

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

SCOTT MEEKER and ERIN MEEKER,
KELLY GOODWIN, BRUCE ELY and
KRISTI HAUKE, ELIZABETH BORTE and
RINO PASINI, CHRISTIAN MINER, and
JUDY SANSEI and HOWARD BANICH;
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

BULLSEYE GLASS CO., an Oregon
corporation,

Defendant.

CIVIL ACTION NO. 16-CV-07002

**THIRD AMENDED CLASS ACTION
COMPLAINT**

CLAIM **NOT** SUBJECT TO MANDATORY
ARBITRATION
ORS 21.135(2)(a)

AMOUNT SOUGHT: OVER \$10,000,000
ORS 21.160(1)(E)

INTRODUCTION

1.

Plaintiffs, Scott Meeker, Erin Meeker, Kelly Goodwin, Bruce Ely, Kristi Hauke, Elizabeth Borte, Rino Pasini, Christian Miner, Judy Sanseri, and Howard Banich (collectively “Plaintiffs”), individually and on behalf of all others similarly situated, allege the following against Bullseye Glass Co. (“Defendant” or “Bullseye”), based, where applicable, on personal knowledge, information and belief, and the investigation and research of counsel. Plaintiffs provided notice and a demand for damages to Defendant pursuant to Oregon Rules of Civil Procedure (“ORCP”) 32H at least thirty days prior to filing this Amended Complaint. Defendant has not satisfied the Plaintiffs’ demand.

1 **NATURE OF THE ACTION**

2 2.

3 Southeast Portland is home to thousands of families, vibrant businesses, and thriving schools.
4 The people who live and work in this neighborhood represent a broad range of ethnic, socio-economic,
5 and age groups. Indeed, this diverse neighborhood is one of the most dynamic in the City, and has been
6 key to shaping Portland and its culture.

7 3.

8 Decades ago, citizens in Southeast Portland were instrumental in preventing the Mount Hood
9 Highway from being built through their neighborhood, an event often noted as being one of the most
10 important decisions in making Portland such a special place today. In fact, in 1974—near the time when
11 the community defeated the ill-conceived highway project—Defendant Bullseye Glass Co. opened its
12 Portland factory just half a mile from where the freeway would have been. Since that time, Bullseye has
13 been using the neighborhood’s air and backyards as its private dumping ground for the arsenic,
14 cadmium, hexavalent chromium, and other toxins it sends up its smokestacks.

15 4.

16 Notwithstanding the fact that Bullseye uses thousands of pounds each year of these toxic heavy
17 metals in its glass furnaces, it decided to not install any pollution control technology to capture these
18 pollutants. For decades, it freely sent waste from its furnaces into the air of Southeast Portland. Once
19 Bullseye emits this toxic pollution, children inhale it, it lands on skin, in yards, and on playgrounds. It is
20 taken up by the vegetables in gardens, and it comes into homes on the soles of people’s feet, on pets’
21 fur, and by other routes. Once inside homes and bodies, these toxins create profound health risks for
22 people, particularly children and those with medical sensitivities.

23 5.

24 Over the past several decades, Bullseye has emitted sufficient amounts of toxic heavy metals to
25 make Southeast Portland a “hotspot” of these pollutants; the Oregon Department of Environmental
26 Quality (“DEQ”) measured arsenic in Southeast Portland at over 159 times state-established safety
27 levels, and cadmium at 49 times safety levels. After Bullseye temporarily stopped using arsenic and
28

1 cadmium in its glass furnaces in February 2016, subsequent monitoring showed that the amount of those
2 toxins in the air around Bullseye dropped in response. In April 2016, Bullseye announced it would
3 resume the use of cadmium.

4 6.

5 Bullseye knew or should have known that it is and has been emitting significant amounts of toxic
6 materials. In fact, Bullseye privately lobbied the United States Environmental Protection Agency
7 (“EPA”) to create an exemption in Clean Air Act regulations so that manufacturers like Bullseye would
8 not need to treat or filter the emissions from their smokestacks. As a result, Bullseye has contaminated
9 homes, businesses, and families.

10 7.

11 Plaintiffs bring this action pursuant to ORCP 32, individually and on behalf of those similarly
12 situated, in order to protect themselves, their families, and their community.

13 **JURISDICTION AND VENUE**

14 8.

15 All of the claims giving rise to this action accrued in Multnomah County, Oregon. Defendant
16 engages in regular, sustained business in Multnomah County and is a registered Oregon Corporation.
17 Further, Plaintiffs affected by Defendant’s conduct reside in Multnomah County. Defendant’s corporate
18 headquarters are also located in Multnomah County.

19 9.

20 The claims in this case are based solely on State law. Plaintiffs make no federal claims in this
21 case. In addition, all named plaintiffs are Oregon citizens, at least two thirds of the proposed class
22 members are citizens of Oregon, Plaintiffs’ and Class members’ injuries occurred in Oregon, and no
23 other class actions have been filed in the last three years with similar factual allegations against the
24 Defendant.

1 **THE PARTIES**

2 10.

3 Plaintiffs, Scott Meeker, Erin Meeker, Kelly Goodwin, Bruce Ely and Kristi Hauke, Elizabeth
4 Borte and Rino Pasini, Christian Miner, and Judy Sanseri and Howard Banich are residents and citizens
5 of Multnomah County, Oregon.

6 11.

7 Defendant Bullseye Glass Co. is a domestic corporation organized under the laws of Oregon,
8 with its principal place of business at 3722 SE 21st Avenue, Portland, Oregon 97202, also known as the
9 facility governed by Air Contaminant Discharge Permit number 26-3125.

10 **FACTS**

11 **A. Southeast Portland's Air**

12 12.

13 For at least the past decade, state agencies, including DEQ, have known that Portland's air
14 contains high levels of a variety of toxic contaminants. For example, DEQ has known that there are
15 unexpectedly high levels arsenic and cadmium in the City's air. However, despite knowing about
16 concerning levels of air toxics, DEQ had apparently not been able to locate the sources of the
17 contaminants.

18 13.

19 In 2013, researchers at the United States Forest Service began collecting moss from trees to track
20 air quality across the City. Because moss grows on trees, which are stationary, it absorbs and stores the
21 nutrients and toxins in the air and water in the tree's immediate environment. Because moss lacks roots,
22 any contaminants found in moss are derived solely from the air or rain, rather than from the soil.

