

ENVIRONMENTAL  
PROTECTION

**McSHANE, SCHNACK & CHEITLIN**

PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

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June 23, 1995

KENNETH A. CHEITLIN

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TERRY D. McSHANE  
(1948 - 1994)

KATHLEEN T. McSHANE  
OF COUNSEL

State Water Resources  
Control Board  
901 P Street  
Sacramento, CA 95814

Attn: Karen O'Haire

(916) 657-2088

Re: Petition For Review of Action  
Date of Petition: May 11, 1994  
State Board Filing Date: May 13, 1994  
State Board File No.: A-908  
Site: 5330 Foothill Blvd., Oakland, CA  
Petitioner: Edward Simas  
San Francisco Bay Region File: 01-0508-2198.17  
Our File No. 397.012

Dear Ms. O'Haire:

This office represents petitioner Edward Simas in the above matter. Our firm was previously named McSHANE & FELSON. We have now changed the name and address of our firm.

Please correct your records to reflect our new firm name and address as follows:

McShane, Schnack & Cheitlin  
2033 No. Main Street, Suite 700  
Walnut Creek, CA 94596-3728  
Phone: (510) 932-8500  
Fax: (510) 943-6178

Very truly yours,

  
J. JAY SCHNACK

JJS/kam

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA            )  
  )  
CONTRA COSTA COUNTY            )

I am a citizen of the United States of America and an employee in the County of Contra Costa. I am over the age of eighteen (18) years and not a party to the within action. My business address is McShane, Schnack & Cheitlin, 2033 No. Main Street, Suite 700, Walnut Creek, California 94596.

On the date set forth below, I served the within LETTER by placing a true and sealed copy of said document, with first class postage fully prepaid, following the ordinary business practices for collection in McShane, Schnack & Cheitlin's outgoing mail system on the date set forth below, addressed to:

California Regional Water  
Quality Control Board  
San Francisco Bay Region  
2101 Webster St., Suite 500  
Oakland, CA 94612

Hue and Ruby Crosby  
3015 38th Avenue  
Oakland, CA 94610

Ms. Eva Chu  
Hazardous Materials Division  
Department of Environmental  
Health  
80 Swan Way, Room 200  
Oakland, CA 94521

Walter Simas, as an individual  
and beneficiary of the will of  
Jean L. Simas, through John  
McDougal, Receiver  
c/o Walter Youngman, Conservator  
1981 N. Broadway, Suite 300  
Walnut Creek, CA 94596

Gilbert A. Jensen, Esq.  
Alameda County District  
Attorney's Office  
Alameda County Courthouse  
1225 Fallon Street, Room 900  
Oakland, CA 94612

John McDougal, as Receiver  
for Ashland Oil Company, a  
Limited Partnership  
4864 American River Drive  
Carmichael, CA 94596

Miguel and Marcela Florez  
802 Sea Chase Drive  
Redwood City, CA 94065

Walter Simas, General Partner  
of Ashland Oil Company of  
California, a Limited  
Partnership  
c/o Walter Youngman,  
Conservator  
1981 N. Broadway, Suite 300  
Walnut Creek, CA 94596

Jorge and Maria Del Rio  
732 Crespi Drive  
Pacifica, CA 94044

I am readily familiar with the business practice for collection and processing of documents for mailing with the United States Postal Service, and said documents would be deposited with the United States Postal Service at Walnut Creek, California that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 23, 1995, at Walnut Creek, California.

Kristine Melcher

397.012\O'HAIRE.LTR

McSHANE & FELSON

PROFESSIONAL CORPORATION

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(1948-1994)  
JOSEPH L. FELSON  
(RETIRED)

95 JAN 9 PM 3:35

December 27, 1994

State Water Resources  
Control Board  
901 P Street  
Sacramento, CA 95814

CERTIFIED MAIL NO. P 026 408 053  
RETURN RECEIPT REQUESTED

Attn: Ted Cobb, Esq.

Re: Points and Authorities in Support of  
Petition For Review Of Action  
Date of Petition: May 11, 1994  
State Board Filing Date: May 13, 1994  
State Board File No. A-908  
Site: 5330 Foothill Blvd., Oakland, California  
Petitioner: Edward Simas  
San Francisco Bay Region File: 01-0508 & 2198.17  
Our File No. 397.012

Gentlemen:

This matter was previously held in abeyance. Petitioner and the Regional Board were unable to reach an informal resolution.

Petitioner therefore requests that the State Board:

- a) Reverse the decisions set forth in the Regional Board's April 15, 1994 action,
- b) Find that Petitioner is not a responsible party, and
- c) Relieve Petitioner of any obligation to provide technical reports or take any other action respecting this site.

The original Petition for Review filed May 13, 1994 is incorporated herein by reference.

Petitioner has submitted to the Regional Board a request for preparation of the Regional Board record. A copy of that request is attached.

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Copies of this letter and all attachments have been submitted to all interested parties, including the Regional Board and the Alameda County Hazardous Materials Division. A Proof of Service listing all those recipients is attached hereto.

This letter constitutes Petitioner's Statement of Points and Authorities in Support of the Petition for Review.

#### SUMMARY OF ARGUMENT

The Regional Board's action must be reversed for the following reasons, each of which, by itself, requires reversal even if each of the other grounds is rejected:

I. Petitioner has never owned or operated an "underground storage tank" at the site.

II. Petitioner is not subject to California Code of Regulations ("CCR") Title 23, Chapter 16, Underground Tank Regulations.

III. Petitioner is not a "responsible person" as defined in CCR, Title 23, Chapter 16, Section 2720.

IV. Petitioner is not subject to Water Code Section 13267, subdivision (b).

V. Petitioner's relationship (as a minority, non-voting shareholder and an involuntary, non-voting limited partner) to the site's prior owners (Simas Bros. and Ashland) cannot be the basis for imposing responsibility on Petitioner.

VI. In light of all the facts and circumstances it would be highly unjust and inequitable to impose liability on Petitioner.

#### SUMMARY OF FACTS

Prior to February 23, 1983, the site at 5330 Foothill Blvd., Oakland (the "site") was a gasoline service station owned and operated by a corporation (Simas Bros.) and, later, by a limited partnership (Ashland Oil Company of California, referred to below as "Ashland").

Edward Simas ("Petitioner") has never, directly or indirectly, directed or controlled the operations of either Simas Bros. or Ashland. Petitioner's business has always been operated through a separate, unrelated corporation, Xtra Oil Company ("Xtra"). There

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has never been any relationship of any sort between Xtra and either Simas Bros. or Ashland. Xtra had no involvement, connection or dealings with the site at any time.

All the voting stock of Simas Bros. was owned equally, as community property, by Walter Simas ("Walter") and his wife Jean. (Walter is Ted's stepfather. He adopted Ted as a child.) Walter and Jean's stock represented 86% of the Simas Bros. equity. In the 1960's they gave to Petitioner the other 14% of the corporate equity in the form of non-voting stock. Petitioner did not, directly or indirectly, control or direct the operations of Simas Bros. at all. Since he held no voting stock, he could not even participate in the election of directors or officers.

The operations of Simas Bros. were exclusively controlled by its president, Walter. Petitioner had no influence, not even informally, over those operations. The relationship between Walter and Petitioner was so hostile that, in approximately 1975, when Jean (Walter's wife and Petitioner's mother) became critically ill, Walter refused to let Petitioner visit her. When Jean died in mid-1977, her handwritten will appointed Petitioner as executor and left her entire estate to him. Walter, however, refused to provide Petitioner any information regarding Simas Bros.

In December 1977, in order to further prevent Petitioner from obtaining information about Simas Bros., Walter created Ashland, with Walter as its sole, general partner, and transferred to Ashland all assets of Simas Bros., including the site. In exchange, all Simas Bros. stockholders became limited partners of Ashland. Ashland was created by Walter, and this transfer was made, without any notice to or consent by Petitioner. As a result of that transfer, Petitioner involuntarily became a limited partner of the site's owner (Ashland). He still had no power, authority or involvement in the site's operation and control.

In January 1978, Petitioner filed suit against Walter, Simas Bros. and Ashland in order to obtain information regarding their assets and the status of their operations. The court appointed a receiver (Jack McDougal) over all the assets of Simas Bros. and Ashland, including the site. The receiver took control in January 1979 and continued in control through February 23, 1983. During all that time, Ashland remained the owner of the site, and Petitioner had no involvement in the operation of the site or any of the other receivership properties.

The litigation between Ted and Walter was settled pursuant to a Settlement Agreement signed December 29, 1982. It was agreed Ashland would be liquidated by deeding each of its properties to either Ted or Walter and each deed would be executed by all the

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parties having any potential interests in the litigation, including the receiver. The deed for the site was recorded February 23, 1983. Until the recordation of that deed, the site continued to be owned by Ashland and controlled by the receiver.

Prior to February 23, 1983, the receiver ceased all operations at the site, emptied the tanks, disabled the pumps, and covered all the pumps, doors and windows with sheets of plywood. That was the condition of the site when Petitioner received title on February 23, 1983.

That condition remained the same until Petitioner sold the site seven months later.

Petitioner had never wanted to acquire the site. Discovery in the litigation had revealed its profitability was marginal and Petitioner believed it was an undesirable investment. However, several other Ashland properties were similarly undesirable. In order to settle the litigation, Petitioner was forced to accept some of those undesirable properties, including the site.

As soon as he received the site, Petitioner immediately began trying to sell it. Seven months later, in September 1983, Petitioner sold it to Hue and Ruby Crosby ("Crosby"). Petitioner made no use of the tanks, pumps or any other part of the site at any time. The site was delivered to Crosby in exactly the same condition as when Petitioner acquired it.

Since the tanks had been emptied before the site was transferred to Petitioner, and since the tanks had never been put to any use by him, it is clear the unauthorized discharge must have occurred either after Petitioner sold the site to Crosby, or before Petitioner acquired the site. ?

Petitioner's first information regarding any unauthorized discharge was when Crosby removed the tanks in 1988 and informed Petitioner of the contamination discovered during that removal. Petitioner has no information regarding what use Crosby made of the tanks during the five years between Crosby's acquisition of the site in 1983 and removal of the tanks in 1988.

Crosby reported the contamination to the Alameda County Health Care Services Agency, now known as the Hazardous Materials Division, (the "County") in January 1988. Despite being directed by the County to take appropriate steps to address the situation, Crosby essentially did nothing.

In 1991, Crosby sold the site to Mr. and Mrs. Manuel Florez and Mr. and Mrs. Jorge Del Rio (collectively, "Florez/Del Rio").

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Florez/Del Rio acknowledged, in writing, that they were informed of the contamination before purchasing the site. But they, too, have refused to follow the County's directives to address the situation.

In 1993, the County began directing its attention at Petitioner. Despite Petitioner's cooperation in providing the above information, which clearly establishes Petitioner is not responsible for the site's contamination, and despite the fact that no one disputes any of the above information, on April 15, 1994 the Regional Board, acting at the County's request, issued its determination that Petitioner is a responsible party and required that Petitioner provide technical reports.

If the unauthorized discharge occurred while the property was operated by the receiver, presumably he would have informed Petitioner of that discharge before transferring the property to him. Since no such information was provided to Petitioner, it is presumed the discharge occurred either before the receiver took over management of this site in January 1979, or after Petitioner transferred the property to Crosby in 1983.

In any event, it is clear Petitioner is not a responsible party with respect to this unauthorized discharge.

LEGAL ARGUMENT

I. PETITIONER HAS NEVER OWNED OR OPERATED AN "UNDERGROUND STORAGE TANK" AT THE SITE.

The Regional Board's action can only be affirmed if, in fact, Petitioner at some time was an "owner" or "operator" of an "underground storage tank" (sometimes referred to below as an "UST") at the site.

The applicable statutory definitions make clear that if a tank is not being used, then it is not a UST under the subject rules and regulations.

The terms "owner," "operator," "tank," and "underground storage tank" are defined in Health and Safety Code ("HSC") Section 25281, subdivisions (h)(i), (t) and (x)(1), respectively, as follows:

"(h) 'Operator' means any person in control of or having daily responsibility for, the daily operation of an underground storage tank system.

. . .



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(i) 'Owner' means the owner of an underground storage tank.

. . .

(t) 'tank' means a stationary device designed to contain an accumulation of hazardous substances which is constructed primarily of non-earthen materials (e.g., wood, concrete, steel, plastic) which provides structural support.

. . .

