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3/28/91

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BEFORE THE CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

Petition for Review of Failure to Act by the County of Alameda Health Care Services Agency re: Corrective Action Order for Harrison Street Garage, 1432 Harrison Street, Oakland, California 94612	)	No.

INTRODUCTION

This Petition seeks to have Douglas Motor Services ("Douglas"), a former long-term tenant of Petitioner herein, named as the primarily responsible party on the Order which is the subject of this Petition, or, in the alternative, to have Douglas added to said Order as a jointly responsible party.

This Petition is filed pursuant to the provisions of Chapter 6.7 of the California Health & Safety Code ("Underground Storage of Hazardous Substances," Health and Safety §25280 et seq.), which provides that:

> A person to whom an order is issued pursuant to [§25299.37(c)], shall have the same rights of administrative and judicial appeal and review as are provided by law for clean-up and abatement orders issued pursuant to §13304 of the Water Code. §25299.37(d).[1]

1 All code sections cited herein refer to the California Health and Safety Code unless otherwise noted.

This petition has been prepared in compliance with the requirements of 23 California Code of Regulations ("C.C.R.") §2050 regarding review by the State Water Resources Control Board ("State Board") of an action or failure to act by a regional board. Alvin Bacharach and Barbara Borsuk (collectively "Petitioner") own the Harrison Street Garage located in Oakland, California. Petitioner has always managed this land as rental property. Tenants have used it as a parking garage, gasoline station and auto repair shop. Petitioner has never owned or controlled the garage and service station business conducted by its tenants on the property. See Declaration of Alvin Bacharach ("Bacharach Dec.").

The Alameda County Health Care Services Agency ("County") issued a Notice of Violation to Petitioner on July 31, 1990 regarding two underground storage tanks ("USTs") on the property. This Notice was followed on September 24, 1990 by a §25299.37(c) Cleanup Order for the site naming Petitioner as the sole party responsible for taking corrective action. See Exhibit 1.

Petitioner objected to being named as the sole responsible party because the tanks are owned and were operated solely by Douglas. Petitioner provided the County with substantial documentation demonstrating that Douglas was the tenant on the site, that Douglas owned and operated the USTs and that Petitioner was in no way responsible for the operation or maintenance of the tanks. Based upon this documentation, Petitioner requested the County to substitute Douglas for Petitioner on the Order, or in the alternative, to add Douglas to the Order as the primarily

responsible co-respondent. The County refused to substitute Douglas for Petitioner on the Cleanup Order, and further refused to add Douglas to the Order as either the primarily or an additionally responsible party. Petitioner submits that the failure of the County to add Douglas to the Order was improper, inappropriate and wholly inequitable.[2]

Petitioner submits the following information pursuant to 23 C.C.R. §2050.

1. NAME AND ADDRESS OF PETITIONER

Alvin Bacharach
Barbara Borsuk
383 Diablo Road, #100
Danville, CA 94526

2. SPECIFIC ACTION OF THE LOCAL AGENCY WHICH THE STATE BOARD IS REQUESTED TO REVIEW.

The specific action presented for review is the County's refusal to add Douglas as the primarily or jointly responsible party on the Order issued by the County to Petitioner regarding the Harrison Street Garage. The County's final decision in this regard was orally communicated to Petitioner in a meeting between Petitioner and the County on January 14, 1991. A letter

2 Petitioner has chosen not to appeal from that portion of the County's decision which denied Petitioner's request to substitute Douglas for Petitioner on the Order. Petitioner reserves all legal rights and remedies against Douglas, however, and the decision not to appeal the County's denial of Petitioner's request to seek substitution on the Order is made without prejudice to any subsequent civil action which Petitioner may choose to bring against Douglas.

documenting this meeting and the County's decision is attached hereto as Exhibit 2. See also Declaration of Jonathan S. Leo ("Leo Dec.").

3. DATE ON WHICH THE LOCAL AGENCY ACTED.

The County's final decision was made on January 14, 1991.

4. FULL AND COMPLETE STATEMENT OF REASONS THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER.

The County's failure to add Douglas to the Cleanup Order (which failure thereby imposes the full burden of this Order on Petitioner) was inappropriate and improper for the reasons stated below.