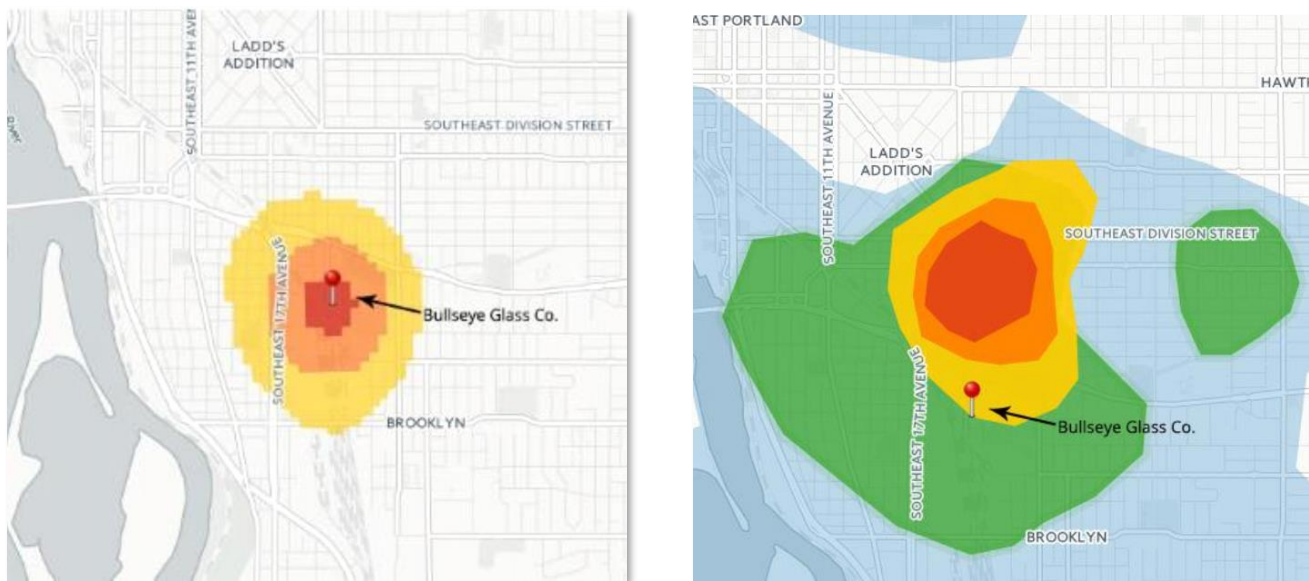
23 14.

24 By the time the researchers had gathered the moss, analyzed its contents, and then mapped their
25 results, it became apparent that there was something terribly wrong taking place in Southeast Portland.
26 Those maps show dangerously high levels of cadmium and other heavy metals in the air, with a
27
28

proverbial “bullseye” at the center. That bullseye, in fact, centers on Defendant Bullseye’s glass production facility in Southeast Portland.

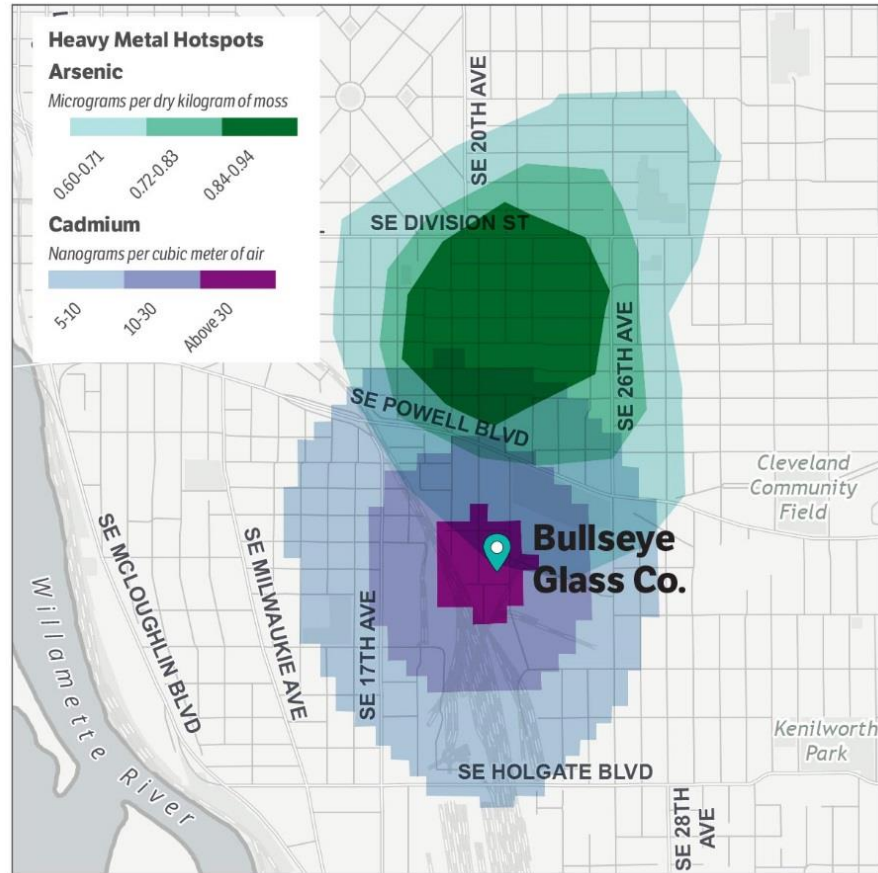
15.

These maps, from Plaintiffs’ March 3, 2016 Complaint, depict elevated levels of cadmium (left) and arsenic (right) detected in samples of moss near Bullseye Glass Co:



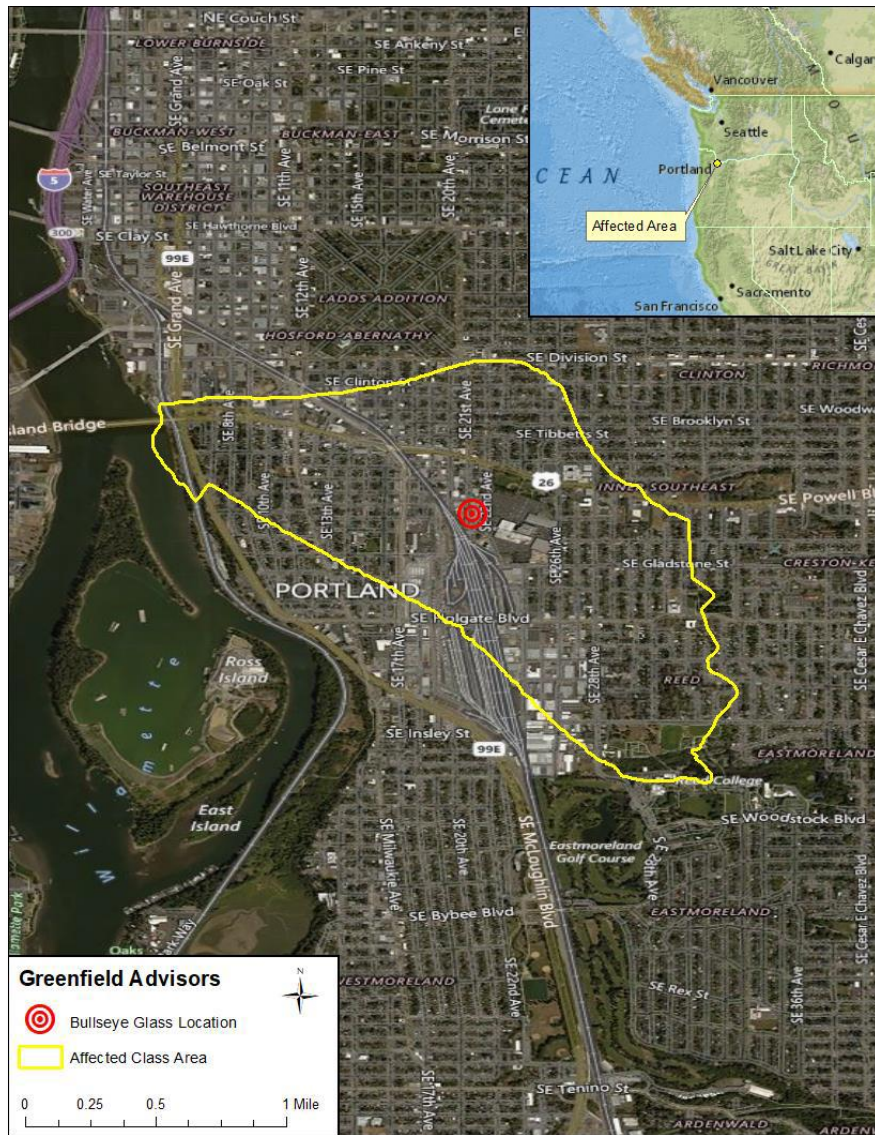
16.