(x)(1) 'Underground storage tank' means any one or combination of tanks, including pipes connected thereto, which is used for the storage of hazardous substances and which is substantially or totally beneath the surface of the ground. . . ." (emphasis added)

CCR Section 2610, subdivision (b) incorporates the above definitions into CCR Title 23, Chapter 16, Underground Tank Regulations.

These statutory definitions expressly distinguish between a "tank", which is merely "designed to contain an accumulation of hazardous substances," and an "underground storage tank", which is a tank "which is used for the storage of hazardous substances."

It is therefore clear that if a "tank" is not being used, then it is not an "underground storage tank".

Since it is undisputed the tanks on the site were never used (for storage of hazardous materials or for any other purpose) during Petitioner's ownership and control of the site, those tanks were never "underground storage tanks" (as defined above) during Petitioner's ownership or control of the site. Petitioner was, therefore, never an "owner" or "operator" of any "underground storage tank." This conclusion is consistent with the intent and applicability of the underground storage tank regulations.

**II. PETITIONER IS NOT SUBJECT TO CCR, TITLE 23, CHAPTER 16, UNDERGROUND TANK REGULATIONS.**

As noted above, the foregoing definitions are incorporated by reference into the Underground Tank Regulations. CCR 2610 sub (b).

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CCR 2620 clearly defines, and limits, the applicability of those regulations. Petitioner is outside that scope:

"2620. General Intent, Content, Applicability  
and Implementation

. . .

(b) Owners and operators of one or more underground storage tanks storing hazardous substances shall comply with these regulations . . . ." (emphasis added) CCR 2620.

As discussed above, the owner or operator of a tank is not an "owner" or "operator" under these statutes unless that tank is an "underground storage tank," and the term "underground storage tank" only applies if the "tank" is actually being used for storage. HSC 25281 sub (h)(i) and (x)(1). CCR 2620 emphasizes this restriction by stating that it only applies to those owners and operators of UST's "storing hazardous substances".

Thus, the Chapter 16 regulations only apply in the case of tanks that are storing hazardous substances at the time in issue. Since the tanks on the site were not storing hazardous substances at any time during Petitioner's ownership, and were not being used in any way at all, Petitioner is outside the scope of the regulations' intent and application.

For the reasons discussed below (including the facts that Petitioner did not in any way contribute to any contamination and none of the applicable statutes or regulations were even in effect during Petitioner's ownership of the site), this conclusion is compelled by both logic and equity.

**III. PETITIONER IS NOT A "RESPONSIBLE PARTY" AS DEFINED IN CCR SECTION 2720.**

The Regional Board's actions can only be supported if Petitioner is within the definition of "responsible party" set forth in CCR Title 23, Chapter 16, Section 2720. That definition has four alternative subparts, none of which includes Petitioner. Those alternate definitions are:

"(1) Any person who owns or operates an underground storage tank used for the storage of any hazardous substance;

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(2) In the case of any underground storage tank no longer in use, any person who owned or operated the underground storage tank immediately before the discontinuation of its use;

(3) Any owner of property where an unauthorized release of a hazardous substance from an underground storage tank has occurred; and

(4) Any person who had or has control over an underground storage tank at the time of or following an unauthorized release of a hazardous substance." CCR 2720

The first definition does not apply to Petitioner because the tanks on the site were not underground storage tanks at any time during Petitioner's ownership (i.e., they were never used during that time). NO

Similarly, the second definition does not apply because Petitioner did not own or operate the tanks immediately before the discontinuation of their use. Immediately before that discontinuation they were owned by Ashland and operated by the receiver.

The third definition does not apply because Petitioner is not currently the owner of the site and the definition does not extend to past owners.

Finally, the fourth definition does not apply to Petitioner because he has never had control of an underground storage tank. Since the tanks were never used during his ownership, they were never within the definition of "underground storage tanks" during his ownership.

**IV. PETITIONER IS NOT SUBJECT TO WATER CODE SECTION 13267, SUBDIVISION (b).**

In requiring Petition to provide technical reports, the Regional Board has relied on its authority under Water Code Section 13267, subdivision (b). That section does not apply to Petitioner.

Water Code 13267 sub (b) allows the Regional Board to require technical reports only from a "person who has discharged, discharges, or is suspected of discharging, or who proposes to discharge waste within its region. . . ." (emphasis added)

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Petitioner is not within this class of persons because:

- (1) as demonstrated above, and further below, Petitioner has never discharged or threatened to discharge anything. All tanks were emptied before Petitioner acquired the site and were never used by him; and
- (2) the tanks never contained "waste".

For purposes of Water Code Section 13267, the term "waste" is defined in Water Code 13050 as follows:

"(d) "waste" includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal."

It is clear from this definition that "waste" includes only material which is not intended to be used, such as unwanted byproducts of a process or activity. In this case, the contamination is presumably caused by the unknown and unintended leaking of gasoline. That gasoline was being stored for sale to customers and therefore constituted an inventory of products for sale. It did not constitute "waste" within the subject definition.

In any event, it is clear that Petitioner has never been involved in any "discharge":

"[D]ischarge" means: "to relieve of a charge, load, or burden . . . . to give outlet to: pour forth: EMIT . . . . "Lake Madrone Water D. v. State Water Res. (1989) 209 Cal. App. 3d 163 at 174, 256 Cal. Rptr. 894 at 900.

Petitioner is not within the class of persons who may be required to provide technical reports under Water Code 13267 sub(b).

V. PETITIONER'S RELATIONSHIP TO THE SITE'S PRIOR OWNERS CANNOT BE THE BASIS FOR IMPOSING RESPONSIBILITY ON PETITIONER.

The Regional Board apparently concluded Petitioner is a "responsible party" because of his association with the site's previous owners, Simas Bros. and Ashland. That conclusion is contrary to both the facts and the law.

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It is basic law that a corporation (such as Simas Bros.) is a separate and distinct legal entity from its shareholders (such as Petitioner) and that shareholders have no ownership of corporate property, nor liability for corporate obligations:

"A corporation is a legal person or entity recognized as having an existence separate from that of its shareholders . . . The shareholders are not the owners of corporate property, and the corporation and a shareholder are distinct parties. . . ." Witkin, Summary of California Law, 9th Ed., Vol. 9, p. 511, Corporations §1(1)

Similarly, in a limited partnership (such as Ashland) the limited partners (such as Petitioner) have no ownership interest in assets owned by the partnership and no liability for partnership obligations:

". . . [T]he limited partner is given no property interest in specific partnership assets . . ." Evans v. Galardi (1976) 16 Cal.3d 308, 306; 128 Cal.Rptr. 25, 30.

"This unwillingness on the part of the legislature to grant the limited partner a property interest in the specific assets owned by the partnership . . . compels the conclusion that the limited partner has no interest in the partnership property by virtue of his status as a limited partner." Evans, supra, at 16 Cal.3d 307, 128 Cal.Rptr. 31

". . . [A] limited partnership is viewed as an entity separate and apart from the limited partners for purposes of suing and being sued. . . . The limited partner is not a proper party to proceedings by or against the limited partnership . . ." Evans, supra, at 16 Cal.3d 311, 128 Cal.Rptr. 34

See also California Corporations Code §§15501; 15507(a); 15518; 15632; and 15671.

The only time a shareholder or a limited partner is held liable for corporate or partnership obligations is when that individual has had a direct, personal involvement in the operation of the corporate or partnership business:

"It must be shown that the corporation is dominated or controlled by the individual . . . but it is not enough merely to show a "one-man" or "two-man" corporation.

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. . . Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality or separateness of the said person and corporation has ceased. . . ." Witkin, supra, at p. 526, Corporations, §13.

"A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." California Corporations Code §15507(a). See also California Corporations Code §15632(a).

These same principles apply in the field of environmental law. For example, one of the primary decisions respecting the liability of corporate officers, employees and shareholders under CERCLA and RCRA is United States of America v. Northeastern Pharmaceutical & Chemical Co., Inc. [NEPACCO] (1986, 8th Cir.) 810 F.2d 726, in which two shareholders who were also corporate officers were held liable. The court noted, however, their liability

"was not derivative but personal. Liability was not premised solely upon . . . [the individual's] status as a corporate officer, employee or shareholder. Rather . . . [he] is individually liable because he personally arranged for the transportation and disposal of hazardous substances. . . ." USA v. NEPACCO, supra, at 810 F.2d 744.

Shareholders can be held individually liable only if they were personally involved in or directly responsible for the wrongful corporate acts, or had the ultimate authority to control those acts. USA v. NEPACCO, supra, at 745.

California law, as a matter of public policy, also restricts liability in the environmental field to those individuals who have personally participated in the wrongful acts. For example, damages under Health & Safety Code §25359 cannot be imposed against an owner of real property who did not himself generate, treat, transport, store or dispose of any hazardous substances at the facility located on his property. Health & Safety Code §25359(b).

Similarly, under Health & Safety Code §25363, individuals are only required to reimburse costs or expenditures to the extent they

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are "attributable to that party's actions." Health & Safety Code §25363(a).

Although Health & Safety Code §§25359 and 25363, referred to above, are not involved in these proceedings, they do reflect California's public policy of not imposing environmental liability on innocent parties who have had no control or personal participation in the wrongful activities.

Since Petitioner had no control over or personal participation in the activities of Simas Bros. and Ashland, the above authorities clearly establish that he cannot be held responsible for unauthorized discharges which may have occurred before he acquired the property or after he sold it.

It is unclear whether the Regional Board was concerned about the court appointment of a receiver over the Ashland assets and business. In any event, that appointment is of no significance in determining Petitioner's liability. The court appointed receiver was not a surrogate or alter ego of Petitioner:

"The appointment of a receiver is an ancillary proceeding concerned with the preservation of the property subject to litigation pending its ultimate disposition pursuant to final judgment. A receiver is not an agent of either party to the action . . ." (emphasis added) Maggiora v. Palo Alto Inn, Inc. (1967) 249 Cal.App.2d 706 at 711-712; 57 Cal.Rptr. 787 at 791.

Appointment of a receiver did not change any ownership interests in the site. The site's owner continued to be Ashland:

"The receiver does not occupy the status of an assignee. His function is that of a minister of the court in possession of the property, to the end of conserving the rights of everybody having any interest." (emphasis added) Wright v. Standard Engineering Corporation (1972) 28 Cal.App.3d 244 at 248; 104 Cal.Rptr. 539 at 542.

Petitioner did not exercise any control over, or participate in any way, in Ashland's properties or operations during the pendency of the litigation.

VI. IT WOULD BE HIGHLY UNJUST AND INEQUITABLE TO IMPOSE LIABILITY ON PETITIONER.

Requiring Petitioner to bear the expense and effort of preparing technical reports is not only contrary to the Water Code

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and Code of Regulations, it is also highly unjust in light of the following facts:

- (a) Petitioner is not the current owner or operator of the site. Remediation will increase the value of the site, but provide no benefit to Petitioner.
- (b) Petitioner was not the owner or operator when the discharge occurred, nor when the pollution was discovered.
- (c) Petitioner never used or operated the tanks.
- (d) Petitioner never desired to acquire the site, but was required to do so in order to settle massive, protracted litigation which involved numerous separate parcels of real property. The only way the litigation could be settled was for petitioner to accept the site as part of an overall settlement. Immediately upon receiving the site, Petitioner began trying to sell it.
- (e) The tanks were pumped dry and the gasoline dispensers made inoperable before Petitioner obtained possession and title to the site.
- (f) Petitioner never used or operated the tanks, dispensers or site in any way. From before Petitioner acquired the site until after he disposed of it the site remained closed down and boarded up.
- (g) Petitioner owned the site for only 7 months.
- (k) Petitioner sold the site in September 1983 (over 11 years ago), which was before any of the laws or regulations relied upon by the Regional Board were even in effect.
- (h) Petitioner was not aware of any pollution at the site until 5 years after he sold it.
- (i) Crosby, who purchased the site from petitioner in 1983, removed the tanks in 1988, and reported the pollution that was discovered at that time, but refused to remediate it. In 1991, Crosby sold the site to its current owners, Flores/Del Rio. Those current owners agreed, in writing, to accept responsibility for the pollution, but have refused to perform any remediation.
- (j) Crosby (who owned the site for 8 years after petitioner, and who owned the site when the pollution was



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discovered), Flores/Del Rio (who purchased the site with knowledge of the pollution and who currently own the site), and Walter Simas (who operated the site and tanks for decades before Petitioner acquired it) are all before the Regional Board and subject to its jurisdiction.

For all the reasons discussed in this letter (each of which, by itself, is a sufficient reason, even if the others are rejected): the Regional Board's action should be reversed as to Petitioner Edward Simas; it should be determined that he is not a responsible party in this matter; and he should be relieved of any obligation to provide technical reports or take any other action respecting this site.