A. Standard of Review.

Water Code §13320 governs the State Board's review of the County's failure to act. See Health and Safety Code §25299.37(d). Under this provision, the County's decision may be reversed upon a finding that it was "inappropriate or improper." Water Code §13320(c). The State Board's standard of review is similar to the "independent judgment rule" utilized by courts. In re Exxon Company, U.S.A., WQ 85-7. This standard permits the Board to "take a fresh look at the facts to see if the weight of the evidence supports the decision." Id. Under the independent judgment rule, the Board "[will] not defer to the [local] agency if [it] disagrees with the conclusion." Id.

Petitioner submits that an independent review of the facts in this case must lead to the conclusion that the County has erred in failing to add Douglas to the Order.

B. The Statute Directs That Douglas is Responsible for the Cleanup.

(1) Douglas Was the Owner and Operator of the USTs When the UST Statute Was Enacted in 1984.

Petitioner purchased the Harrison Street property in 1945 and has owned it continuously since that time. The garage has always been a rental property used as a parking garage, gasoline station and auto repair facility. Douglas Motor Services purchased the garage business from prior tenant Carl Don Skjoldager in 1972. On August 21, 1972 Douglas entered into a lease with Petitioner for use of the property. Douglas leased this property from Petitioner continuously from 1972 through 1988. Douglas had exclusive possession and control of the property during that period. See Leases, attached hereto as Exhibit 3.

The Order which is the subject of this Petition was issued on September 24, 1990 by the County of Alameda pursuant to the California Underground Storage of Hazardous Substances law (the "Statute"). See Exhibit 1. §25299.37(c) of the Statute authorizes local agencies to issue compliance orders to the "owner, operator, or other responsible party." Under the Statute, an "owner" is defined as "the owner of an underground storage tank." §25281(i). An "operator" is defined as "any person in control of, or having daily responsibility for, the daily operation of an underground storage tank system." §25281(h). Thus, unlike the State Water

Code or the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), the Statute specifically ties cleanup responsibility to control or ownership of the tank, and not to ownership of the property under which the tank is located.

Under any reading of the Statute, Douglas is the party with primary responsibility for taking corrective action in response to any release from the USTs on the property. The Statute was enacted in 1984, during Douglas' tenancy. At that time, Douglas was both the owner and the operator of the two USTs on the property. Douglas earlier had replaced both of the existing 550 gallon USTs with 1000 gallon USTs, one in 1975 and the other in 1982.

Douglas' actions regarding the USTs unequivocally establish that it considered itself to be the owner of these USTs. First, Douglas registered itself as the "owner" of the USTs on the installation permits issued by the City of Oakland. See Exhibit 4. In addition, permits to operate were issued to Douglas by the County also identifying it as the "owner" of the tanks. See Exhibit 5. Moreover, Douglas identified itself as the "owner" of the USTs on relevant State Board Hazardous Substance Storage Statements. See Exhibit 6.

In 1975, after replacing the first UST, and without first consulting Petitioner, Douglas sought reimbursement from Petitioner for the purchase and installation costs of that UST. Petitioner

refused to compensate Douglas for the replacement of the UST since the rent for the garage space was not in any way related to gasoline sales. See Exhibit 7.

Clearly Douglas considered itself to be the owner, as well as the admitted operator, of the UST. As such, Douglas should bear the primary responsibility for corrective action under the Statute.

(2) Douglas' Failure to Comply With the Statute Substantially Contributed to and Exacerbated the Contamination.

As the owner and operator of the USTs, it was Douglas' responsibility -- not Petitioner's -- to comply with the Statute in order to, among other requirements, prevent unauthorized releases from the USTs. Douglas' deficient performance of its responsibilities in this regard substantially contributed to the contamination.

First, Douglas failed to comply with any of the requirements of the Statute. At no time did Douglas monitor the underground storage tank systems, or keep records of testing and repairs as required by Health and Safety Code §25293. Indeed, Douglas has admitted that it never maintained the USTs. See Exhibit 8.[3] Douglas failed to keep records of unauthorized releases and, even more critically, failed to report such

3 Exhibit 8 is a Declaration of Steven Davis filed in a civil action unrelated to this Petition. Mr. Bacharach has filed an unlawful detainer action against Mr. Davis, a former tenant, for failure to pay rent and Mr. Davis has filed a suit against Petitioner for fraud. These actions are in no way relevant to the only issue presented to the State Board by this Petition -- namely, whether Douglas should be named on the County's Cleanup Order.

unauthorized releases as required by the Statute. Health and Safety Code §§25294, 25295(a). Finally, at the termination of its lease in 1988, Douglas simply ignored the statutory requirements regarding UST closure. Health and Safety Code §25298. Product was left in the USTs and had to be removed at Petitioner's expense. See Exhibit 9.