The map below, based on maps *The Oregonian* prepared using data from the United States Forest Service, which is excerpted below and attached as Exhibit 1 to this complaint (and by reference incorporated into this suit), shows elevated levels of arsenic and cadmium in moss circling Bullseye. On the map, dark green indicates arsenic at .84 to .94 micrograms per kilogram of moss, lighter green indicates .72 to .83 micrograms of arsenic per kilogram of moss, and light green indicates .60 to .71 micrograms of arsenic per kilogram of moss. Additionally, purple indicates cadmium as being above 30 nanograms per cubic meter of air, darker blue indicates 10 to 30 nanograms per cubic meter of air, and light blue indicates 5 to 10 nanograms per cubic meter of air.



17.

The map below depicts the area where air dispersion modeling shows Bullseye has contributed significant levels of hazardous metal-laden particulate matter into Southeast Portland's air:



The area depicted within the yellow line on this map is defined as the “Affected Area.” A map based on Multnomah County data that preliminarily depicts the residential properties included in the proposed subclasses below is attached to this complaint as Exhibit 2.

18.

When presented with information about the United States Forest Service findings, DEQ deployed its air monitors in Southeast Portland in the area near Bullseye. DEQ’s monitors confirmed that Bullseye is, in fact, a primary source of the unsafe levels of heavy metals in the neighborhood.

19.

Bullseye is an industrial facility in a primarily residential and commercial area. In 2011, the DEQ noted in Bullseye's proposed air quality permit that there were "no other industrial air sources with permits within ½ mile of Bullseye Glass."

B. Bullseye Glass Has Been Quietly Emitting Toxic Metals for Decades

20.

Bullseye has at times claimed that it was surprised to learn that it had been polluting the neighborhood. However, it should be no surprise to Bullseye that it is a primary source of cadmium, arsenic, perhaps hexavalent chromium and/or other toxics in Portland's air. Since 1974, Bullseye Glass has manufactured glass at its Portland facility using a wide variety of chemicals to color or process the glass, many of which are toxic, including arsenic, cadmium, and chromium. Bullseye has grown significantly in the intervening decades and has continued to use large amounts of cadmium and toxic materials, including thousands of pounds of arsenic trioxide.

21.

In 2007, the EPA proposed new National Emissions Standards for Hazardous Air Pollutants (called "NESHAPs") pursuant to the mandates of the Clean Air Act. EPA recognized that glass facilities were often significant sources of arsenic, cadmium, chromium, lead, manganese, and nickel. Under the new rules, EPA proposed to regulate the emissions of these hazardous air pollutants (known as "HAPs") from a variety of sources, including glass manufacturers. The final rule EPA adopted required glass manufacturers to "comply with a [particulate matter] emission limit of 0.1 gram per kilogram (g/kg) (0.2 pound per ton (lb/ton)) of glass produced or an equivalent metal HAP emission limit of 0.01 g/kg (0.02 lb/ton) of glass produced." The rule also requires factories to do performance testing to demonstrate compliance with the rule, and perform routine monitoring of emissions from the facilities.

22.

While that rule goes a long way to protecting human health and the environment, it does not apply to Bullseye, because Bullseye privately lobbied EPA to create an exemption for glass makers of its size, in order to avoid complying with the proposed rule. Bullseye also argued that the rule should not

1 apply to its furnaces because those furnaces were not “continuous.” EPA granted Bullseye’s wish. The
2 final rule exempted facilities that do not operate continuous furnaces, regardless of the amounts of HAPs
3 they use in their production. In 2009, after the rules were in place, Bullseye again told regulators that its
4 furnaces were periodic, not continuous, and thus not subject to the HAP rules. As a result, Bullseye
5 continued to emit arsenic, cadmium, and other metals, from roughly 1974 until some point in February
6 2016, and, it appears that Bullseye recently began or will soon begin using cadmium again in its glass-
7 melting furnaces. It also now appears that—despite Bullseye’s statements to regulators about the nature
8 of its furnaces—at least some of those furnaces are and have always been “continuous” and thus should
9 have complied with rules governing hazardous air pollutants.

10 23.

11 The pollutants Bullseye emits travel through the air of the Affected Area. The moss studies,
12 DEQ’s air monitoring, and other data, have revealed that Bullseye has created a toxic hotspot in the
13 Affected Area, Plaintiffs’ neighborhood in Southeast Portland. Bullseye’s pollutants have invaded and
14 will potentially continue to invade the air of Plaintiffs’ property. Plaintiffs have in the past unknowingly
15 inhaled some or all of those pollutants. Some of Bullseye’s pollutants have landed on Plaintiffs’ trees,
16 moss, soil, plants, houses, and other objects on their property. Some of those pollutants have most likely
17 also traveled inside of Plaintiffs’ homes. Pollutants that Bullseye has emitted currently remain on
18 Plaintiffs’ properties and in some of the Plaintiffs’ bodies.

19 24.

20 While Bullseye acted behind the scenes to avoid installing emissions controls, Plaintiffs and the
21 Class did not know and could not reasonably have discovered the pollution Bullseye had caused and
22 continued to emit in their neighborhood and onto their properties until February 2016, at the earliest,
23 when the moss studies revealing the air pollution in the area were made public. State regulators claimed
24 to have been caught off guard by that information. If state regulators did not know of Plaintiffs’ and
25 Class members’ injuries or their source, a reasonable person in Plaintiffs’ and Class members’ position
26 would not have learned or known those facts.

25.

Bullseye did not warn its neighbors about the harm from its emissions, but it appears that Bullseye did warn employees not to eat fruit from pear trees outside of its facility. That was likely due to the trees' proximity to Bullseye's harmful emissions.

C. Health Impacts of Bullseye's Emissions

26.

The health impacts of prolonged exposure to the hazardous pollutants emitted from Bullseye are potentially profound.

27.

Although Bullseye emits or has emitted arsenic, cadmium, hexavalent chromium, and other toxic pollutants to the air, inhalation is not the only route of exposure for people in Southeast Portland. Many of these materials precipitate out of the air, landing on soil or grass in backyards, playgrounds, and gardens. There, children playing may ingest the toxic materials directly and absorb them through their skin. People and pets who come into contact with contaminated soil or dust can bring these hazardous materials into their home on shoes and in clothing, hair, or fur. And, the metals contaminate crops, particularly leafy greens grown in backyard gardens, including kale, lettuce, and broccoli, all of which are favorites of the Portland gardener. As a result, in light of information about Bullseye's pollution, the Oregon Health Authority issued a warning against eating any fruits or vegetables grown within half a mile of Bullseye.

28.