Respectfully submitted,

McSHANE & FELSON  
PROFESSIONAL CORPORATION

By:  J. JAY SCHNACK  
Attorneys for Petitioner

JJS/jbw

cc: Client

# McSHANE & FELSON

PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

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PAMELA J. ZAID

TERRY D. McSHANE  
(1948-1994)

JOSEPH L. FELSON  
(RETIRED)

December 27, 1994

The California Regional Water  
Quality Control Board  
San Francisco Bay Region  
2101 Webster Street, Ste. 500  
Oakland, CA 94612

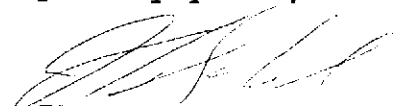
RE: Request for Preparation of Regional Board Record  
Petition for Review of Action  
Site: 5330 Foothill Blvd., Oakland, CA  
Petitioner: Edward Simas  
San Francisco Bay Region File: 01-0508 & 2198.17  
Our File No. 397.012

Gentlemen:

On May 13, 1994 Petitioner Edward Simas filed with the State Water Resources Control Board a Petition For Review Of Action regarding the above site and your above-referenced file numbers. The action subject to review is your April 15, 1994 Designation Of Responsible Party And Request For Submittal Of Technical Reports.

Please promptly prepare and forward to the State Water Resources Control Board your complete regional board record in this matter.

Very truly yours,

  
J. JAY SCHNACK

JJS/kam

1 397.012 CRWQCB.LTR

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA )  
                                  )  
CONTRA COSTA COUNTY )

I am a citizen of the United States of America and an employee in the County of Contra Costa. I am over the age of eighteen (18) years and not a party to the within action. My business address is McShane & Felson, Professional Corporation, 2175 N. California Boulevard, Suite 900, Walnut Creek, California 94596.

On the date set forth below, I served the within POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW OF ACTION, together with attachments, by placing a true and sealed copy of said document, with first class postage fully prepaid, following the ordinary business practices for collection in McShane & Felson's outgoing mail system on the date set forth below, addressed to:

California Regional Water  
Quality Control Board  
San Francisco Bay Region  
2101 Webster St., Suite 500  
Oakland, CA 94612

Ms. Eva Chu  
Hazardous Materials Division  
Department of Environmental  
Health  
80 Swan Way, Room 200  
Oakland, CA 94521

Gilbert A. Jensen, Esq.  
Alameda County District  
Attorney's Office  
Alameda County Courthouse  
1225 Fallon Street, Room 900  
Oakland, CA 94612

Miguel and Marcela Florez  
802 Sea Chase Drive  
Redwood City, CA 94065

Jorge and Maria Del Rio  
732 Crespi Drive  
Pacifica, CA 94044

Hue and Ruby Crosby  
3015 38th Avenue  
Oakland, CA 94610

Walter Simas, as an individual  
and beneficiary of the will of  
Jean L. Simas, through John  
McDougal, Receiver  
c/o Walter Youngman, Conservator  
1981 N. Broadway, Suite 300  
Walnut Creek, CA 94596

John McDougal, as Receiver  
for Ashland Oil Company, a  
Limited Partnership  
4864 American River Drive  
Carmichael, CA 94596

Walter Simas, General Partner  
of Ashland Oil Company of  
California, a Limited  
Partnership  
c/o Walter Youngman,  
Conservator  
1981 N. Broadway, Suite 300  
Walnut Creek, CA 94596

I am readily familiar with the business practice for collection and processing of documents for mailing with the United States Postal Service, and said documents would be deposited with the United States Postal Service at Walnut Creek, California that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 27, 1994, at Walnut Creek, California.

Kristine Melcher  
KRISTINE MELCHER

**McSHANE & FELSON**

PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

2175 N. CALIFORNIA BLVD., SUITE 900

WALNUT CREEK, CALIFORNIA 94596-3500

(510) 943-6111

**COPY**  
ALSO  
HAZMAT

94 MAY 13 PM 2:32

OF COUNSEL

JOSEPH L. FELSON

FACSIMILE  
(510) 943-6178

TERRY D. McSHANE  
KATHLEEN T. McSHANE  
J. JAY SCHNACK  
KENNETH A. CHEITLIN  
PAMELA J. ZAID  
CHRISTINA C. BRINLEY

May 11, 1994

**VIA FEDERAL EXPRESS**

State Water Resources Control Board  
901 P Street  
Sacramento, CA 95814

Attn: Ted Cobb, Esq.

Re: Petition For Review Of Action  
Site: 5330 Foothill Blvd., Oakland, California  
Petitioner: Edward Simas  
San Francisco Bay Region File: 01-0508 & 2198.17  
Our File No. 397.012

Gentlemen:

This Petition For Review is filed with you pursuant to Water Code Section 13320(a) as follows:

1. The name and address of the petitioner is:

Edward Simas  
c/o J. Jay Schnack, Esq.  
McShane & Felson  
2175 No. California Blvd., Suite 900  
Walnut Creek, CA 94596-3500

2. The specific regional board action which the state board is hereby requested to review is:

- (a) The erroneous determination that petitioner is a "responsible party" respecting alleged soil and ground water pollution on the property located at 5330 Foothill Blvd., Oakland, California, 94601; and
- (b) The formal request that petitioner provide technical reports regarding that pollution pursuant to California Water Code Section 13267(b).

State Water Resources Control Board  
May 11, 1994  
Page 2

Both of the above actions were taken by the San Francisco Bay Regional Water Quality Control Board letter of April 15, 1994, a copy of which is attached hereto.

3. The date on which the Regional Board acted was April 15, 1994, which was within 30 days of the date this petition is being received by you.

4. The reasons the Regional Board's actions were inappropriate and improper are:

- (a) Petitioner is not a "responsible party" as defined in Section 2720 of Title 23 of the California Code of Regulations;
- (b) The Regional Board purported to act under authority of Water Code Section 13267(b). Under that section, the Regional Board may only require technical reports from a person "who has discharged, discharges, or is suspected of discharging or who proposes to discharge waste within its region." Petitioner is not within this class of people, and it is therefore improper to require that petitioner provide those technical reports.
- (c) Requiring petitioner to prepare technical reports is not only contrary to the Water Code and Code of Regulations, it is also highly unjust in light of the following facts:
  - (i) Petitioner is not the current owner or operator of the site.
  - (ii) Petitioner was not the owner or operator when the discharge occurred, nor when the pollution was discovered.
  - (iii) Petitioner never used or operated the underground storage tanks.
  - (iv) Petitioner never desired to acquire the site, but was required to do so in order to settle massive, protracted litigation which involved numerous separate parcels of real property. The only way the litigation could be settled was for petitioner to accept the site as part of

State Water Resources Control Board  
May 11, 1994  
Page 4

all before the Regional Board and are the proper responsible parties.

5. Petitioner is aggrieved by the action of the Regional Board as follows:

The Regional Board requires by its action that petitioner incur large expenses to investigate and, presumably, remediate pollution for which petitioner is not responsible. Petitioner would thereby pay to improve the value of property in which petitioner has no interest and satisfy the legal obligations of the parties who rightfully should bear those costs.

6. Petitioner requests that the State or Regional Board:

- a) Reverse the decisions set forth in the Regional Board's April 15, 1994 action,
- b) Find that petitioner is not a responsible party, and
- c) Relieve petitioner of any obligation to provide technical reports or take any other action respecting this site.

7. Petitioner will submit a statement of points and authorities in support of the legal issues raised by this petition in a supplemental letter brief to be submitted hereafter.

8. A list of the persons, other than petitioner, which the Regional Board believes to have an interest in the subject matter of this petition is set forth as the addressees of the April 15, 1994 letter from the Regional Board attached hereto.

9. A copy of this petition has been mailed to each of the persons, other than petitioner, referred to in item 8 above, at their respective addresses set forth on the April 15, 1994 action by the Regional Board attached hereto. A copy of this petition has also been sent to the San Francisco Bay Region Water Quality Control Board and the Alameda County Hazardous Materials Division.

10. A request to the Regional Board for preparation of the Regional Board record will be submitted hereafter.

11. Petitioner requests a hearing for the purpose of presenting additional evidence that was not presented to the Regional Board. A specific statement of that additional evidence and the reasons it was not presented will be submitted hereafter.

State Water Resources Control Board  
May 11, 1994  
Page 5

This petition for review is being submitted at this time and in this form in order to protect petitioner's rights of appeal.

It is requested that this petition be held in abeyance until further notice from petitioner in order that petitioner may have further discussions with the Regional Board to determine whether an informal resolution of the issues raised by this petition may be reached.

If it is necessary to submit any further information or take any other steps in order to perfect petitioner's appeal rights, or if we may provide any further information to you at the present time, please contact the undersigned at your earliest opportunity.

Respectfully submitted,

McSHANE & FELSON  
PROFESSIONAL CORPORATION

  
By: J. JAY SCHNACK  
Attorneys for Petitioner

JJS/km

cc: Client



It has been brought to my attention by Regional Board staff that a condition of soil and groundwater pollution exists on the property located at 5330 Foothill Blvd., Oakland, CA 94601 from an underground storage tank release. The Alameda County Department of Environmental Health (ACHD) staff have requested technical reports from one or more of you to fulfill your obligations per California Code of Regulations, Title 23 Waters, Chapter 16, Underground Storage Tank Regulations, Article 11, Corrective Action Requirements. It is my understanding that ACHD staff were unsuccessful in eliciting your cooperation in resolving these issues through normal correspondence.

A Pre-Enforcement Review Panel was held at the ACHD offices on January 18, 1994, attended by Mr. Sumadhu Arigala, of my staff. Pursuant to the Regional Board's authority under Section 13267 (b) of the California Water Code, you are hereby found to be a responsible party as defined by Title 23 of the California Code of Regulations, Division 3, Chapter 16, Article 11, Section 2720. A Responsible Party is "any person who owned or operated the underground storage tank immediately before the discontinuation of its use." A responsible party also includes any owner of property from which an unauthorized release of a hazardous substance from an underground storage tank has occurred, or any person who had or has control over an underground storage tank at the time of or following an unauthorized release of a hazardous substance, among others.

As a responsible party, you are required to conduct both soil and groundwater investigations to determine the extent of the environmental pollution resulting from the release. Therefore, you are requested to submit a technical report specifically addressing the following numbered items within thirty (30) days of the date of this letter:

- 1) A proposal for the removal of polluted soils, if deemed necessary, from the vicinity of the former underground storage tanks;
- 2) A proposal to define the lateral and vertical extent of pollution in soil and groundwater.

All Work should adhere to the requirements of the Tri-Regional Board Staff Recommendations for the Preliminary Evaluation and Investigation of Underground Storage Tank Sites - August 10, 1990 and Article 11 of Title 23, Waters, California Code of Regulations.

I am hereby transmitting this request for a technical report to ACHD for service and continued case handling. You should be aware that failure on your part to submit the requested technical report, or late submittal may result in fines up to \$1000 per day of

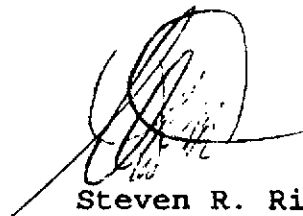
Enforcement Review Panel  
Page 3 of 3

**delinquency.** Your response to this technical report request should be sent to the attention of Ms. Eva Chu at ACHD. Please inform Ms. Chu at least three working days in advance of all field activities.

Please be advised that this is a formal request for a technical reports pursuant to California Water Code Section 13267 (b). Any extensions of the stated deadlines, or modifications of the required tasks, must be confirmed in writing by either this agency or the ACHD.

If you have any questions regarding the contents of this letter, Please contact Ms. Chu, of ACHD, at (510) 271-4530.

Sincerely,



Steven R. Ritchie  
Executive Officer

cc: Gil Jensen, ACDA, 7677 Oakport Street, Suite 400, Oakland  
94621

Eva Chu, ACHD, 80 Swan Way, Suite 200, Oakland 94621

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA )  
                              )  
CONTRA COSTA COUNTY )

I am a citizen of the United States of America and an employee in the County of Contra Costa. I am over the age of eighteen (18) years and not a party to the within action. My business address is McShane & Felson, Professional Corporation, 2175 N. California Boulevard, Suite 900, Walnut Creek, California 94596.