Second, Douglas knew that unauthorized releases of product from the USTs had occurred and yet failed to take any type of corrective action. In April 1982, Douglas was put on notice by its own contractor that at least one of the USTs was leaking. See Declaration of Mark Borsuk. Nevertheless, Douglas took no action to investigate or remediate this problem for six months. See Bacharach Dec. Even when it did replace the UST, it failed to report the release.

Taken together, these facts indicate that Douglas' inaction in violation of the Statute substantially contributed to and exacerbated the petroleum contamination. Had Douglas performed the required routine tank and tank system maintenance and properly responded to the unauthorized releases, as it was obligated to do by the Statute, neither the County, Petitioner nor the State Board would be faced with the problem today.

C. Petitioner is Not Primarily Responsible for the Performance of Any Required Corrective Action.

(1) Petitioner is Neither the Owner Nor the Operator of the USTs.

There is no dispute that Petitioner was at no time the operator of the USTs at the Harrison Street Garage, either of the original 550 gallon USTs, or of the 1000 gallon USTs installed by Douglas. In addition, Petitioner had no access to, or control of, those USTs. See Bacharach Dec. As established supra, Douglas clearly and repeatedly identified itself, and not Petitioner, as the owner of the USTs on official records filed with the County and other regulatory agencies. Petitioner had no means of knowing about releases or other statutorily required compliance activities absent notification by Douglas. In short, Petitioner lacked any ability to comply with the relevant statutory provisions during Douglas' tenancy without Douglas' cooperation.

Nor was there any reason for Petitioner to exercise such control since it did not own the USTs. Even if, assuming arguendo, Petitioner did own the original 550 gallon USTs, he did not own (and certainly never operated) the 1000 gallon USTs which were purchased and installed by Douglas and which were in place in 1984 when the Statute took effect. The State Board has adopted as its own the holding of the court in Murr v. Cohen, (1927) 87 Cal. App. 478, to the effect that an UST is a removable fixture which does not become part of the realty. The critical issue, the court

stated, is the intent of the parties. See In re Exxon Company U.S.A., WQ 85-7. In this case, the documentary record demonstrates that the parties intended that the USTs belonged to Douglas.

Petitioner did not contribute at all to the cost of the first UST, and contributed only marginally to the cost of the second as a good faith gesture. See Bacharach Dec. Moreover, Petitioner specifically informed Douglas in 1988 (the year the lease expired) that Douglas was responsible for the remediation of any contamination caused by leakage from the USTs. See Exhibit 10. Thus, Petitioner, who neither owned nor operated the USTs, was not, and should not now be held to be, primarily responsible for any corrective action related to them.

(2) Petitioner Was Entitled to Rely on the Lease Agreements Which Placed Responsibility for UST Leakage on the Tenant Douglas.

The three leases executed between Douglas and Petitioner covering the period between 1972 and 1988 provide unequivocally that Douglas agreed to hold Petitioner harmless from all liability relating to UST leakage. The leases provided expressly:

> Lessee agrees to keep, save, and hold lessor free from all liability, penalties . . . from any causes whatsoever, including leakage while in, upon or in anyway connected with said demised premises . . . (emphasis added).

See Leases paragraph 9, Exhibit 3. Thus, the parties specifically agreed that Douglas, and not Petitioner, would bear the responsibility for damages and costs associated with unauthorized (or other) releases from the USTs.

In addition, the lease provided that Douglas agreed to:

> Repair and maintain the demised premises in compliance and conformity with all laws and ordinances, municipal, state, federal and/or any other governmental authority and all lawful requirements or orders of any . . . [government] in anyway relating to the condition, use or occupancy of the . . . premises throughout the entire term of this lease and to the perfect exoneration from liability of the lessor.

See Leases paragraph 3, Exhibit 3. The parties therefore contemplated that, with respect to the USTs, any statutory or regulatory violation occurring during the term of the lease was to be Douglas' sole responsibility.

D. Applicable Law and State Board Decisions Require That Douglas be Added to the Cleanup Order.

The State Board has consistently determined that operators responsible for site contamination should be named on cleanup orders:

> Generally speaking it is appropriate and responsible for a Regional Board to name all parties for which there is reasonable evidence of responsibility, even in cases of disputed responsibility.