Because Bullseye's emissions not only contaminate the air, but the soil, grass, plants, and homes throughout the community, people living in this neighborhood continue to be exposed to dangerous levels of hazardous pollutants on a daily basis. Thus, even if Bullseye ceases its operations today, the community would remain contaminated, causing harm of various types and posing a serious threat of ongoing and likely mounting problems for the people who live and work there.

29.

Arsenic is a toxic material that presents a wide range of serious health effects. The United States Department of Health and Human Services, the International Agency for Research on Cancer, and the EPA have all determined that inorganic arsenic is a human carcinogen, and that its ingestion can increase the risk of cancer in the liver, bladder, and lungs. Ingestion of arsenic can also cause irritation of the gut, and lead to decreased production of red and white blood cells, which may cause fatigue, abnormal heart rhythm, blood-vessel damage resulting in bruising, and impaired nerve function. Inhalation of arsenic, too, can cause a host of health problems, including lung irritation and damage, as well as lung cancer. When arsenic comes in contact with skin it can produce circulatory and peripheral nervous disorders.

30.

The effects of arsenic exposure are likely more pronounced in children. Children who are exposed to inorganic arsenic have many of the same effects as adults, including irritation of the stomach and intestines, blood vessel damage, skin changes, and reduced nerve function. Long-term exposure to inorganic arsenic in children may result in lower IQ scores, and exposure to arsenic in early life (including gestation and early childhood) may increase mortality in young adults.

31.

Inhaled or ingested inorganic arsenic can injure pregnant women or their unborn babies. Large doses of inorganic arsenic that cause illness in pregnant female animals can also cause low birth weight, fetal malformations, and even fetal death. Arsenic can cross the placenta and has been found in fetal tissues. Arsenic is even traceable in human breast milk.

32.

Like arsenic, cadmium is a carcinogen that poses a host of health risks and impacts. Exposure to high levels of air-borne cadmium can severely damage the lungs, causing short- and long-term impacts on breathing and lung function. Eating food or drinking water with high levels of cadmium severely irritates the stomach, leading to vomiting and diarrhea.

33.

Chronic exposure to cadmium also carries serious health risks. Long-term exposure to lower levels of cadmium in air, food, or water leads to a buildup of cadmium in the kidneys. Not only can this cause serious kidney disease, but it also leads to other risks throughout the body. Long-term effects of even low-levels of exposure to cadmium include lung damage and fragile bones.

34.

Children are particularly susceptible to suffering serious health impacts from the exposure to cadmium. Children absorb cadmium at higher rates than adults. Not only do children's bodies take up cadmium at increased rates, but they are also more susceptible than adults to a loss of bone and decreased bone strength from exposure to cadmium. Babies of animals exposed to high levels of cadmium during gestation had changes in behavior and learning ability, and high enough exposures to cadmium before birth can reduce body weight and affect the skeleton in developing young animals.

35.

While Bullseye recently installed one pilot emissions control system, it has resumed the use of cadmium. Bullseye's past and present toxic emissions therefore present a clear threat to the health of people living and working in Southeast Portland. While some of the harms from this exposure are manifest today, others may remain latent or undetected for years, leaving those exposed to Bullseye's waste to deal with health impacts today and into the distant future.

PLAINTIFFS' FACTS

A. Plaintiffs Scott and Erin Meeker

36.

Scott and Erin Meeker live in the Affected Area, within a half mile of Bullseye Glass, and their young daughter attends a daycare center across the street from the Bullseye factory.

37.

The Meekers have lived in their current home since 2006. They bought the home in 2010. They did not know when they bought their home, and could not have known based on reasonably available public information, that it was in the shadow of a major polluter. The Meekers are concerned that the

1 value of their house has declined or will decline now that it is public knowledge that the property is so
2 close to a notorious polluter. Had the Meekers known about the emissions from Bullseye, including
3 arsenic, cadmium, and chromium, they would not have bought their house or paid as much for it as they
4 did.

5 38.

6 Bullseye has emitted cadmium, chromium, arsenic, and other pollutants that have entered on to
7 and currently remain on the Meekers' property. As a result, the value of their property has declined. The
8 Meekers' property is also worth less now that it is public knowledge that the property is so close to a
9 notorious polluter and located within the known toxic hotspot created by Bullseye.

10 39.

11 Since learning they live in the plume of Bullseye's dangerous air emissions, the Meekers' use
12 and enjoyment of their property has declined significantly. The Meekers are concerned that the soil their
13 daughter plays in, and in which they grew sugar snap peas, lettuce, and other produce, is tainted by toxic
14 metals. Normally the Meekers would be planting strawberry plants right now, but since health officials
15 told residents in their neighborhood to not eat food from their own gardens, the Meekers have not been
16 able to enjoy gardening or the process of growing their own food.

17 40.

18 Beyond the couple's concerns about the effects on their family from eating the produce that they
19 have grown on their land for years, they will need to pay for costly health and soil testing. The Meekers
20 are also deeply concerned about their daughter's daily exposure to the air toxins while attending and
21 playing outside at her daycare.

22 **B. Plaintiff Kelly Goodwin**

23 41.

24 Kelly Goodwin has lived in the Affected Area, near Bullseye for eight years. Between 2008 and
25 2012 she lived near the intersection of SE Woodward Street and SE 27th Avenue, and then in 2012 she
26 bought a home less than a quarter mile from Bullseye. She did not know when she bought her home that
27 it was in the shadow of a major polluter. Had Ms. Goodwin known about the emissions from Bullseye,
28

1 including arsenic, cadmium, and chromium, she would not have bought her house or paid as much for it
2 as she did.

3 42.

4 Bullseye has emitted cadmium, chromium, arsenic, and other pollutants that have entered into
5 and currently remain on Ms. Goodwin's property. As a result, the value of her property has declined.
6 Ms. Goodwin's property is also worth less now that it is public knowledge that the property is so close
7 to a notorious polluter and located within the known toxic hotspot created by Bullseye.

8 43.

9 Since learning that she lives in the plume of Bullseye's dangerous air emissions, Ms. Goodwin's
10 use and enjoyment of her property has declined significantly. In the front yard of that home, Ms.
11 Goodwin would normally plant tomatoes, zucchinis, and other produce. In season, the perennial
12 strawberries in her garden will start coming up. However, because of Bullseye, Ms. Goodwin is
13 concerned that she cannot safely plant in her garden or eat what it grows.

14 44.

15 Ms. Goodwin is similarly concerned that her family has and/or will be forced to pay for
16 expensive health and soil testing.

17 **C. Plaintiffs Elizabeth Borte and Rino Pasini**

18 45.

19 Plaintiffs Elizabeth "Libby" Borte and Rino Pasini bought their home less than a half mile from
20 Bullseye's glass-making factory in 2010. The couple lives there with their two young children.

21 46.

22 Bullseye has emitted cadmium, chromium, arsenic, and other pollutants that have entered into
23 and currently remain on the Borte and Pasini property. As a result, the value of their property has
24 declined. The Borte and Pasini property is also worth less now that it is public knowledge that the
25 property is so close to a notorious polluter and located within the known toxic hotspot created by
26 Bullseye.

1 47.

2 Since learning that they live in the plume of Bullseye's dangerous air emissions, Plaintiffs Borte
3 and Pasini's use and enjoyment of their property has declined significantly. The couple used to garden at
4 their home, which also has fruit trees and a grape vine from which they and their children typically eat.
5 The couple is concerned that their family can no longer eat the fruit from their own property.