On the date set forth below, I served the within PETITION FOR REVIEW OF ACTION by placing a true and sealed copy of said document, with first class postage fully prepaid, following the ordinary business practices for collection in McShane & Felson's outgoing mail system on the date set forth below, addressed to:

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  Quality Control Board  
San Francisco Bay Region  
2101 Webster St., Suite 500  
Oakland, CA 94612

Ms. Eva Chu  
Hazardous Materials Division  
Department of Environmental  
  Health  
80 Swan Way, Room 200  
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Gilbert A. Jensen, Esq.  
Alameda County District  
  Attorney's Office  
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802 Sea Chase Drive  
Redwood City, CA 94065

Jorge and Maria Del Rio  
732 Crespi Drive  
Pacifica, CA 94044

Hue and Ruby Crosby  
3015 38th Avenue  
Oakland, CA 94610

Walter Simas, as an individual  
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Jean L. Simas, through John  
McDougal, Receiver  
c/o Walter Youngman, Conservator  
1981 N. Broadway, Suite 300  
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 11, 1994, at Walnut Creek, California.

Kristine Melcher

**McSHANE & FELSON**

PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

2175 N. CALIFORNIA BLVD., SUITE 900  
WALNUT CREEK, CALIFORNIA 94596-3500

Ms. Eva Chu  
Hazardous Materials Division  
Dept. of Environmental Health  
80 Swan Way, Room 200  
Oakland, CA 94521



LAW OFFICES OF  
**NORMOYLE & NEWMAN**

A PROFESSIONAL LAW CORPORATION

1700 STANDIFORD AVENUE - SUITE A-340  
MODESTO, CALIFORNIA 95350

TELEPHONE (209) 521-9521 TELECOPIER (209) 521-4968

MICHAEL C. NORMOYLE  
RUSSELL A. NEWMAN  
WYLIE P. CASHMAN  
MARY ANN AGUIRRE  
MICHAEL L. ABBOTT  
JOHN T. RESSO

PATRICK M. McGRATH  
DAVID O. ROMANO, P.E.  
Land Use Analysts

*M.A. Aguirre  
(209) 524-7504  
491-5330*  
May 17, 1993

**Via Facsimile & U.S. Mail**  
(510) 271-4320

Thomas F. Peacock, Supervising HMS  
Hazardous Material Division  
Alameda County Health Care Services Agency  
Dept. of Environmental Health  
State Water Resources Control Board  
80 Swan Way, Room 200  
Oakland, California 94621

*5710 3674*

**Re: 5330 Foothill Blvd., Oakland, California 94610**

Dear Mr. Peacock:

I appreciated the opportunity to speak with you recently regarding the property at 5330 Foothill Blvd., located in Oakland, California (the "Property"). As promised, I am writing to you to respond to your letter of February 18, 1993, to Xtra Oil Company ("Xtra Oil") which was forwarded to the attention of Mr. Edward Simas. As we recently discussed, I am environmental counsel to Xtra Oil and Mr. Simas.

As environmental counsel to Xtra Oil and Mr. Simas, I have reviewed the facts surrounding the Property and I have concluded that neither Xtra Oil nor Mr. Simas are considered responsible parties under the federal or state underground storage tank ("UST") regulations. Set forth below is a brief statement of facts regarding Mr. Simas's limited involvement with the Property, followed by an analysis regarding the applicable federal and state regulations.

**I. STATEMENT OF FACTS.**

Mr. Simas, in his individual capacity, first acquired the Property in late February of 1983. Title to the Property was never held in the name of Xtra Oil. Prior to 1983, Mr. Simas was neither an owner nor an operator of the Property nor did he have any control over the Property or the business conducted there. The entire service station operations, including the use of any Underground Storage Tanks ("USTs") on the Property had been

completely discontinued when Mr. Simas acquired the Property in 1983. In fact, the service station itself was boarded up and the UST's emptied before Mr. Simas became the owner of the Property. Mr. Simas did not reopen the station, or even unboard it, prior to selling it to Mr. Crosby on August 21, 1983, about six months later. At no time did Mr. Simas own or operate the USTs on the Property. Mr. Simas was merely an intervening, innocent, passive owner of the Property.

## II. LEGAL ANALYSIS.

Since Xtra Oil never held title to the Property and never operated the USTs at issue, Xtra Oil is clearly not a responsible party under either the federal or state regulations. Accordingly, the analysis set forth below is limited to whether Mr. Simas can be classified as a responsible party under the applicable regulations.

### A. Federal UST Requirements.

As in many environmental areas, UST law is controlled "from the top down" by federal law administered by the Environmental Protection Agency ("EPA"). In 1984, Congress adopted several amendments to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 et. seq. One of these amendments added Subchapter I to RCRA (42 U.S.C. §6991, et. seq.) and required EPA to develop corrective action requirements for owners and operators of USTs containing petroleum products.<sup>1</sup>

As you know, EPA's UST regulations are set forth in Title 40 Code of Federal Regulations ("C.F.R."), Parts 280 and 281. 40 C.F.R §280.60 sets forth the corrective action requirements for USTs containing petroleum products. Compliance with these regulatory requirements is the responsibility of "owners" and

---

<sup>1</sup>The 1984 RCRA amendments were adopted because petroleum contamination is not regulated under the Comprehensive Environmental Response and Liability Act ("CERCLA"), 42 U.S.C. Sections 9601, et seq., the major federal statute which authorizes the government to respond to releases of hazardous substances. (See, EPA Guidance Document, dated July 31, 1987, entitled: "Scope of the Petroleum Exclusion Under Sections 101(14) and 104(a)(2).")

"operators" of the petroleum UST systems involved.

The term "owner" is defined under the federal UST regulations to mean:

(a) In the case of a UST system in use on November 8, 1984, or brought into use after that date, any person who owns a UST system used for storage, use, or dispensing of regulated substances; and

(b) In the case of any UST system in use before November 8, 1984, but no longer in use on that date, any person who owned such UST immediately before the discontinuation of its use.

(40 C.F.R. Ch. 1 § 280.12)

The term "operator" is defined under the federal UST regulations to mean: any person in control of, or having responsibility for, the daily operation of the UST system.

Applying these definitions, Mr. Simas would not be classified as either an "owner" or "operator" under the federal UST regulations. Thus, he is not a "responsible party" under these federal UST requirements.

Mr. Simas cannot be classified as an "owner" under the federal UST regulations. Since the UST system at issue was not in use on November 8, 1984, subparagraph (a) above does not apply. The USTs at issue were in use before November 8, 1984, but were no longer in use on that date. Thus, subparagraph (b) above applies. As stated above, at the time that Mr. Simas acquired the Property in 1983, the entire service station operations had been discontinued, the USTs at the Property were no longer in use, and the tanks have been emptied of their contents by the prior owner of the Property. Thus, under subparagraph (b) the entity that would be classified as an "owner" and thus, a responsible party would be the "owner" of the UST system immediately before the discontinuation of its use, not Mr. Simas.



**B. California's UST Requirements.**

As you know, in 1983, California adopted its own law governing USTs. This law is found in Division 20, Chapter 6.7 of the Health and Safety Code ("H.S.C."), Sections 25280, et. seq. Overall administration of California's UST laws and regulations is vested with the State Water Resources Control Board (the "Board"), although direct implementation of the law occurs at the county or city level. The Board's regulations are found in Title 23, Division 3, Chapter 16 of the California Code of Regulations ("C.C.R."), Sections 2610, et. seq. USTs containing petroleum products are regulated under California's UST requirements (H.S.C., Section 25281(f)).

California's UST regulations require that certain parties take corrective action in the event of an unauthorized release of a hazardous substance from a UST (23 C.C.R., Chapter 16, § 2721). Under these regulations, a responsible party is defined as one or more of the following:

- (1) Any person who owns or operates an underground storage tank used for storage of any hazardous substance;
- (2) In the case of any underground storage tank no longer in use, any person who owned or operated the underground storage tank immediately before the discontinuation of its use;
- (3) Any owner of property where an unauthorized release of a hazardous substance from an underground storage tank has occurred; and
- (4) Any person who had or has control over a underground storage tank at the time of or following an unauthorized release of a hazardous substance.

(23 C.C.R., Chapter 16, § 2720).

Thomas F. Peacock, Supervising HMS  
May 17, 1993  
Page 5

Applying these definitions, Mr. Simas would not be classified as a "responsible party" under California's UST regulations. With respect to subparagraph (1) above, Mr. Simas did not own "an underground storage tank used for storage of any hazardous substance" because the USTs at issue had been emptied of their contents before Mr. Simas acquired the Property in 1983. Furthermore, Mr. Simas never operated the subject USTs. With respect to subparagraph (2) above, Mr. Simas did not own or operate the subject USTs immediately before the discontinuation of their use.

Applying subparagraph (3) above, although Mr. Simas owned the Property for a few months in 1983, he is not currently the owner of this Property, having sold it nearly ten years ago. Furthermore, applying subparagraph (4) above, Mr. Simas did not have control over the USTs either "at the time or following an unauthorized release of a hazardous substance." When Mr. Simas purchased the Property in 1983, the UST's had already been emptied of their contents. Thus, to the extent that an unauthorized release occurred from the USTs prior to Mr. Simas's purchase of the Property, he did not have control over these UST at the time of the unauthorized release. In addition, the unauthorized release could not have occurred after he purchased the Property because the USTs were emptied of their contents before Mr. Simas purchased the Property.

### III. CONCLUSION.

Since Xtra Oil never held title to the Property and never owned or operated the subject USTs, Xtra Oil is clearly not a responsible party under the applicable regulations. Furthermore, for the reasons discussed above, Mr. Simas is not a responsible party under either the federal or state UST regulations. Therefore, we respectfully request that your agency remove Xtra Oil and Mr. Simas from your list of potentially responsible parties with respect to any contamination at the Property.

Enclosed for your information is an article regarding a recent jury decision on UST liability. In the case referenced in the article, Emerald Oil Co., Inc., which was one of a series of owners of a UST system, was dismissed from the case on the grounds that it was not the owner of the tank when the leak took place.

Thomas F. Peacock, Supervising HMS  
May 17, 1993  
Page 6

We remain open to fully cooperating with your office and the other regulatory agencies involved in this matter. However, in light of the facts set forth above, Mr. Simas cannot accept responsibility for a contamination problem which he did not cause and which neither he nor Xtra Oil Company are legally responsible for. Please do not hesitate to contact me should you have any questions regarding this letter.

Sincerely,



Mary Ann Aguirre

MAA:vlf

Enclosure

cc: R. Hiett, RWQCB  
Hue Crosby  
Marcela & Miguel Florez  
M. & Jorge Del Rio  
Gil Jensen, Alameda County District Attorney's Office

LAW OFFICES OF  
**NORMOYLE & NEWMAN**  
 A PROFESSIONAL LAW CORPORATION

1700 STANDIFORD AVENUE - SUITE A-340  
 MODESTO, CALIFORNIA 95350  
 TELEPHONE (209) 521-4521 TELECOPIER (209) 521-4963

MICHAEL C. NORMOYLE  
 RUSSELL A. NEWMAN  
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 MARY ANN AQUERRE  
 MICHAEL L. ABBOTT  
 JOHN T. RESEO

PATRICK M. McORATH  
 DAVID G. ROMANO, P.E.  
 Land Use Analysts

Telecopier Transmission Form

DATE: May 17, 1993  
 TIME: 3:10

PLEASE FORWARD TO: Thomas J. Peacock

TELECOPIER TELEPHONE NUMBER: 510-~~211-1820~~ 514-11153

TRANSMISSION FROM: Mary Ann Aquerre

NUMBER OF PAGES (including this cover page): 9

OPERATOR: Vicki

ATTACHMENT (S): \_\_\_\_\_

MESSAGE (if any): \_\_\_\_\_

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LAW OFFICES OF  
**NORMOYLE & NEWMAN**

A PROFESSIONAL LAW CORPORATION

1700 STANDIFORD AVENUE - SUITE A-340

MODESTO, CALIFORNIA 95350

TELEPHONE (209) 521-9521 TELESCOPIER (209) 521-4968

ST10 3674

MICHAEL C. NORMOYLE  
 RUSSELL A. NEWMAN  
 WYLLIE P. CASHMAN  
 MARY ANN AQUERRA  
 MICHAEL L. ABBOTT  
 JOHN T. RESSO

PATRICK M. McGRATH  
 DAVID G. ROMANO, P.R.  
 Lead Use Analysts

Telecopier Transmission Form

DATE: April 29, 1993

TIME: 2:40

PLEASE FORWARD TO: Thomas A. Peacock

TELECOPIER TELEPHONE NUMBER: 510-569-4757

TRANSMISSION FROM: Mary Ann Aquerra (209) 521-9521

NUMBER OF PAGES (including this cover page): 11

OPERATOR Vicki A. French

ATTACHMENT (S): \_\_\_\_\_

MESSAGE (if any): \_\_\_\_\_

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ST 10 3674

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A PROFESSIONAL LAW CORPORATION

1700 STANDIFORD AVENUE - SUITE A-340

MODESTO, CALIFORNIA 95350

TELEPHONE (209) 521-9521 TELECOPIER (209) 521-4968

SEARCHED  
SERIALIZED  
INDEXED  
FILED

PATRICK M. McGRATH  
DAVID O. ROMANO, P.E.