In re Exxon Company, U.S.A, WQ 85-7. See also, In re Stuart Petroleum, WQ 86-15 (correct to name just tenant on cleanup and abatement order regarding petroleum contamination).

Moreover, the State Board has held that "[t]he initial responsibility for cleanup is with the operator." In re Schmidl, WQ 89-1. The user/discharger bears "primary responsibility" for compliance with a local agency cleanup order. Id. In this vein, a tenant should be named as the primarily responsible party when the tenant was the operator and caused the contamination, or

contributed substantially to it. See In re Vallco Park, Ltd., WQ 86-18 (local agency can "without undue difficulty or expense, set a slightly different standard of performance for a landowner" where the landowner did not initiate or contribute to the discharge.)

Finally, this Board has conclusively determined that a lessee remains responsible for the cleanup of contaminated sites even when it no longer has control over the property. In a similar case involving a prior lessee's responsibility for petroleum contamination, the Board found:

> [Lessee's] lack of present control is not relevant. Responsibility for a problem created in the past is.

In re Stuart Petroleum, Order No. 86-15. State Board precedent thus manifestly indicates that Douglas should be named on the Order as the primarily responsible party.

E. The County's Failure to Add Douglas to the Order was Arbitrary and Capricious.

Petitioner is at a loss to explain why the County has refused to add Douglas to the Order. The County has acknowledged that Douglas was the operator of the USTs. Moreover, it knows that Douglas not only remains within its jurisdiction (notwithstanding the termination of its tenancy with Petitioner), but also that Douglas currently owns and/or operates several garage and service station businesses in Oakland, at least one of which was in violation of the statute as of April 1990. See Exhibit 11.

In addition, it is possible that, after a full assessment of the extent of contamination has been completed, the cost of performing the necessary corrective action at the Harrison Street

Garage may exceed the financial resources available to Petitioner and could very well force Petitioner into bankruptcy. See Bacharach Dec. In this case, as in Vallco Park, "[t]he difficult position into which the petitioner has been placed does not further any legitimate public purpose."

Although he has acceded to the County's demand to conduct an investigation and preliminary site assessment, Petitioner objected vigorously to his status as the sole responsible party on the Order. He informed the County that he had never operated or in any way controlled the USTs, and provided the County with documentary evidence regarding Douglas' ownership, its responsibilities under the lease, its knowledge of the contamination, and its obligations and failure to act in compliance with the Statute. See November 27, 1990 letter to Paul M. Smith, Exhibit 12. Petitioner took every step possible to provide the County, and the District Attorney, with all of the information requested regarding this matter. See December 13, 1990 letter to Mark Thomson, Deputy District Attorney, Exhibit 13.

Nevertheless, the County refused to add Douglas to the Order and has refused to give its reasons for this decision. Petitioner met with representatives of the County Health Services Agency and District Attorney's office on January 14, 1991. At that meeting, the County unequivocally informed Petitioner that under no circumstances would it be willing to add Douglas to the Order. The County stated that it believed that Petitioner is the owner of the USTs and that it was therefore "not inappropriate" for Petitioner

to be solely responsible for performance of the corrective action required by the Order. Although the County admitted that Douglas was the undisputed operator of the USTs, it nevertheless could not or would not explain its decision to ignore clear precedent by refusing to name the undisputed operator of the USTs as a responsible party on the Order. See Leo Dec.

At the January 14, 1991 meeting, Petitioner asserted that forcing Petitioner to bear the entire economic burden of performing corrective action on the property was grossly inequitable where another party, Douglas, was primarily responsible for the operation and maintenance of the USTs at issue. The County representatives responded that Petitioner had the option of independently seeking contribution from Douglas for costs incurred in performing such corrective action. See Bacharach Dec. However, Petitioner pointed out that the ability to obtain such contribution would be materially impaired by the County's failure to name Douglas on the Order, since such failure (after a request to do so) would be construed as an affirmative local agency determination on the merits that the County did not regard Douglas as at all responsible for the unauthorized release. See Leo Dec. The County's only reply was that the purpose of issuing the Order was not to "send messages", but to achieve corrective action. Petitioner submits that this remark was unresponsive.

Finally, the Deputy District Attorney informed Petitioner that if Petitioner did not immediately comply with the Order by conducting an environmental assessment of the release, he would shortly file a civil or criminal enforcement action against Petitioner. Id. See Exh. 2; Leo Dec.