6 48.

7 Recent testing of the couple's soil and children disclosed elevated levels of cadmium in both.
8 Bullseye's emissions have interfered with the quiet enjoyment of the couple's property, and they are
9 concerned the value of their house has declined or will decline now that it is public knowledge that the
10 property is so close to a notorious polluter. Had they known about the unchecked heavy metal emissions
11 from Bullseye, the couple would not have bought their house or paid as much for it as they did.

12 **D. Plaintiff Christian Miner**

13 49.

14 Christian Miner has lived in Portland since 2002 and bought a home last year about four blocks from
15 Bullseye, in the Affected Area.

16 50.

17 Bullseye has emitted cadmium, chromium, arsenic, and other pollutants that have entered on to
18 and currently remain on Mr. Miner's property. As a result, the value of his property has declined. Mr.
19 Miner's property is also worth less now that it is public knowledge that the property is so close to a
20 notorious polluter and located within the known toxic hotspot created by Bullseye.

21 51.

22 Since learning that he lives in the plume of Bullseye's dangerous air emissions, Mr. Miner's use
23 and enjoyment of his property has declined significantly. For example, before learning of Bullseye's
24 emissions, Mr. Miner, like so many of his neighbors, gardened in his spare time, raising leafy greens and
25 other produce for himself on his property. Now, because of Bullseye's pollution, he is concerned that he
26 cannot or should not eat those vegetables, and he is concerned that his soil will need to be replaced or
27 otherwise remediated before he can garden again.

52.

In addition to paying for sampling of that soil and other parts of his property, like his roof and gutters, to determine the levels of cadmium, arsenic, and other metals, Mr. Miner anticipates incurring expenses for medical testing to determine the levels of those toxins in his own body. Mr. Miner is justifiably concerned that the value of his house has declined or will decline now that it is public knowledge that the property is so close to a notorious polluter. Had he known about the unchecked heavy metal emissions from Bullseye, Mr. Miner would not have bought his house or paid as much for it as he did.

E. Plaintiffs Bruce Ely and Kristi Hauke

53.

In 2002, Bruce Ely and Kristi Hauke bought a home roughly a third of a mile from Bullseye in the Affected Area. Mr. Ely and Ms. Hauke did not grow vegetables as they customarily would, because of the newly disclosed information about heavy metal emissions from Bullseye.

54.

Bullseye has emitted cadmium, chromium, arsenic, and other pollutants that have entered into and currently remain on Plaintiffs Ely and Hauke's property. As a result, the value of their property has declined. The Ely and Hauke property is also worth less now that it is public knowledge that the property is so close to a notorious polluter and located within the known toxic hotspot created by Bullseye.

55.

Since learning that they live in the plume of Bullseye's dangerous air emissions, Mr. Ely's and Ms. Hauke's use and enjoyment of their property has declined significantly. Normally, Mr. Ely and Ms. Hauke would plant tomatoes, green beans, eggplant, kale, lettuce, and other produce. Instead, they are concerned about the harm Bullseye's emission have caused to their property and the plants on that property

56.

In addition to not being comfortable gardening, the couple is concerned about the need to pay for expensive metals testing both for themselves and their property, and they are concerned that the value of their home has dropped or will drop because the property is so close to a now notorious polluter. Had they known about Bullseye's emissions of toxic metals, the couple would not have bought their home or paid as much for it as they did.

F. Plaintiffs Judy Sanseri and Howard Banich

57.

Judy Sanseri and Howard Banich bought their home in 1976. Their home is located in the Affected Area.

58.

Bullseye has emitted cadmium, chromium, arsenic, and other pollutants that have entered on to and currently remain on the property of Plaintiffs Sanseri and Banich. As a result, the value of their property has declined. Their property is also worth less now that it is public knowledge that the property is so close to a notorious polluter and located within the known toxic hotspot created by Bullseye.

59.

When Plaintiffs Sanseri and Banich bought their home they did not know, and could not have reasonably known, that it was in a hotspot of toxic air emissions from Bullseye. Had they known of the dangerous emissions from Bullseye, they would not have bought their house or paid as much for it as they did.

60.

Since learning that they live in the plume of Bullseye's dangerous air emissions, Plaintiffs Sanseri and Banich's use and enjoyment of their property declined significantly. For example, in light of the news about Bullseye's toxic emissions, they stopped growing vegetables in their yard, something they had previously enjoyed doing for many years. Plaintiff Sanseri loves to garden, and has taken great pride in creating a lovely garden at their home. However, as a result of Bullseye's toxic emissions, she no longer did any gardening. Their social life also changed significantly because of Bullseye's

1 emissions. They no longer sat outside for meals or entertain in their beautiful and secluded yard,
2 something they loved to do and had done with great frequency until they learned about Bullseye's toxic
3 emissions. They kept their windows closed, and left their neighborhood to walk their dog or enjoy the
4 outdoors. Plaintiffs Sanseri and Banich recently moved to a new home and intend to rent out their
5 property in the Affected Area.

6 61.

7 Not only have Bullseye's emissions dramatically affected the value of their home and their use
8 and enjoyment of their property, but they have also forced Plaintiffs Sanseri and Banich to spend
9 considerable sums of money. For example, as they no longer grow vegetables in their garden they have
10 been forced to purchase produce from farms located outside of the Affected Area. And, they have had to
11 hire a gardener to tend to the trees, bushes, and other plants in their yard, rather than doing that yard
12 work themselves. Additionally, Plaintiffs Sanseri and Banich have spent approximately \$1,700 on air
13 purifiers for their home. They will also need to pay for costly health and soil testing, now and into the
14 future.

15 **CLASS ACTION ALLEGATIONS**

16 62.

17 Plaintiffs bring claims pursuant to Oregon Rule of Civil Procedure 32 on behalf of the Class of
18 similarly situated persons. Plaintiffs propose to represent the following Subclasses, a "Resident
19 Subclass" and an "Owner Subclass," defined as follows:

20 All residents of the residential properties within the Affected Area
21 as of February 3, 2016.

22 All owners of the residential properties within the Affected Area as
23 of February 3, 2016.

24 63.

25 Collectively, the members of those subclasses are "Class members." The Class members are
26 ascertainable and have a well-defined community of interest of their members. Excluded from the Class
27 are Defendant and its subsidiaries, affiliates, and employees; all persons who make a timely election to
28

1 be excluded from the Class; governmental entities; Reed College; and the judge to whom this case is
2 assigned and his/her immediate family. Plaintiffs reserve the right to revise the Class definition based
3 upon information learned through discovery.

4 64.

5 **Numerosity.** The members of the Class are so numerous that joinder of all members would be
6 impracticable. There are approximately 2,185 residential real properties fully within or intersected by
7 the boundary of the Affected Area.

8 65.

9 **Commonality.** There are common questions of law and fact that predominate over any questions
10 affecting only individual members of the Class. Those common factual and legal questions include but
11 are not limited to: whether Defendant was negligent and continues to be negligent in its construction,
12 maintenance, or operation of Bullseye's facility, whether Bullseye's facility has created a nuisance,
13 whether Defendant has trespassed on Class members' property and land enjoyed by Class members,
14 whether Defendant owed any duties to Class members, whether and how Class members have been
15 harmed by Defendant's conduct, and whether Class members' personal or real property has been
16 damaged and if so how the values of that property have been affected by emissions from the facility near
17 where Class members live.