Land Use Analysts

MICHAEL C. NORMOYLE  
RUSSELL A. NEWMAN  
WYLIE P. CASHMAN  
MARY ANN AGUIRRE  
MICHAEL L. ABBOTT  
JOHN T. RESSO

April 29, 1993

Via Facsimile & U.S. Mail  
(510) 569-4757

Thomas F. Peacock, Supervising HMS  
Hazardous Material Division  
Alameda County Health Care Services Agency  
Dept. of Environmental Health  
State Water Resources Control Board  
80 Swan Way, Room 200  
Oakland, California 94621

**Re: 5330 Foothill Blvd., Oakland, California 94610**

Dear Mr. Peacock:

I hope this letter finds you doing well. As we recently discussed, I am environmental counsel to Xtra Oil Company. I have been practicing in the area of environmental law for over twelve years and I have had extensive experience in handling gasoline contamination cases. Attached for your review and information is a copy of my biographical sketch and resume. (See Attachment One.)

I have appreciated the opportunity to speak with you recently regarding the above-referenced site. I am writing to you to let you know that yesterday I completed my preliminary review of the facts surrounding the above-referenced site. As we discussed, I am in the process of preparing a letter to you which responds to your letter to Xtra Oil Company, dated February 18, 1993, which was forwarded to the attention of Mr. Edward Simas.

I will forward my letter to you as soon as possible regarding the site. I apologize for not getting a responsive letter to you sooner. However, it was necessary for me to review numerous documents and to confer with my client before our responsive letter could be finalized. In addition, I have been preparing for trial in another case which is scheduled to take place next Thursday, May 6, 1993.

Thomas F. Peacock, Supervising HMS  
April 29, 1993  
Page Two

Upon your receipt of my letter, which I intend to get to you in the next two weeks, please call me so that we can discuss our views regarding the site. In addition, we would be glad to meet with you once you have had an opportunity to review my letter.

I greatly appreciate your willingness to provide me with sufficient time to review the facts in this case so that we will be in a position to discuss substantive issues relating to the site with you.

Sincerely,

A handwritten signature in cursive script that reads "Mary Ann Aguirre". To the right of the signature, there are some initials or a date, possibly "10/27".

Mary Ann Aguirre

MAA:vlf  
Enclosure  
maa\cr\peacock.428

MARY ANN AGUIRRE

Environmental Compliance  
and  
Environmental Litigation Attorney

Ms. Aguirre has practiced environmental law since 1981 and has handled some of the largest environmental cases in the country. She graduated from the University of California at Berkeley with honors in 1976 and she is a 1981 honor graduate of Hastings Law School in San Francisco. She is fluent in Spanish and has been actively involved in community activities throughout her career.

Ms. Aguirre joined the law firm of Normoyle & Newman, located in Modesto, California, in 1992 where she continues to specialize in environmental compliance and environmental litigation matters. She advises clients on compliance with local, state and federal environmental laws, particularly in the hazardous waste management and cleanup areas. She also advises clients on environmental issues relating to real estate transactions and prepares environmental regulatory opinions for financial transactions. Ms. Aguirre has also successfully obtained numerous environmental permits on behalf of clients and has had extensive experience with the California Environmental Quality Act and the air, water and hazardous waste laws applicable to new and existing sources of pollution. Ms. Aguirre also specializes in the handling of criminal environmental matters, having successfully negotiated such cases with district attorneys throughout California. She is a frequent national speaker on criminal environmental law matters.

From 1981 to 1984, Ms. Aguirre practiced environmental law with the United States Department of Justice in Washington, D.C. as an Honor Graduate in the Policy, Legislation and Special Litigation Section of the Land and Natural Resources Division. Her policy responsibilities included representation of the United States Attorney General ("AG") on the Executive Board of the National Trust for Historic Preservation, re-authorization of the Clean Air Act, and representation of the AG on the first federal Committee on Indoor Air Quality. She also worked with the Assistant AG of the Lands Division on environmental policy positions for presentation to the United States Congress and the White House. Her legislative work involved the drafting of environmental regulations for federal client agencies and the evaluation of environmental legislation proposed by the United States Congress and the Executive Branch. Ms. Aguirre also handled special environmental litigation projects in the United States Claims Court, federal district courts throughout the United States, and in the Ninth and Eleventh Circuit Courts of Appeal. Ms. Aguirre received a Special Achievement Award from the AG for her work on the National Environmental Policy Act in 1983.



From 1984 to 1988, Ms. Aguirre practiced environmental law with Pillsbury Madison & Sutro in San Francisco, where she also handled environmental compliance and environmental litigation matters. For instance, Ms. Aguirre was one of two principal attorneys who handled the infamous Stringfellow hazardous waste case and the corollary "toxic-tort" case on behalf of Chevron U.S.A., Inc. and fifty-five other corporations. In 1987, while at Pillsbury, she was placed on special assignment to the San Francisco Public Defender's Office where she handled felony criminal trials.

Ms. Aguirre practiced environmental law at Adams & Broadwell in San Mateo, California from 1988 to 1989, representing labor unions on environment matters. This practice provided her with extensive experience in handling administrative hearings before the California Coastal Commission, Boards of Supervisors, Boards of Zoning Appeals, and other public forums throughout California.

From 1989 to 1991, Ms. Aguirre practiced law with Graham & James' Environmental Department in San Francisco. At Graham & James Ms. Aguirre was responsible for supervising numerous lawyers on complex environmental cases. She has successfully defended criminal environmental cases and has been recognized nationally for her expertise in this specialized field. While at Graham & James Ms. Aguirre also served on the firm's hiring committee, co-founded the "Downtown Hispanic Attorneys' Luncheon" group, and chaired Graham & James' Minority Counsel Program Steering Committee.

In addition to Ms. Aguirre's extensive involvement with hispanic and women's organizations, Ms. Aguirre is also a member of the American Bar Association's Committee on International Environmental Law, the American Bar Association's Committee on Nature Resources, and an International Advisor to the Children's Alliance for the Protection of the Environment ("CAPE").

## MARY ANN AGUIRRE

1700 Standiford Avenue  
Suite A-340  
Modesto, CA 95350  
(209) 521-9521 (Bus.)  
(209) 521-4968 (Fax)  
(209) 852-2319 (Home)

### EDUCATION

#### HASTINGS COLLEGE OF THE LAW

University of California, San Francisco  
Juris Doctor 1981 with Honors  
Newhouse Scholarship 1980  
Moot Court Semi-Finalist 1981

#### UNIVERSITY OF CALIFORNIA, Berkeley

BA 1976 Cum Laude  
National Scholarship Competition,  
Honorable Mention 1976  
California State Scholarship 1976-1978

Admitted to California Bar in 1981  
**Law Practice Emphasis: Environmental Matters**

### CURRENT EMPLOYMENT

#### Environmental Attorney

**Normoyle & Newman**  
Modesto, CA

June 1992 to Present

Represent clients on environmental compliance and environmental litigation matters due to extensive experience with the California Environmental Quality Act and the air, water and hazardous waste laws applicable to new and existing sources of pollution. Responsible for advising clients regarding compliance with local, state and federal environmental laws, particularly in the hazardous waste management and cleanup areas. Advise clients on environmental issues relating to financial transactions and continue to specialize in criminal environmental law cases, having successfully negotiated such cases with District Attorneys throughout California.

### PREVIOUS EMPLOYMENT

#### Environmental Compliance Attorney

**Graham & James**  
San Francisco, CA

October 1989 to  
February 1992

Represent clients on a broad range of international and domestic environmental law matters as a member of the firm's Environmental Compliance Group. Responsible for supervising up to ten attorneys on complex environmental cases. A frequent national speaker on environmental criminal law matters, including numerous presentations in Washington, D.C. for the American Bar Association and before the Peninsula Industrial Business Association in California. Member of the firm's Hiring

Committee, co-founder of the "Downtown Hispanic Attorney's Luncheon" group. Founder of Graham & James' Minority Counsel Steering Committee.

**Regional Finalist**

March 1988

President's Commission on White House Fellowships.

**Environmental Attorney**

June 1988 to  
August 1989

**Adams & Broadwell**  
San Mateo, CA

Firm specializes in environmental, land use and real estate matters. Represented unions, throughout California, on environmental matters before numerous courts, administrative agencies, local governing boards and State Commissions. Responsible for obtaining a \$123 million dollar union contract, the largest in the history of the firm. Work involved highly technical Clean Air Act issues, including participation in the historic South Coast Management Plan (1989) and the Public Health and Socioeconomic Task Force; Clean Water Act, energy, endangered species, historic preservation and coastal zone management issues. Appointed the firm's in-house expert on hazardous waste issues. Responsible for supervising numerous support staff.

**Environmental  
Litigation Attorney**

June 1984 to  
April 1988

**Pillsbury, Madison & Sutro**  
San Francisco, CA

Environmental Litigation: Handled some of the largest environmental cases in the country, including the representation of 55 corporations in the infamous Stringfellow litigation and corollary toxic-tort case which involved about 4,500 plaintiffs. Member of the Western Processing Superfund Site Coordinating Committee, Seattle, Washington. Represented Chevron U.S.A. Inc. on the American Petroleum Institute's Task Force regarding EPA's National Contingency Plan Amendments and before the California Energy Commission. Rendered legal advise to corporate clients on a multitude of environmental issues concerning natural resources, pesticides, hazardous waste, water, air and occupational health and safety issues.

General Civil Litigation: Handled "toxic tort," personal injury, contracts, maritime law, medical malpractice and other cases in federal and state courts.

Criminal Litigation: Handled a death-penalty appeal to the California Supreme Court.

Special Assignment

January 1987 to  
April 1987

San Francisco Public Defender's Office, Felony Criminal Section:  
Handled felony criminal trials from arraignment through trial.

Trial Attorney

October 1981  
June 1984

United States Department of Justice, Honor Graduate Program  
Washington, D.C.

Land and Natural Resources Division: Policy, Legislation & Special to  
Litigation Section

1983

Attorney General's Special Achievement Award.

Special Litigation: Handled trial and appellate litigation in the United States Claims Court, Federal District Courts and the Ninth and Eleventh Circuit Courts of Appeal. My case load involved the major federal environmental statutes dealing with pollution control, public land, wildlife, energy and natural resources. Utilized bilingual ability translating legal documents for the Department of Justice Solicitor's Office in a case before the United States Supreme Court.

Policy: Prepared speeches for the Assistant Attorney General and other high ranking officials of the Division. Prepared annual reports for the Division. Handled all policy matters relating to historic preservation and reauthorization of the Clean Air Act. Answered ethical questions for the Division.

Legislation: Drafted client agency regulations and legislation; prepared legal comments on a wide range of legislation proposed by the U.S. Congress and the Executive Branch; briefed high ranking officials for Congressional hearings and meetings; coordinated the Department's comments on proposed legislation relating to environmental laws; and rendered legal opinions on a broad spectrum of environmental issues. Handled all matters for the Division relating to federal legislative jurisdiction.

OTHER LAW-RELATED EMPLOYMENT

Judicial Intern  
(1980)

California Court of Appeals, First Appellate District  
San Francisco, CA

Professor's Assistant

Hastings College of the Law, Substantive Law of Contracts  
San Francisco, CA

Law Clerk  
(Summer 1979)

Juvenile Justice Legal Advocacy Project  
San Francisco, CA

Legal Team Member  
(1975-1979)

Criminal Legal Aid Collective  
San Francisco, CA

Law Clerk  
(1975)

Mexican American Legal Defense and Education Fund  
San Francisco, CA

LITIGATION TRAINING

1985

Pillsbury, Madison & Sutro Litigation Training  
San Francisco, CA

1983

United States Attorney General's Management Training Course  
Washington, D.C.

1982

United States Attorney General's Civil Trial Advocacy Institute  
Washington, D.C.

1981

United States Attorney General's Appellate Trial Advocacy Institute  
Washington, D.C.

ENVIRONMENTAL TRAINING

April 1991

American Bar Association's Second Annual Conference on Environmental  
Crimes, Washington, D.C.