The Statute clearly grants the County broad authority to name all responsible parties on an Order such as this one. Nonetheless, the County here has chosen to name Petitioner as the only responsible party and not to name Douglas at all. Thus, the party which neither owned nor operated the USTs and was in no way responsible for their leakage bears the full brunt of the corrective action Order, while the party which owned and operated the USTs and clearly had the responsibility for their maintenance and regulatory compliance is absolved (thus far) from any responsibility for taking any corrective action. The resultant inequity is transparent.

For all of these reasons, Petitioner respectfully submits that the County's decision was inappropriate and improper and that this Board should add, or require the County to add, Douglas to the Order as the primarily responsible party thereon.

5. THE MANNER IN WHICH PETITIONER IS AGGRIEVED.

Petitioner is aggrieved within the meaning of 23 C.C.R. §2050 because he is the party against whom the Cleanup Order is directed, and is the person who will be forced to bear the full burden of the Cleanup Order unless Douglas is added to the Order.

For the reasons discussed above, the decision being challenged in this Petition would impose an unreasonable and inequitable burden on Petitioner.

6. SPECIFIC ACTION BY THE STATE BOARD REQUESTED BY PETITIONER.

Petitioner requests that the State Board add Douglas to the Order as the primarily responsible party or, in the alternative, as a jointly responsible party.

7. STATEMENT OF POINTS AND AUTHORITIES.

Please refer to the points and authorities discussed under Section 4.

8. LIST OF PERSONS HAVING AN INTEREST IN THE PROJECT.

Persons known to have an interest in this Petition include:

Mr. Leland Douglas
Douglas Parking Services
1721 Webster Street
Oakland, CA 94612

Mr. Paul M. Smith
Hazardous Materials Specialist
Alameda County Health Care
Services Agency
Hazardous Materials Program
Department of Environmental Health
80 Swan Way
Room 200
Oakland, CA 94621

Mark Thomson, Esq.
Deputy District Attorney
Office of the Alameda County
District Attorney
Consumer and Environmental

Protection Division
7677 Oakport Street
Suite 400
Oakland, CA 94621

Petitioner has requested the County to prepare a supplemental list of persons, if any, known to the County to have an interest in the addition of Douglas to the Order pursuant to 23 C.C.R. 2050(a)(8). See Exhibit 14.

9. STATEMENT RE TRANSMITTAL OF PETITION.

A copy of this Petition has been forwarded to the Alameda County Health Care Services Agency, Hazardous Materials Program, 80 Swan Way, Room 200, Oakland, California 94621. A copy has also been forwarded to the Alameda County District Attorney's Office, Consumer and Environmental Protection Division, 7677 Oakport Street, Suite 400, Oakland, California 94621. See Proof of Service By Mail.

10. REQUEST TO COUNTY FOR PREPARATION OF THE RECORD.

Petitioner has requested the County to prepare the County's record in this matter. See Exhibit 14.

11. REQUEST FOR EXPEDITED REVIEW

Petitioner respectfully requests the State Board to expedite its review of the matter. Petitioner has recently received direction from the County placing him under an extremely ambitious compliance schedule. See Exhibit 15. Petitioner does

not object to the corrective action schedule set forth by the County, but is anxious to have the issue of Douglas' responsibility for performance or contribution to the costs of the corrective action resolved before he is required to sustain the burden of such costs alone. The County's compliance schedule provides that site characterization/assessment must be completed in approximately two months. Petitioner anticipates that the County will require any necessary corrective action to be commenced immediately thereafter. If this Board grants Petitioner's request that Douglas be added to the Order as the primarily (or, in the alternative, a jointly) responsible party, then Petitioner submits that the impact of such a grant will be maximized by its issuance prior to the time that the County directs the required corrective action to be implemented.

This appeal is not complex and does not require the resolution of any technical issues. Rather, this appeal revolves around principles of administrative liability which have been well established by Water Board precedent. For these reasons, Petitioner respectfully requests that the State Board render its decision in this matter as quickly as possible and not later than March 28, 1991.

CONCLUSION

For all of the reasons stated above, Petitioner requests that the State Board add Douglas to the County's Order as the primarily responsible party, or in the alternative, as a jointly responsible party, and that this decision be made on or before March 28, 1991.

Dated:

Respectfully submitted,

HELLER, EHRMAN, WHITE & McAULIFFE

By: Jonathan S. Leo

Jonathan S. Leo
Attorney for Petitioner