18
19 66.

20 **Typicality.** The representative Plaintiffs' claims are typical of the claims of the members of the
21 Class. Plaintiffs and all the members of the Class have been injured by the same wrongful acts and
22 omissions of Defendant. Plaintiffs' claims arise from the same practices and course of conduct that give
23 rise to the claims of the members of the Class and are based on the same legal theories.

24 67.

25 **Adequacy.** Plaintiffs are representatives who will fully and adequately assert and protect the
26 interests of the Class, and have retained class counsel who are experienced and qualified in prosecuting
27
28

1 class actions. Neither Plaintiffs nor their attorneys have any interests contrary to or in conflict with the
2 Class.

3 68.

4 **Superiority.** A class action is superior to other available methods for the fair and efficient
5 adjudication of this case. The equitable relief and amount of damages available to individual plaintiffs
6 are insufficient to make litigation addressing Defendant's conduct economically feasible in the absence
7 of the class action procedure. Individualized litigation also presents a potential for inconsistent or
8 contradictory judgments, and increases the delay and expense to all parties and the court system
9 presented by the legal and factual issues of the case. By contrast, a class action approach presents far
10 fewer management difficulties and provides the benefits of a single adjudication, economy of scale, and
11 comprehensive supervision by a single court. And, this forum is desirable as Defendant does business
12 here and Class members reside here. Finally, no other similar litigation has been commenced, but if
13 commenced, it can be coordinated under ORCP 32K

14 69.

15 **Notice:** Plaintiffs provided notice and a demand for damages to Defendant pursuant to ORCP
16 32H at least thirty days prior to filing this Amended Complaint seeking damages, and Defendant has not
17 satisfied that demand.

18 70.

19 Plaintiffs will seek fees, costs, and litigation expenses pursuant to ORCP 32M.

20 **FIRST CLAIM FOR RELIEF**

21 (Nuisance)

22 71.

23 Plaintiffs incorporate all prior allegations into this claim.

24 72.

25 The emissions from Bullseye Glass are a nuisance. For at least the last six years metals such as
26 arsenic and cadmium have poured uncontrolled from the stacks of Bullseye's furnaces.

27 73.

1 Those emissions have substantially and unreasonably interfered with the use and enjoyment of
2 Plaintiffs' and Class members' property.

3 74.

4 The interference is substantial because, as described already, Plaintiffs and Class members now
5 have legitimate concerns about whether they can safely use portions of their land to grow fruits and
6 vegetables to feed themselves and their families, and Plaintiffs and Class members now have legitimate
7 concerns about whether they can safely play, or allow their children or pets to play, in their yards
8 without concern that they are putting their health (and that of their children and pets) at risk.

9 75.

10 Plaintiffs and Class members' reactions to this nuisance are ordinary and reasonable reactions to
11 the recent revelation that they live within a previously unknown toxic hotspot.

12 76.

13 Defendant's interference with Plaintiffs' and Class members' use and enjoyment of their land is
14 also unreasonable. Knowingly spewing toxic contaminants into a residential area is not a reasonable
15 thing for anyone to do. Also, Bullseye knows or should know that similar facilities in other states and
16 abroad commonly comply with more strict emissions control limitations imposed by those states and
17 jurisdictions, in order to prevent this very type of problem from occurring.

18
19
20 77.

21 The cost of adequately controlling and containing Defendant's emissions is modest, particularly
22 when compared to the harm that Plaintiffs and Class members have been forced to bear as a result of
23 Defendant's decision to try to externalize rather than bear those costs. The costs are far greater than
24 Plaintiffs and Class members should be forced to bear in their predominantly residential neighborhood.

25 78.

1 Defendant's conduct in creating the nuisance was and/or is negligent, reckless, intentional,
2 and/or abnormally dangerous. As described in this complaint, Defendant's conduct directly caused the
3 nuisance.

4 79.

5 Any compliance by Defendant with applicable laws or permit conditions does not excuse
6 Defendant's nuisance or any other tort.

7 80.

8 As a result of Defendant's conduct, Plaintiffs and Class members have each suffered or will each
9 have suffered:

- 10 (i) Testing expenses to determine the level of heavy metals in Plaintiffs' and Class
11 members' and their family members' bodies, in a sum the jury determines to be
12 fair but in no event to exceed \$3,000 per person;
- 13 (ii) Testing expenses to determine the level of heavy metals on the Plaintiffs' and
14 Class members' property, in a sum the jury determines to be fair but in no event
15 to exceed \$5,000 per lot;
- 16 (iii) Damage to or the loss of personal property, including but not limited to produce
17 or other edible plants or fruit from the trees or bushes cultivated by Plaintiffs and
18 Class members, in a sum the jury determines to be fair but in no event to exceed
19 \$5,000 per household;
- 20 (iv) Clean up or remediation expenses to remove or contain and make safe the levels
21 of heavy metals found on the Plaintiffs' and Class members' property, in a sum
22 the jury determines to be fair but in no event to exceed \$100,000 per lot;
- 23 (v) Diminution in value of property that the Plaintiffs and Class members own that is
24 within the known plume of the Defendant's toxic emissions, in a sum the jury
25 determines to be fair but in no event to exceed \$125,000 per lot;
- 26 (vi) The expense of future medical monitoring of the Plaintiffs and Class members
27 and/or their family members, to determine the nature of the long term harm
28

1 created by exposure to the Defendant's toxic emissions, in a sum the jury
2 determines to be fair but in no event to exceed \$150,000 per person; and
3 (vii) The loss of use of the funds expended to test and/or clean up Plaintiffs' and Class
4 members' property, in a sum to be calculated using prejudgment interest at the
5 highest allowable rate – which is currently 9% per annum;
6 all to Plaintiffs' economic damages in a sum to be proven at trial.

7 81.

8 As a result of Defendant's conduct, Plaintiffs and Class members have each suffered or will each
9 have suffered mental anguish, distress, annoyance, inconvenience, and/or interference with their normal
10 daily activities and the use of their property, all to Plaintiffs' non-economic damages in a sum the jury
11 determines to be fair but in no event to exceed \$50,000 per Class member.

12 82.

13 In addition, Plaintiffs seek punitive damages in the sum of up to \$3,000 per Class member.

14 83.

15 Plaintiffs seek an injunction ordering Bullseye not to resume the use of arsenic, cadmium, and
16 chromium unless it has adequate emissions controls equipment in operation.

17 84.

18 Any hardship allegedly caused to the Defendant by such an injunction is greatly outweighed by
19 the benefits resulting to Plaintiffs and the Class members: the ability to live secure in the knowledge that
20 the air they breathe, and the land that they live on and enjoy and rely on for food, are safe.

21 **SECOND CLAIM FOR RELIEF**

22 (Common Law Trespass)

23 85.

24 Plaintiffs re-allege paragraphs 1-70 and paragraphs 80-84 and further allege:

25 86.

26 By emitting particulate emissions onto the land possessed by Plaintiffs and the Class, Defendant
27 disturbed Plaintiffs' and Class members' rights to exclusive possession of that land.

87.