April 1990

American Bar Association's First Annual Conference on Environmental  
Crimes, Washington, D.C.

May 1990

Conference on "International Environmental Law: The Changing Scene"  
sponsored by the American Bar Association, San Francisco, CA

May 1989

"1989 California Environmental Quality Act Conference Update"  
Monterey, CA

May 1986

Geraghty & Miller "Groundwater Contamination Seminar"  
San Francisco, CA

ENVIRONMENTAL ACTIVITIES

August 1990 to Present

Frequent National Speaker on Criminal Environmental Law Matters.

October 1989 to Present

International Advisor to the Children's Alliance for Protection of the  
Environment ("CAPE"), Austin, Texas. CAPE has received numerous  
international awards, including the prestigious Global 500 award from the

United Nations in 1990. In 1991, the United Nations Environment Programme chose CAPE as its Regional Youth Focal Point for the United States.

- 1989 to Present ABA International Environmental Law Committee Member.
- November 1992 ALEX '92 Conference. Speaker: "Environmental Laws Applicable to Analytical Laboratories."
- October 1992 Continuing Education of The Bar (State Bar of California). Panelist: "Hazardous Waste and Real Estate Transactions."
- April 1992 ETEX '92 Conference. Speaker: "Corporate Liability for Environmental Crimes", Washington, D.C.
- November 1991 Peninsula Industrial Business Association ("PIBA"). Speaker: "Criminal Environmental Liabilities -- An Overview of Individual and Corporate Criminal Liabilities Within Hazardous Waste Management and Related Business Activities. Palo Alto, CA.
- October 1991 ALEX '91 Conference. Speaker: "Environmental Crimes: How to Avoid Liability", San Jose, CA.
- August 1991 PIBA. Speaker: "The California Corporate Liability Act of 1991."
- March 1991 ETEX '91 Conference. Speaker: "Trends in Criminal Environmental Matters in California", Las Vegas, NV.
- April 1990 Seminar on "Environmental Issues in Real Estate Transactions". Speaker: Sacramento, CA.
- 1988 National Hispanic Bar Association Annual Convention. Speaker: "How Environmental Issues Affect Hispanics and Citizen's Suits Under the Environmental Statutes", Albuquerque, NM.
- February 1984 to June 1984 Assistant Attorney General's Representative  
Federal Committee on Indoor Air Quality, Washington, D.C.
- October 1981 to June 1984 Attorney General's Representative:  
Executive Board of the National Trust for Historic Preservation,  
Washington D.C. (Board meetings held throughout the United States).
- 1982 National Hispanic Bar Convention, Environmental Law Panel Speaker:  
"Victim's Compensation for Exposure to Hazardous Substances".

## OTHER ACITIVTIES

- March 1991 Founder of Graham & James' California Minority Counsel Program Steering Committee.
- October 1991 La Raza Lawyers Association Annual Conference. Speaker: "Marketing Tips for Minority Attorneys", Sacramento, CA.
- June 1990 Co-Founder of the "Bay Area Hispanic Attorneys Luncheon Series", San Francisco, CA.
- October 1989 to January 1991 San Mateo County Municipal Court Small Claims Judge (Pro Bono Appointment)
- January 1985 to Present World Affairs Council, Member
- May 1989 ABA Speaker: "Marketing a Small or Minority-Owned Law Firm"
- September 1987 to March 1988 La Raza Information Center, Board Member San Francisco, CA
- 1985 to Present ABA Community Law Week: "Speaker in the School" Program.
- December 1985 Member and Fundraiser for the Committe to Reelect the Honorable Cruz Reynoso.
- August 1982 to June 1984 Mexican American Women's National Association Vice President for Communications; Editor of the Organization's National Newsletter, Washington, D.C.
- January 1982 to January 1984 Vice Chairperson for the Department of Justice Association of Hispanic Employees, Washington, D.C.
- 1983 Speaker at the ABA's Young Lawyer's Division Conference: "Minorities and the Law", Washington, D.C.

**References Available Upon Request**

**ENDORSED  
FILED**

**DEC 22 1978**

**RENE C. DAVIDSON, County Clerk  
By: James Kitterman, Deputy**

1 MOORE, CLIFFORD, WOLFE, LARSON & TRUTNER  
A Professional Corporation  
2 201 - 19th Street  
Oakland, California 94612  
3 (415) 444-6800

4 DALE I. STOOPS, ESQ.  
Wells Fargo Bank Building  
5 415 - 20th Street  
Oakland, California 94612  
6 (415) 836-2204

7 Attorneys for Plaintiff

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 IN AND FOR THE COUNTY OF ALAMEDA

10	EDWARD T. SIMAS,	)	NO. 503556-6
11	Plaintiff,	)	<u>ORDER APPOINTING RECEIVER</u>
12	vs.	)	
13	WALTER J. SIMAS, et. al.,	)	
14	Defendants.	)	
15	<hr/>		

16 The motion of plaintiff EDWARD T. SIMAS for an order  
17 appointing a receiver to take possession, control, charge  
18 and management of all the assets, business and affairs,  
19 including all books and records, belonging to either of the  
20 named corporate defendants and/or the defendant partnership,  
21 which motion was filed March 20, 1978, having been duly and  
22 timely served on all parties entitled thereto, came on  
23 for hearing in Department 19 of this Court on April 5, 1978  
24 and further hearings were held thereon on April 13, 1978 and  
25 May 1, 1978. At said hearings, plaintiff appeared personally  
26 and by and through his attorneys of record, DALE I. STOOPS



1 and MOORE, CLIFFORD, WOLFE, LARSON & TRUTNER, A Professional  
2 Corporation, by J. JAY SCENACK, and defendants WALTER J.  
3 SIMAS, SIMAS BROS., a California corporation, ASHLAND OIL  
4 COMPANY OF CALIFORNIA, a California corporation, and ASHLAND  
5 OIL COMPANY OF CALIFORNIA, a California Limited Partnership,  
6 appeared by and through their attorneys of record, COOLEY,  
7 GODWARD, CASTRO, HUDDLESON & TATUM, by KENNETH J. ADELSON.  
8 The matter was then continued by stipulation of the parties  
9 and further hearings thereon were held October 27, 1978,  
10 November 1, 1978, December 1, 1978, December 8, 1978 and  
11 December 21, 1978. At each of these latter hearings, plaintiff  
12 again appeared personally and by and through his aforementioned  
13 counsel and said defendants appeared by and through their  
14 substituted attorneys of record, CLEMENT & FITZPATRICK,  
15 INC., by PAUL J. FITZPATRICK. Defendant WALTER J. SIMAS  
16 also appeared personally at said hearings.

17 Evidence, documentary and oral, points and authorities  
18 and extensive argument offered by all parties having been  
19 considered and good cause appearing for the appointment of a  
20 receiver in this action to perform the functions and execute  
21 the orders hereinafter set forth,

22 THE COURT FINDS that:

23 1. This is an action between parties owning or interested  
24 in the property hereinafter described;

25 2. Plaintiff is a party whose right to or interest in  
26 the subject property, and the proceeds thereof, is probable;

1           3. The subject property is in danger of being lost,  
2 removed or materially injured.

3           IT IS ORDERED that:

4           1. Mr. John McDougal be and he hereby is appointed  
5 receiver in this action, effective January 3, 1979;

6           2. Before entering upon his duties as receiver, he  
7 shall take the oath and file herein a bond with surety  
8 thereon approved by this Court in the penal sum of \$75,000.00,  
9 conditioned for the faithful performance of his duties as  
10 receiver. The cost of the premium for said bond is to be  
11 paid out of the assets subject to the receiver's control;

12           3. After so qualifying, the receiver shall take possession,  
13 control, charge and management of all the assets, business  
14 and affairs, including all books and records, belonging to  
15 defendant ASHLAND OIL COMPANY OF CALIFORNIA, a California  
16 corporation, and/or defendant STMAS BROS., a California  
17 corporation, and/or defendant ASHLAND OIL COMPANY OF CALIFORNIA,  
18 a California Limited Partnership, and manage, care for,  
19 preserve and maintain said assets and business,  
20 and incur the expenses necessary or appropriate for such  
21 management, care, preservation and maintenance;

22           4. The receiver shall, subject to further order of  
23 this Court, operate and conduct the business of defendant  
24 ASHLAND OIL COMPANY OF CALIFORNIA, a California Limited  
25 Partnership, at 1436 14th Avenue, Oakland, California, as  
26 its principal place of business and elsewhere, and the

(FOLLOWING IS AN EVALUATION PERIOD AS IN HIS DISCRETION IS NECESSARY)

1 receiver is authorized to employ and ~~or~~ discharge such  
2 servants, agents, employees, clerks, attorneys and accountants  
3 as he deems appropriate and to pay therefor at ordinary and  
4 usual rates and prices out of funds that shall come into his  
5 possession as receiver and to do all things and to incur the  
6 risks and obligations ordinarily incurred by owners, managers  
7 and operators of similar businesses and enterprises as such  
8 receiver, and no such risk or obligation so incurred shall  
9 be the personal risk or obligation of the receiver, but a  
10 risk or obligation of the receivership estate;

11 5. The receiver is authorized to pay to himself a by-  
12 weekly salary based upon a yearly rate of \$50,000.00;

13 6. The receiver is hereby instructed that he shall not  
14 pay any salary or compensation to defendant WALTER J. SIMAS  
15 by reason of WALTER J. SIMAS' capacity as general partner of  
16 the defendant partnership; provided, however, that if, at the  
17 request of the receiver, WALTER J. SIMAS provides services of  
18 value to the receivership estate, the receiver is authorized  
19 to pay to WALTER J. SIMAS for such services an amount equal to  
20 what the receiver believes to be reasonable compensation therefor.

21 DONE IN OPEN COURT DECEMBER 21, 1978 AND PRESENTED FOR  
22 SIGNATURE AND SIGNED DECEMBER 22, 1978.

23 JOHN P. SPARROW

24  
25 JOHN P. SPARROW  
26 JUDGE OF THE SUPERIOR COURT

7. EFFECTIVE JANUARY 3, 1979, THAT "PRELIMINARY  
INJUNCTION PURSUANT TO STIPULATION" FILED  
HEREIN ON JUNE 15, 1978, SHALL BE DISSOLVED.

## CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN FRANCISCO BAY REGION

2101 WEBSTER STREET, SUITE 500

OAKLAND, CA 94612

(510) 286-1255

**RECEIVED**

APR 15 1994

DISTRICT ATTORNEY  
ALAMEDA COUNTY  
CEPDApril 15, 1994  
File:01-0508 & 2198.17

Miguel and Marcela Florez  
802 Sea Chase Drive  
Redwood City, CA 94065

Jorge and Maria Del Rio  
732 Crespi Drive  
Pacifica, CA 94044

Hue and Ruby Crosby  
3015 38th Avenue  
Oakland, CA 94610

Edward Simas, as an individual and beneficiary of the will of  
Jean L. Simas, through John McDougal, Receiver  
2307 Pacific Avenue  
Alameda, CA 94605

Walter Simas, as an individual and beneficiary of the will of  
Jean L. Simas, through John McDougal, Receiver  
c/o Walter Youngman, Conservator  
1981 N. Broadway, Suite 300  
Walnut Creek, CA 94596

John McDougal, as Receiver  
for Ashland Oil Company, a Limited partnership  
4864 American River Drive  
Carmicheal, CA 94596

Walter Simas, General Partner  
of Ashland Oil Company of California, A limited Partnership  
c/o Walter Youngman, Conservator  
1981 N. Broadway, Suite 300  
Walnut Creek, CA 94596

Edward Simas, Limited Partner  
of Ashland Oil Company, a Limited Partnership  
2307 Pacific Avenue  
Alameda, CA 94501

**RE: Legal Designation of Responsible Party and Request for  
Submittal of a Technical Report Resulting from the Alameda  
County Department of Environmental Health's Pre-Enforcement  
Review Panel Meeting on January 18, 1994**

Dear Mmes. Crosby, Del Rio, and Florez and Messrs. Crosby, Del Rio,  
Florez, McDougal, Edward Simas, Walter Simas, and Youngman:

It has been brought to my attention by Regional Board staff that a condition of soil and groundwater pollution exists on the property located at **5330 Foothill Blvd., Oakland, CA 94601** from an underground storage tank release. The Alameda County Department of Environmental Health (ACHD) staff have requested technical reports from one or more of you to fulfill your obligations per California Code of Regulations, Title 23 Waters, Chapter 16, Underground Storage Tank Regulations, Article 11, Corrective Action Requirements. It is my understanding that ACHD staff were unsuccessful in eliciting your cooperation in resolving these issues through normal correspondence.

