Mary J. Swanson, Esq. Bar No. 100341
LAW OFFICE OF MARY J. SWANSON
101 Ygnacio Valley Road
Suite 350
Walnut Creek, California 94596
(510) 938-3800

Attorney for Jessen and Agnes Calleri

STATE WATER RESOURCES CONTROL BOARD

In re the Property Known as: Linda Shell 15595 Washington Avenue San Lorenzo, California	PETITIONERS REQUEST FOR PREPARATION OF RECORD

Jessen and Agnes Calleri (the "Petitioners") hereby request that the California Regional Water Quality Control Board (the "Regional Board") and Alameda County Environmental Health Department (the "County") prepare a record to submit to the State Water Resources Control Board for the review of the Regional Board's August 31, 1995 designation of the Petitioners as responsible parties with respect to the soil and ground water contamination at 15595 Washington Avenue, San Lorenzo, California.

Petitioners understand that the record includes all documents in the County's file, including notes of oral evidence presented at the Pre-Enforcement Hearing on February 28, 1995.

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Petitioners request the right to supplement the record to the extent that this is not the case.

LAW OFFICE OF MARY J. SWANSON

Mary J. Swanson
Attorney for Petitioners
Jessen and Agnes Calleri

PROOF OF SERVICE

I, Mary J. Swanson, am employed in Contra Costa County, California; I am over the age of 18 years and not a party to the within action; my business address is: 101 Ygnacio Valley Road, Suite 350, Walnut Creek, California 94596.

On October 2, 1995, I served (1) the Petition for Review of the California Regional Water Quality Control Board's Designation of Jessen and Agnes Calleri as Responsible Parties; (2) Memorandum of Points and Authorities in Support of Petition for Review; (3) Petitioners' Request for Preparation of Record; and (4) Petitioners' Request for Stay of Order Directing Responsible Parties to Submit Technical Reports, on all interested parties by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows (in addition to the addresses listed in the Petition):

S. Andrew Motozaki, Esq. — Mohammadians
Law Offices of Jeffrey P. Widman
84 W. Santa Clara Street
Suite 690
San Jose, CA 95113

Robert C. Borris, Esq. — Bertram Kubo
Law Office of Robert Borris, Inc.
20200 Redwood Road
Castro Valley, CA 94546

James Wesley Kinnear, Esq. — Texaco, Inc.
Cohen, Nelson & Makoff
625 Market Street
Suite 1100
San Francisco, CA 94105

Scott Seery — ACEHD
Alameda County Environmental
Health Dept.
1131 Harbor Bay Parkway
Suite 250
Alameda, CA 94502-6577

I caused such envelopes with postage thereon fully paid to be placed in the United States mail in Benicia, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 2, 1995, in Benicia, California.

Mary J. Swanson

Mary J. Swanson, Esq. Bar No. 100341
LAW OFFICE OF MARY J. SWANSON
101 Ygnacio Valley Road
Suite 350
Walnut Creek, California 94596
(510) 938-3800

Attorney for Jessen and Agnes Calleri

STATE WATER RESOURCES CONTROL BOARD

In re the Property Known as: Linda Shell 15595 Washington Avenue San Lorenzo, California	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW OF THE REGIONAL BOARD'S DESIGNATION OF JESSEN AND AGNES CALLERI AS RESPONSIBLE PARTIES

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Jessen and Agnes Calleri (the **"Calleris"**) respectfully submit the following Memorandum of Points and Authorities in support of their Petition for Review of the California Regional Water Quality Control Board, San Francisco Bay Region's (the **"Regional Board's"**) designation of them as responsible parties.

STATEMENT OF FACTS

The property at 15595 Washington Avenue, San Lorenzo, California (the **"Property"** or **"Site"**) has been operated as a service station off and on from 1965 to the present. During that time, there have been three generations of underground storage tanks.

Gulf Oil installed the first generation of tanks in March of 1965. These tanks were used until September of 1969 when Gulf Oil had them removed and replaced with the second generation of tanks. (See Chronology, in record below).

The Calleris and Stanley and Mildred Long purchased the Property from Gulf Oil on August 9, 1974. The Longs (who are now deceased) conveyed their interest in the Property to the Calleris in January, 1979, and the Calleris were on title until August 8, 1983. During most of that time, the Calleris leased the property to others to operate as a gasoline service station, although there were periods when the station was only being operated as a repair shop and tire distributorship. (See Chronology and Alameda County Dept. of Weights & Measures Certificates of Inspection, in record below). The Calleris never operated the service station themselves.

In late 1982, the Calleris' lender, The Bank of California, instituted foreclosure proceedings against them and the service station was closed.

On June 21, 1983, the property was sold at public auction to Texaco, Inc. and, shortly thereafter, on August 8, 1983, a Trustee's Deed Upon Sale was recorded in Texaco's favor with the Alameda County Recorder's office.

Texaco contends that it had no use for the Property and immediately began marketing it for sale as a service station with the second generation of tanks in place. In the summer of 1986, Texaco retained Groundwater Technology, Inc. to conduct an environmental investigation of the Property. On October 17, 1986, Groundwater Technology issued a Report reflecting low levels of contamination, believed by them to be from "a small localized loss likely [to have] occurred at the pump island". (See Groundwater Technology's 1986 Report, page 10). Texaco failed to file Groundwater Technology's 1986 Report with the SWRCB or Regional Board. Between October 1986 and December 1986, Texaco contends that it arranged for the removal of the second generation of tanks, although there is no documentation in the record confirming that the tanks were removed.

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On December 31, 1996, Texaco sold the Property to Bertram Kubo ("Kubo"). In February of 1987, Kubo installed the third generation of tanks on the Property. Kubo thereafter operated the site as a service station until June of 1990, when he sold the Property to the current owners,

Mehdi and Fereshteh Mohammadian.