Bullseye directly or indirectly allows particles from its furnaces to enter on to and remain on Plaintiffs' and Class members' land.

88.

Defendant's conduct that allowed and/or created a trespass was and is negligent, reckless, intentional, and/or abnormally dangerous.

89.

Defendant had no license or other authorization to enter on to or to leave contaminants on land possessed by Plaintiffs and the Class members. Any compliance by Defendant with applicable laws or permit conditions does not excuse Defendant's trespass.

90.

Plaintiffs seek an injunction also ordering Bullseye to remove the particles it has caused to be deposited on Plaintiffs' and all other Class members' property.

THIRD CLAIM FOR RELIEF

(Negligence)

91.

Plaintiffs re-allege paragraphs 1-70, and paragraphs 80-82 and further allege:

92.

By emitting particulate emissions onto the land possessed by Plaintiffs and the Class, Defendant disturbed Plaintiffs' and Class members' rights to exclusive possession of that land.

93.

Bullseye directly or indirectly allows particles from its furnaces to enter on to and remain on Plaintiffs' and Class members' land.

94.

Bullseye Glass was unreasonable in the operation of its facility, in one or more of the following ways:

- 1 (a) Defendant failed or neglected, and continues to fail or neglect, to install appropriate
2 emissions control equipment on each of their furnaces, when Defendant knew or
3 should have known that failure to do so could result in emission of pollutants that
4 would likely travel to and land on neighboring properties;
- 5 (b) Defendant failed or neglected, and continues to fail or neglect, to monitor its furnace
6 emissions on a regular basis to determine if heavy metals were escaping from its
7 facilities, when Defendant knew or should have known that failure to do so could
8 result in emission of pollutants that would likely travel to and land on neighboring
9 properties;
- 10 (c) Defendant failed or neglected, and continues to fail or neglect, to install appropriate
11 emissions control equipment on the other portions of its facility where fugitive
12 emissions might escape, when Defendant knew or should have known that failure to
13 do so could result in emission of pollutants that would likely travel to and land on
14 neighboring properties;
- 15 (d) Defendant failed or neglected, and continues to fail or neglect, to monitor its
16 facilities' fugitive emissions on a regular basis to determine if heavy metals were
17 escaping, when Defendant knew or should have known that failure to do so could
18 result in emission of pollutants that would likely travel to and land on neighboring
19 properties;
- 20 (e) Defendant failed or neglected, and continues to fail or neglect, to properly train its
21 employees to operate the facilities in a way that would not allow furnace or fugitive
22 emissions, when Defendant knew or should have known that failure to do so could
23 result in emission of pollutants that would likely travel to and land on neighboring
24 properties;
- 25 (f) Defendant failed or neglected, and continues to fail or neglect, to construct its
26 furnaces in a way that would preclude emissions, when Defendant knew or should
27
28

1 have known that failure to do so could result in emission of pollutants that would
2 likely travel to and land on neighboring properties;

3 (g) Defendant failed or neglected, and continues to fail or neglect, to maintain its
4 furnaces in a way that would preclude emissions, when Defendant knew or should
5 have known that failure to do so could result in emission of pollutants that would
6 likely travel to and land on neighboring properties;

7 (h) Defendant failed or neglected, and continues to fail or neglect, to maintain its facility
8 in a way that would preclude fugitive emissions, when Defendant knew or should
9 have known that failure to do so could result in emission of pollutants that would
10 likely travel to and land on neighboring properties;

11 (i) Defendant operated or operates its furnaces or facility in a way that created emissions
12 of hexavalent chromium, when Defendant knew or should have known that burning
13 glass constituents, waste, or both in such a manner could result in emission of
14 pollutants that would likely travel to and land on neighboring properties; or

15 (j) Defendant failed or neglected to warn the neighbors that its furnaces or facility was
16 emitting heavy metals, when Defendant knew or should have known that failure to do
17 so could result in damage to the neighbors, their children, their guests, and/or to
18 neighboring properties.

19 95.

20 Defendant Bullseye knew or should have known that its conduct was causing a foreseeable risk
21 of harm because: (i) it knew that it was using toxic metals in its glass furnaces; (ii) it knew or should
22 have known that as a matter of basic chemistry not all of the toxic metals it was putting into its glass
23 manufacturing would be bound up in the glass; (iii) it knew that emissions from similar furnaces were
24 regulated at similar facilities in nearby States and elsewhere; (iv) it knew that EPA had been sufficiently
25 worried about the emissions from glass furnaces that EPA created and proposed regulations for such
26 furnaces; (v) it knew that it was providing personal protective gear to employees working with those
27 same glass constituents; (vi) it knew that it was located in a primarily residential neighborhood; (vii) it
28

1 knew that material filtered from its emissions in the future would need to be disposed of as hazardous
2 materials; and (viii) it could foresee that by emitting toxic metals unchecked it could damage the health,
3 property, or both of those living near its facility.

4 **REQUEST FOR RELIEF**

5 Plaintiffs request a judgment for and seek the following economic and non-economic damages as
6 well as equitable relief:

7 A. An Order certifying this matter as a class action pursuant to ORCP 32;

8 B. An Order directing Defendant to preserve documents and other information related to
9 Plaintiffs' current claims, including claims for damages;

10 C. An Order directing Defendant to permanently cease the use of arsenic, cadmium, and
11 chromium and any other toxins in its glass production processes unless and until it installs adequate
12 emissions control;

13 D. An Order requiring Bullseye to pay for all residents living within the Affected Area to
14 have urine and/or blood testing performed for the presence of arsenic, cadmium, and chromium;

15 E. An Order requiring Bullseye to remove all particulate matter Bullseye has deposited or
16 allowed to be deposited on the property of Plaintiffs and Class members;

17 F. An Order requiring Bullseye to pay economic and/or non-economic damages to Plaintiffs
18 and the Class;

19 G. An Order requiring Bullseye to establish a fund to cover the costs of ongoing diagnostic
20 testing of Plaintiffs and the Class for the heavy metals emitted by Bullseye, to determine if there are any
21 long term health effects of those exposures;

22 H. An Order directing Bullseye to pay attorneys' fees and costs;

23 I. An Order directing Bullseye to pay punitive damages in the sum of up to \$3,000 per
24 Class member;

25 J. An Order awarding prejudgment interest at the highest allowable rate on the economic
26 damages; and

27 K. Such other relief that the Court may deem just.
28

1 DATED this 13th day of February, 2018

KELLER ROHRBACK L.L.P.

2
3 By /s/Matthew J. Preusch

Matthew J. Preusch (Bar No. 134610)

mpreusch@kellerrohrback.com

KELLER ROHRBACK L.L.P.

1129 State Street, Suite 8

Santa Barbara, CA 93101

Telephone: (805) 456-1496

Facsimile: (805) 456-1497

7 Daniel Mensher (Bar No. 074636)

dmensher@kellerrohrback.com

Amy Williams-Derry (*Admitted pro hac vice*)

awilliams-derry@kellerrohrback.com

KELLER ROHRBACK L.L.P.

1201 Third Ave., Suite 3200

Seattle, WA 98101

Telephone: (206) 623-1900

Facsimile: (206) 623-3384

12 Karl G. Anuta (Bar No. 861423)

kga@integra.net

LAW OFFICE OF KARL G. ANUTA, P.C.