A Pre-Enforcement Review Panel was held at the ACHD offices on January 18, 1994, attended by Mr. Sumadhu Arigala, of my staff. Pursuant to the Regional Board's authority under Section 13267 (b) of the California Water Code, you are hereby found to be a responsible party as defined by Title 23 of the California Code of Regulations, Division 3, Chapter 16, Article 11, Section 2720. A Responsible Party is "any person who owned or operated the underground storage tank immediately before the discontinuation of its use." A responsible party also includes any owner of property from which an unauthorized release of a hazardous substance from an underground storage tank has occurred, or any person who had or has control over an underground storage tank at the time of or following an unauthorized release of a hazardous substance, among others.

As a responsible party, you are required to conduct both soil and groundwater investigations to determine the extent of the environmental pollution resulting from the release. Therefore, you are requested to submit a technical report specifically addressing the following numbered items within thirty (30) days of the date of this letter:

- 1) A proposal for the removal of polluted soils, if deemed necessary, from the vicinity of the former underground storage tanks;
- 2) A proposal to define the lateral and vertical extent of pollution in soil and groundwater.

All Work should adhere to the requirements of the Tri-Regional Board Staff Recommendations for the Preliminary Evaluation and Investigation of Underground Storage Tank Sites - August 10, 1990 and Article 11 of Title 23, Waters, California Code of Regulations.

I am hereby transmitting this request for a technical report to ACHD for service and continued case handling. You should be aware that failure on your part to submit the requested technical report, or late submittal may result in fines up to \$1000 per day of

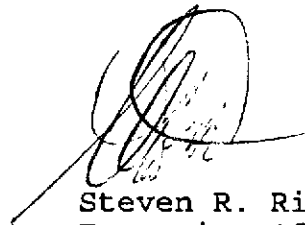
Enforcement Review Panel  
Page 3 of 3

delinquency. Your response to this technical report request should be sent to the attention of Ms. Eva Chu at ACHD. Please inform Ms. Chu at least three working days in advance of all field activities.

Please be advised that this is a formal request for a technical reports pursuant to California Water Code Section 13267 (b). Any extensions of the stated deadlines, or modifications of the required tasks, must be confirmed in writing by either this agency or the ACHD.

If you have any questions regarding the contents of this letter, Please contact Ms. Chu, of ACHD, at (510) 271-4530.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven R. Ritchie", with a long horizontal flourish extending to the left.

Steven R. Ritchie  
Executive Officer

cc: Gil Jensen, ACDA, 7677 Oakport Street, Suite 400, Oakland  
94621

Eva Chu, ACHD, 80 Swan Way, Suite 200, Oakland 94621

# McSHANE & FELSON

PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

2175 N. CALIFORNIA BLVD., SUITE 900  
WALNUT CREEK, CALIFORNIA 94596-3500

(510) 943-6111

TERRY D. McSHANE  
KATHLEEN T. McSHANE  
J. JAY SCHNACK  
KENNETH A. CHEITLIN  
PAUL D. CLARK  
PAMELA J. ZAID  
CHRISTINA C. BRINLEY

OF COUNSEL

JOSEPH L. FELSON

FACSIMILE  
(510) 943-6178

ALCO  
HAZMAT  
94 JAN 28 PM 3:38

January 28, 1994

Ms. Eva Chu  
Hazardous Materials Division  
Department of Environmental Health  
80 Swan Way, Room 200  
Oakland, California 94521

**VIA HAND-DELIVERY**

Gilbert A. Jensen, Esq.  
Alameda County District Attorney's Office  
Alameda County Courthouse  
1225 Fallon Street, Room 900  
Oakland, California 94612

**VIA HAND-DELIVERY**

RE: 5330 Foothill Boulevard, Oakland  
Our File No. 397.012

Dear Ms. Chu and Mr. Jensen:

Ted Simas and I appreciated the opportunity to meet with you and the other regulators at the further pre-enforcement review panel hearing January 18, 1994. This office is now representing Ted Simas in the proceedings regarding this property.

At the January 18 hearing, you indicated the regulators have concluded Mr. and Mrs. L. Hue Crosby ("Crosby"), who purchased the property from Ted Simas in September 1983, are not responsible parties because: 1) when they acquired the property the underground storage tanks ("USTs") had already been emptied and the associated pumps rendered unusable; 2) during their ownership, they made no use of the USTs or pumps; 3) they did not own or operate the property at the time the unauthorized discharge occurred; and 4) they are not the current owners of the property.

You and the other regulators concede all these same factors are equally applicable to Ted Simas: 1) when he acquired the property on February 23, 1983, the USTs had already been emptied and the pumps had already been rendered unusable; 2) he made no use of the USTs or the pumps at any time during the seven months of his ownership; 3) he did not own the property when the unauthorized discharge occurred; and 4) he is not the current owner of the property. In fact, Ted Simas has even less connection with this

January 28, 1994

Page 2

property than Crosby. Ted Simas owned the property for only seven months in 1983, whereas the Crosbys were the owners of the property for approximately eight years (from 1983 until they sold the property to Del Rios in 1991).

You have suggested that, notwithstanding the foregoing, Ted Simas might be considered a potentially responsible party because of his "association" with the site's prior owners. Attached is a summary of the pertinent facts presented to you previously and at the January 18 hearing. Set forth below is a summary of the applicable law. It is clear that Ted Simas was in no sense an owner (nor an operator) of this site before it was transferred to him on February 23, 1983. He should, therefore, be dismissed from these proceedings on the same grounds as Crosby has been.

#### APPLICABLE LAW

Before this site was transferred to Ted Simas on February 23, 1983, its prior owners were:

A. Simas Bros., a California corporation. Ted Simas was a non-voting shareholder of this corporation. He was neither a director nor officer. He had no authority, control or participation in the corporate decision-making or business operations; and

B. Ashland Oil Company of California, a California limited partnership ("Ashland"). Ted Simas was made a limited partner of Ashland without his consent. He was never a general partner. He had no authority, control or participation in Ashland's decision-making or business operations.

It is basic law that a corporation (such as Simas Bros.) is a separate and distinct legal entity from its shareholders (such as Ted Simas) and that shareholders have no ownership of corporate property, nor liability for corporate obligations:

"A corporation is a legal person or entity recognized as having an existence separate from that of its shareholders . . . The shareholders are not the owners of corporate property, and the corporation and a shareholder are distinct parties. . . ." Witkin, Summary of California Law, 9th Ed., Vol. 9, p. 511, Corporations 1(1)



January 28, 1994

Page 3

Similarly, in a limited partnership (such as Ashland) the limited partners (such as Ted Simas) have no ownership interest in assets owned by the partnership and no liability for partnership obligations:

". . . [T]he limited partner is given no property interest in specific partnership assets . . ." Evans v. Galardi (1976) 16 Cal.3d 308, 306; 128 Cal.Rptr. 25, 30.

"This unwillingness on the part of the legislature to grant the limited partner a property interest in the specific assets owned by the partnership . . . compels the conclusion that the limited partner has no interest in the partnership property by virtue of his status as a limited partner." Evans, supra, at 16 Cal.3d 307, 128 Cal.Rptr. 31

". . . [A] limited partnership is viewed as an entity separate and apart from the limited partners for purposes of suing and being sued. . . . The limited partner is not a proper party to proceedings by or against the limited partnership . . ." Evans, supra, at 16 Cal.3d 311, 128 Cal.Rptr. 34

See also California Corporations Code 15501; 15507(a); 15518; 15632; and 15671.

The only time a shareholder or a limited partner is held liable for corporate or partnership obligations, is when that individual has had a direct, personal involvement in the operation of the corporate or partnership business:

"It must be shown that the corporation is dominated or controlled by the individual . . . but it is not enough merely to show a "one-man" or "two-man" corporation. . . . Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality or separateness of the said person and corporation has ceased. . . ." Witkin, supra, at p. 526, Corporations, 13.

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"A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." California Corporations Code 15507(a). See also California Corporations Code 15632(a).

These same principles apply in the field of environmental law. For example, one of the primary decisions respecting the liability of corporate officers, employees and shareholders under CERCLA and RCRA is United States of America v. Northeastern Pharmaceutical & Chemical Co., Inc. [NEPACCO] (1986, 8th Cir.) 810 F.2d 726, in which two shareholders who were also corporate officers were held liable. The court noted, however, their liability "was not derivative but personal. Liability was not premised solely upon . . . [the individual's] status as a corporate officer, employee or shareholder. Rather . . . [he] is individually liable because he personally arranged for the transportation and disposal of hazardous substances. . . ." USA v. NEPACCO, supra, at 810 F.2d 744. Shareholders can be held individually liable only if they were personally involved in or directly responsible for the wrongful corporate acts, or had the ultimate authority to control those acts. USA v. NEPACCO, supra, at 745.

California law, as a matter of public policy, also restricts liability in the environmental field to those individuals who have personally participated in the wrongful acts. For example, damages under Health & Safety Code 25359 cannot be imposed against an owner of real property who did not himself generate, treat, transport, store or dispose of any hazardous substances at the facility located on his property. Health & Safety Code 25359(b).

Similarly, under Health & Safety Code 25363, individuals are only required to reimburse costs or expenditures to the extent they are "attributable to that party's actions." Health & Safety Code 25363(a).

Although Health & Safety Code 25359 and 25363, referred to above, are not involved in these proceedings, they do reflect California's public policy of not imposing environmental liability on innocent parties who have had no control or personal participation in the wrongful activities.

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Since Ted Simas had no authority, control or personal participation in the activities of Simas Bros. and Ashland, the above authorities clearly establish that he cannot be held responsible for unauthorized discharges which occurred before he acquired the property February 23, 1983.

It was unclear at the January 18 hearing whether you were concerned about the court appointment of a receiver over the Ashland assets and business. In any event, that appointment is of no significance in determining Ted Simas' liability. The court appointed receiver was not a surrogate or alter ego of Ted Simas:

"The appointment of a receiver is an ancillary proceeding concerned with the preservation of the property subject to litigation pending its ultimate disposition pursuant to final judgment. A receiver is not an agent of either party to the action . . ." Maggiore v. Palo Alto Inn, Inc. (1967) 249 Cal.App.2d 706 at 711-712; 57 Cal.Rptr. 787 at 791.

Appointment of a receiver did not change any ownership interests in the site. The site's owner continued to be Ashland:

"The receiver does not occupy the status of an assignee. His function is that of a minister of the court in possession of the property, to the end of conserving the rights of everybody having any interest." Wright v. Standard Engineering Corporation (1972) 28 Cal.App.3d 244 at 248; 104 Cal.Rptr. 539 at 542.

In that litigation, Ted Simas sought a court order for dissolution and liquidation of Ashland, but he did not exercise any control over, or participate in any way, in its properties or operations during the pendency of the litigation.

Eventually, by a Settlement Agreement executed December 29, 1982, it was agreed Ashland would be liquidated and dissolved, its assets would be distributed to Ted and Walter as tenants-in-common, and, simultaneously, they would exchange their partial interests in the various parcels so that they acquired sole ownership of separate parcels. All these steps were accomplished concurrently on February 23, 1983 through the recordation of a single quitclaim deed for each of the properties (including the subject site on Foothill Blvd.). There were no other or intermediate transfers of title or possession. Until that deed was recorded, Ashland

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remained the sole owner of this site and the receiver was the only party in possession or control of it.

All of the information set forth above, and in the attached summary of facts, was confirmed at the January 18 hearing by the receiver's attorney, Mr. Donald Edgar. It is clear that Ted Simas' "association" with prior owners cannot form the basis for imposing any liability upon him. For the very same reasons Crosby has been dismissed from these proceedings, Ted Simas must also be dismissed.

Thank you for the opportunity to present the foregoing authorities for your consideration.

Very truly yours,



J. JAY SCHNACK

JJS/jm

cc: Mr. Ted Simas

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#### SUMMARY OF FACTS

Prior to February 23, 1983, the site at 5330 Foothill Blvd., Oakland (the "site") was owned by a corporation (Simas Bros.) and, later, by a limited partnership (Ashland Oil Company of California, referred to below as "Ashland").

Ted Simas' business has always been operated through a separate and unrelated corporation, Xtra Oil. There has never been any relationship of any sort between Xtra Oil and either Simas Bros. or Ashland. Xtra Oil had no involvement, connection or dealings with the site at any time.

