both arise out of the same case in the district court.

Peter J. Voggenthaler, et al. v. Maryland Square, LLC, et al., Docket No. 12-16412, is a related case pending before this Circuit. The relationship between the present appeal and the Docket No. 12-16412 is that both arise out of the same case in the district court. In addition, Docket No. 12-16412 and the present appeal arise out of the same summary judgment order.

RESPECTFULLY SUBMITTED this 30th day of November, 2012.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Carolyn E. Tanner
CAROLYN E. TANNER
Senior Deputy Attorney General
JASMINE K. MEHTA
Deputy Attorney General

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and 9th Cir. R. 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 7,330 words.

RESPECTFULLY SUBMITTED this 30th day of November, 2012.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Carolyn E. Tanner
CAROLYN E. TANNER
Senior Deputy Attorney General
JASMINE K. MEHTA
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2012, I electronically filed the foregoing NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S ANSWERING BRIEF, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Mr. Jeremy Gilman
Benesch Friedlander Coplan
& Aronoff LLP
200 Public Square, Suite 2300
Cleveland, Ohio 44114-2378

Mr. Jeffrey Thomas Oberman, Esq.
Levin & Oberman
361 N. Canon Drive
Beverly Hills, CA 90210

I certify that I am an employee of the Office of the Attorney General and that on this 30th day of November, 2012, I served a copy of the foregoing NEVADA DIVISION OF ENVIRONMENTAL PROTECTION'S ANSWERING BRIEF, by placing said document in the U.S. Mail, postage prepaid, addressed to:

Mr. Neil J. Beller, Esq.
Neil J. Beller, Ltd.
7408 West Sahara Avenue
Las Vegas, NV 89117

/s/ Elizabeth Avram
An Employee of theOffice of the
Attorney General