735 S.W. First Avenue

Strowbridge Bldg, Second Floor

Portland, Oregon 97204

Telephone: (503) 827-0320

Facsimile: (503) 228-6551

Attorneys for Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing **PLAINTIFFS' THIRD AMENDED CLASS ACTION COMPLAINT** on:

Allan M. Garten
Carrie Menikoff
Kent Robinson
GRM LAW GROUP
5285 Meadows Road, Suite 330
Lake Oswego, OR 97035

by the following indicated method or methods:

☐ by faxing full, true, and correct copies thereof to the attorneys at the fax numbers shown above, which are the last-known fax numbers for the attorneys' offices, on the date set forth below. The receiving fax machines were operating at the time of service and the transmissions were properly completed, according to the confirmation reports on file.

☒ by mailing full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, and deposited with the United States Postal Service at Seattle, Washington, on the date set forth below.

☐ by sending full, true, and correct copies thereof via overnight courier in sealed, prepared envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, on the date set forth below.

☒ by electronic transmission of a notice of filing by the electronic filing system provided by the Oregon Judicial Department for the electronic filing and the electronic service of a document via the Internet to the electronic mail (email) address of a party.

I hereby declare that the above is true to the best of my knowledge and belief. I understand that this document is made for use as evidence in court and is subject to penalty of perjury.

DATED: February 13, 2018

Signed: /s/Matthew J. Preusch
Matthew J. Preusch, Attorney for Plaintiffs

Exhibit 1

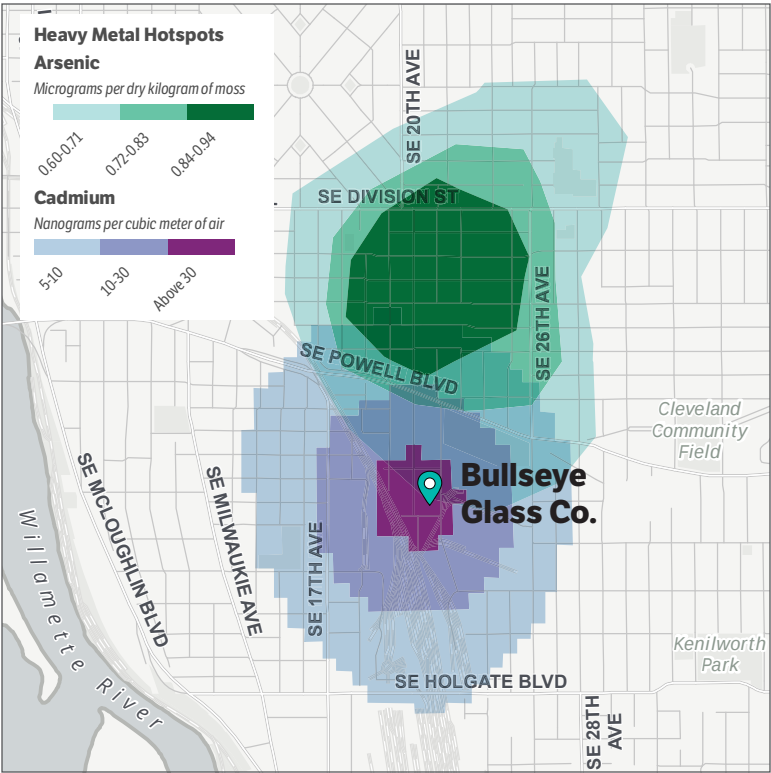
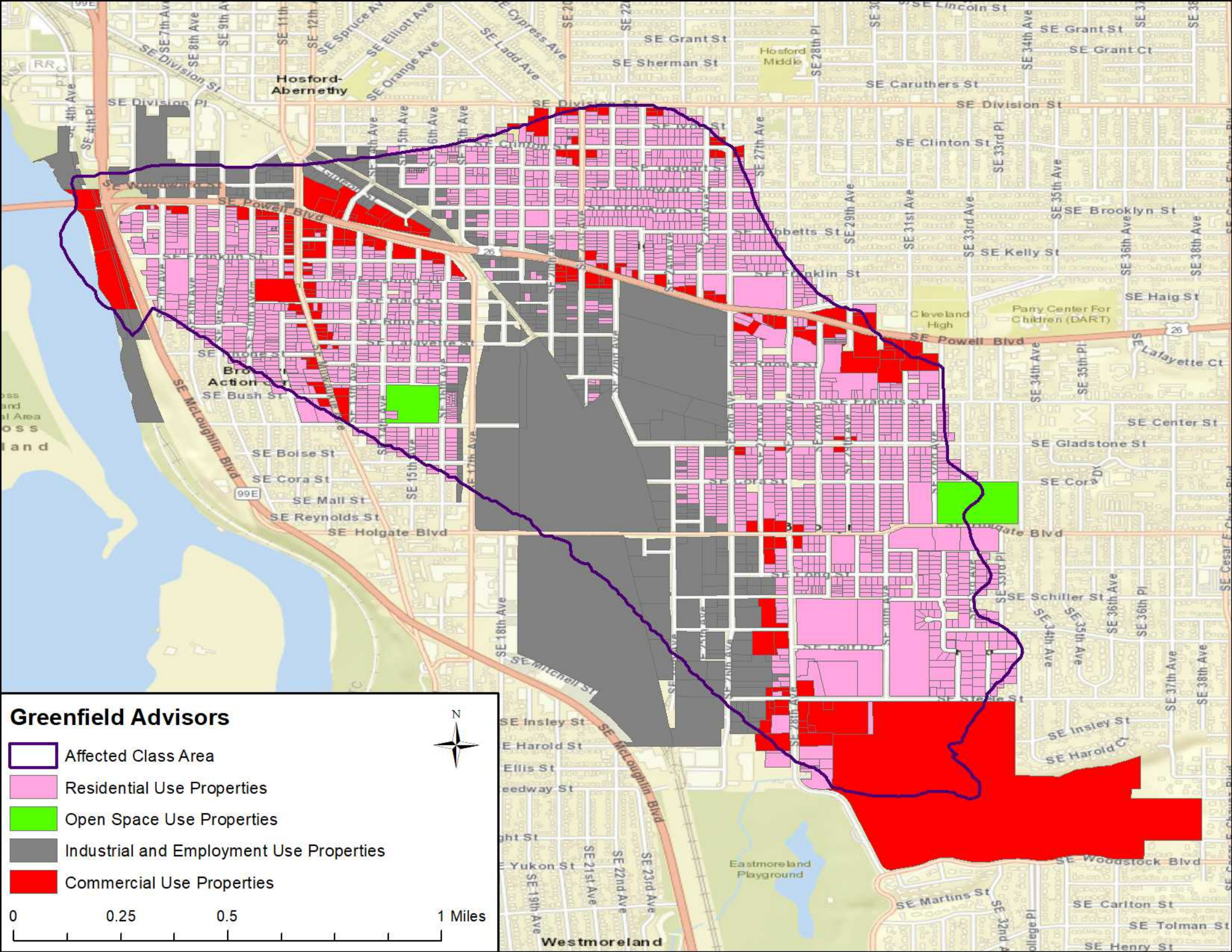


Exhibit 2



Greenfield Advisors

-  Affected Class Area
-  Residential Use Properties
-  Open Space Use Properties
-  Industrial and Employment Use Properties
-  Commercial Use Properties