All the voting stock of Simas Bros. was owned equally, as community property, by Walter Simas and his wife Jean. (Walter Simas is Ted's stepfather. He adopted Ted as a child.) Walter and Jean Simas' stock represented 86% of the Simas Bros. equity. Ted Simas owned 14% of the corporate equity in the form of non-voting stock. Ted Simas did not participate in the operations of Simas Bros. at all. He was neither a director nor an officer. Since he held no voting stock, he could not even participate in the election of directors or officers.

The operations of Simas Bros. were exclusively controlled by its president, Walter Simas. Ted had no influence, not even informally, over those operations. The relationship between Walter and Ted was so hostile that, in approximately 1975, when Jean Simas (Walter's wife and Ted's mother) became critically ill, Walter refused to let Ted visit her until after Ted obtained a court order. When Jean Simas died in mid-1977, her handwritten will appointed Ted as executor and left her entire estate to him. Walter, however, refused to provide Ted any information regarding Simas Bros.

In December 1977, Walter Simas transferred to Ashland all assets of Simas Bros., including the site. Walter was the sole general partner of Ashland. Ashland had been created by Walter, and this transfer was made, without any notice to or consent by Ted Simas. As a result of that transfer, Ted Simas became a limited partner of the site's owner (Ashland). He still had no power, authority or involvement in the site's operation and control.

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In January 1978, Ted Simas filed suit against Walter Simas, Simas Bros. and Ashland in order to obtain information regarding their assets (including the site) and the status of their operations. As part of that suit, Ted asked for a court order liquidating and dissolving Ashland. The court appointed a receiver (Jack McDougal) over all the assets of Simas Bros. and Ashland, including the site. The receiver took control in January 1979 and continued through February 23, 1983. During all that time, Ashland remained the owner of the site, and Ted had no involvement or participation in the operation of the site or any of the other receivership properties.

The litigation between Ted and Walter was settled pursuant to a Settlement Agreement signed December 29, 1982. It was agreed Ashland would be liquidated and dissolved. In order to obtain the desired tax effects, the Settlement Agreement provided that: the site and other properties owned by Ashland would be distributed to Walter and Ted as tenants-in-common; all those tenancy-in-common interests in various properties would be partitioned through the tax exempt, like-kind exchange of undivided interests, so that each property would become owned solely by either Walter or Ted; all these steps would be accomplished simultaneously by the recordation of a single quitclaim deed for each property; that deed would be executed by all the parties having any potential interests in the properties or the litigation, including the receiver. A copy of that quitclaim for the site has been previously provided, and a further copy is attached hereto. That deed was recorded February 23, 1983. There was no other or intermediate transfer of title. Until the recordation of that deed, the site continued to be owned by Ashland and controlled by the receiver.

Prior to February 23, 1983, the receiver ceased all operations at the site, emptied the USTs and disabled the pumps.

In September 1983, seven months after acquiring the site, Ted Simas sold it to Crosby. Ted Simas made no use of the USTs, pumps or any other part of the site at any time. It was delivered to Crosby in exactly the same condition as when Ted Simas acquired it.

Since the USTs had been emptied before the site was transferred to Ted Simas in February 1983, and since the USTs had never been put to any use by him, it is clear the unauthorized discharge must have occurred either after Ted Simas sold the site to Crosby in September 1983, or before Ted Simas acquired the site.

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The first notice to Ted Simas regarding any unauthorized discharge was when Crosby removed the USTs in 1988 and informed Ted Simas of the contamination discovered during that removal. Ted Simas has no information regarding what use Crosby made of the USTs during the five years between Crosby's acquisition of the site in September 1983 and removal of the USTs in 1988.

If the unauthorized discharge occurred while the property was operated by the receiver, presumably he would have informed Ted Simas of that discharge before transferring the property to him. Since no such information was provided to Ted Simas, it is presumed the discharge occurred either before the receiver took over management of this site in January 1979, or after Ted Simas transferred the property to Crosby in September 1983.

In any event, it is clear that Ted Simas is not a responsible party with respect to this unauthorized discharge.

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WILLIAM J. TRINKLE

December 30, 1993

Mr. Steven R. Ritschie  
Executive Officer  
California Regional Water Quality Control Board  
San Francisco Bay Region  
2101 Webster Street, Suite 500  
Oakland, CA 94612

Re: Requests for Technical Report for XTRA Oil Company  
Sites: 1201 The Alameda, Berkeley; UST File and File No.  
2198.17 (JMJ)  
1399 San Pablo Avenue, Berkeley; UST File No. 01-  
1685; File No. 2198.17 (JMJ)

Dear Mr. Ritschie:

This firm has been retained by XTRA Oil Company to assist it in responding to you December 7, 1993, letters to Mr. Keith Simas of XTRA Oil, demanding "Technical Reports" on the above-mentioned properties pursuant to Water Code § 13267(b).

I must say that I was more than a bit bemused by the apparent preemptory issuance of the demands for technical reports to XTRA Oil. My experience has been that such action was reserved for only the most recalcitrant PRPs and then usually after considerable effort to get the PRP to voluntarily address the PRPs' indicated problem sites. My perception in this regard seems to be borne out by your letters in which the issuance of the technical report demand is predicated on an alleged lack of cooperation by XTRA Oil with the local agency, the City of Berkeley Toxics Program ("COBTP"). This, however, is an utterly inaccurate depiction of XTRA Oil's conduct in these matters. To wit:

1. With regard to the San Pablo Ave. property, a work plan was submitted to the COBTP in September, 1992. It was rejected in March, 1993. A cursory reading of that work plan suggests that it might well have been reasonably deemed deficient in some areas and that its rejection may well have been within the reasonable discretion of the COBTP. However, in September, 1993, a revised work plan, which appears to address all of the purported deficiencies of the earlier plan, was submitted for approval. No formal action regarding this work plan was ever forthcoming from the COBTP. I am informed that the COBTP informally notified XTRA Oil that the plan would be rejected but this notification was without any valid objective rationale for the COBTP adopting such a position. Even then, a meeting with the COBTP was scheduled at



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the request of XTRA Oil to discuss the matter but, instead of continuing with the informal, inexpensive, cooperative approach to dealing with these sites, the COBTP opted to involve the Alameda DA, the Alameda County Department of Environmental Health and the Regional Board in an expensive, time-consuming and entirely unnecessary hearing which resulted in the issuance of the technical report demand.

2. As for the The Alameda property, the COBTP file does include a number of entries regarding various occurrences in the vicinity of the site. However, the file is also replete with evidence that, throughout the history of this site, XTRA Oil has been a model of cooperation and civic responsibility. For instance, in 1984, before the UST tank laws came into effect, there were complaints of gasoline odors in the vicinity of the station. XTRA Oil investigated immediately and determined that the odors might be emanating from small spills possibly caused during the filling of the underground storage tanks due to poor fill cap design. XTRA Oil pointed this out to the Berkeley Fire Department and proceeded to replace the poor design cap with a better one which apparently solved the problem since no further complaints were registered for the next seven (7) years. In 1991, April and September to be specific, a couple of complaints were registered by a neighbor, again concerning "gasoline odors" in the area. These complaints were investigated by the then City of Berkeley Health and Human Services Environmental Health Inspector who could find no problems at the station. The investigator did notice that the underground storage tank vents pipes were located in the general vicinity from which the complaints originated. There was no indication at that time that any actual release of petroleum hydrocarbons had taken place.

About two weeks prior to the administrative hearing on this and the San Pablo site, XTRA Oil had its first ever communication with the COBTP regarding the The Alameda station. Apparently, a COBTP representative was reviewing XTRA Oil businesses in Berkeley and came upon the above-referenced file and found therein reports going back to 1985 of sampling of wells on the The Alameda property. The wells had been installed in the backfill around the tanks per Shell Oil Company's specifications when the USTs on site were replaced in 1984. The purpose of the wells was not monitoring but rather as a point for immediate product removal should a catastrophic release occur. Nevertheless, the wells were tested and the subsequent analysis revealed some indication of petroleum hydrocarbons in the backfill. Significantly, XTRA Oil was never told about this finding at the time of the testing nor was there even a suggestion at that time or any time thereafter that the situation should be investigated further by XTRA Oil.

Nevertheless, the disinterment of the report instigated a telephone call to XTRA Oil from the COBTP. XTRA Oil disavowed any knowledge of the report or the alleged results. Significantly, XTRA Oil did not dispute the report or refuse to cooperate in further investigating the situation. In fact, XTRA asked for a meeting to discuss the matter, the same meeting mentioned above with regard to the San Pablo site. The COBTP, however, chose to ignore the meeting and institute the formal proceeding leading to the issuance of the technical report demand instead.

In addition to the above factual evidence of the utter lack of any need for the technical report demand, the COBTP, at the administrative hearing, tacitly admitted as much with regard to the The Alameda site specifically when it was expressly stated that the reason that the The Alameda property was being addressed at all was that the COBTP was, for some unknown reason, "frustrated" with progress at the San Pablo site and thereupon simply scanned all City records regarding XTRA Oil, came up with the file, and thereupon decided, without any provocation whatsoever, to include the site in the administrative hearing and the technical report demand.

Overall, there does not seem to be any valid reason for the issuance of the technical report demand. While the statute does not expressly require any particular determination; i.e., apparently the Regional Board can demand a technical report in its sole discretion, the statute does say that "[T]he burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." The above analyses of the two sites demonstrate that XTRA is voluntarily addressing the San Pablo site and that there does not appear to be a basis for investigation of the The Alameda site at all. Thus, a need for a formal WC § 13267 technical report is quite obviously lacking and, furthermore, the benefits to be gained from the reports if such are prepared are virtually nil.

A general observation, if I may: to those affected, environmental contamination problems are wrought with anxiety, concern and more than a little fear. In my practice I try to allay those concerns and fears as much as I can so that the situation can be addressed in as calm and orderly a manner as possible. This, of course, becomes well nigh impossible when a situation is prematurely escalated to the level of strident formal "demands" and threats of legal action. It is most disturbing when there seems to be no basis for taking such action. It is incalculably more perturbing in cases such as this where express but erroneous bases are cited as the reason for the escalated action. I raise this point only as a prelude to asking that the Regional Board, even though the magnitude of its work over-load is well-known, take the

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time to carefully investigate a situation before an action as serious as a Water Code § 13267 demand is issued to be sure that there is at least a semblance of just cause for such action.

In any event, the above having been said, XTRA Oil remains, as it always has been, ready and willing to cooperate in investigating the two sites. However, in recent discussions with me, I informed XTRA Oil that, as you undoubtedly already know, to be eligible for the Underground Storage Tank Cleanup Fund they must obtain three bids for any work to be done at the sites. Given the proximity of the holiday season together with the normal problems attendant to coordinating the three bids process; that is, getting bids which compare "apples with apples" so that the lowest bid, which the Fund requires be accepted except in extraordinary circumstances, is in fact technically viable, XTRA Oil cannot meet the deadline in your demand letter, January 15, 1994. More accurately, while a technical report, in fact really a work plan, could be submitted through XTRA's current consultant, XTRA could not commit to this plan until the two other bids have been received and evaluated. This seems to render the exercise of submitting a time-forced interim work plan of little, if any, real value.

In light of the above, XTRA Oil requests that the Regional Board grant an extension in time to prepare the technical reports, no more than 90 days, at which time all of the requirements of the Fund can be met as well as those of the Regional Board.

Another consideration: it might be appropriate, with regard to the San Pablo site, for the Regional Board to accept the work plan already submitted to and in the hands of the COBTP but not acted on by that entity as the technical report for that site and to address it as such even though it is understood that two more bids need to be obtained before XTRA Oil can commit to any one work plan.

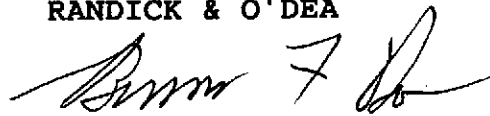
If you have any questions regarding the preceding, please contact me at your convenience to discuss the matter. If there are no questions, it is asked that the Board respond as quickly as possible, due to the impending January 15th deadline, to this request, to recap, that (1) XTRA Oil be afforded an extension up to 90 days to prepare the technical reports for the The Alameda and San Pablo sites or, in the alternative, that (2) the work plan already submitted for San Pablo be accepted as the technical report for that site and that an extension be granted with regard to the The Alameda site.

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Your cooperation in this matter is very much appreciated.

Very truly yours,

RANDICK & O'DEA

A handwritten signature in cursive script, appearing to read "Bernard F. Rose", written in dark ink.

Bernard F. Rose

BFR:cb

cc: Gil Jensen, Esq.  
Alameda County District Attorney's Office

Eva Chu  
Alameda County Department of Health Services

Mr. Lorenzo Perez  
City of Berkeley Toxic Management Program