In late 1992, the Mohammadians attempted to obtain refinancing for the Property. In the process, their prospective lender commissioned a limited environmental investigation of the Property from Groundwater Technology using the groundwater monitoring wells it had installed in 1986. Groundwater Technology's 1992 Report indicated increased levels of contamination. Where the 1986 Report had detected no TPH as gasoline, the 1992 Report found between 720 and 69 ppb. The 1992 Report was filed with the Alameda County Department of Environmental Health.

In 1994, Blaine Tech Services, Inc. issued a third report on the Property. In that report, TPH as gasoline had increased to 1,300 ppb, with benzene and ethylbenzene increasing to 110 and 19 ppb, respectively at MW-1.

On March 21, 1995, the Alameda County Health Care Services Agency (the **"County"**) issued its first Notice of Violation to the Mohammadians listing six pages of deficiencies and required corrective actions in his operation of the third generation of tanks. On May 15, 1995, the County issued its Second Notice of Violation to Mohammadian reiterating deficiencies in his operation of the third generation of tanks and required further corrective action.

The Calleris first became aware of the alleged contamination at the site over seven years after Groundwater Technology issued its 1986 report, and adamantly deny any responsibility for that contamination.

ARGUMENT

I. THE CORRECTIVE ACTION PROVISIONS OF THE BARRY KEENE UNDERGROUND STORAGE TANK CLEANUP TRUST FUND ACT OF 1989 DO NOT APPLY RETROACTIVELY TO THE CALLERIS

Initially, the Calleris contend that since the corrective action provisions of Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 were enacted over six years after the Calleris lost their interest in the subject property, and neither the corrective action provisions, nor the Act itself, expressly or implicitly provide for retroactive application, the corrective action provisions do not apply to them.

A. History of Statutory Provisions:

The Underground Storage of Hazardous Substances Act was enacted on September 23, 1983 -- a little over a month and a half after the Calleris' lost their interest in the subject property. (See Health & Safety Code §§25280-25299.7). Over six years later, on October 2, 1989, the Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 (the **"UST Cleanup Trust Fund Act"** or **"Act"**) was enacted, authorizing the establishment and enforcement of corrective action requirements with respect to underground storage tanks then in the state containing petroleum. (See Health & Safety Code §§25299.10-25299.81). It took another two years -- until December 2, 1991 -- before the SWRCB adopted regulations implementing the corrective action provisions. (See 23 C.C.R. §§2720 et seq.)

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B. **Presumption Against Retroactivity:**

A statute is retroactive if it affects rights, obligations, acts, transactions and conditions performed or existing prior to adoption of the statute and substantially changes the legal effect of those past events. (See Kizer v. Hanna (1989) 48 Cal.3d 1, 7 [255 Cal.Rptr. 412]).

As a general rule, statutes are not to be given retroactive effect unless the intent of the Legislature cannot be otherwise satisfied. (See Balen v. Peralta Junior College District (1974) 11 Cal.3d 821, 828 [114 Cal.Rptr. 589]). "The Legislature, of course, is well acquainted with this fundamental rule, and when it intends a statute to operate retroactively it uses clear language to accomplish that purpose." (DiGenova v. State Board of Equalization (1962) 57 Cal.2d 167, 176 [18 Cal.Rptr. 369]).

A statute's silence as to retroactivity is an authoritative indication the Legislature intended a prospective application. (See Nelson v. A.H. Robins Co. (1983) 149 Cal.App.3d 862, 870 [197 Cal.Rptr. 179]). Consequently, if a statute does not expressly provide that it is to be given retroactive effect, there is a strong presumption that the statute is to operate prospectively. This presumption is only overcome by a clear indication from the language used in the statute, or, in some cases, from the legislative history of the statute, that the Legislature intended for the statute to apply retroactively. (See In re Marriage of Reuling (1994) 24 Cal.App.4th 1428, 1439 [28

Cal.Rptr.2d 726]). This long-established presumption applies particularly to laws creating new obligations, imposing new duties or exacting new penalties because of past transactions. (See Pignaz v. Burnett (1897) 119 Cal. 157, 160 [51 P. 48]; Wienholz v. Kaiser Foundation Hospitals (1989) 217 Cal.App.3d 1501, 1505 [267 Cal.Rptr. 1]).

C. Application of Statutory Construction to UST Cleanup Trust Fund Act:

Neither the UST Cleanup Trust Fund Act, nor the corrective action provisions set forth therein, contain any specific statement regarding retroactivity. (See Health & Safety Code §§25299.10 et seq.) While this fact alone raises a strong presumption that the Act was intended to apply prospectively, rather than retrospectively, this construction is also supported by both the language and legislative history of the Act. (Id.; see also Stats. 1989, c. 1442).

The language used in the Act clearly indicates that the Legislature intended for the provisions to apply prospectively. After finding that "approximately 90 percent of the underground storage tanks in the state contain petroleum", and that "a significant number of the underground storage tanks containing petroleum in the state may be leaking", and that "[i]n recent years, owners or operators of underground storage tanks have been unable to obtain affordable environmental impairment liability insurance coverage to pay for corrective action . . .", the Legislature declared, among other things, that:

"(6) It is in the best interest of the health and safety of the people of the state to establish a fund to pay for corrective action where coverage is not available.

. . . . . .

"(10) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government . . . to authorize the state to implement the provisions of [the federal act] . . . [and]

"(11) It is in the public interest for the state to provide financial assistance . . ., to ensure timely compliance with the law governing underground storage tanks, and to ensure the adequate protection of groundwater."

(Health & Safety Code §25299.10). The operative language used by the Legislature is in the future tense, not the past tense. Furthermore, it is clearly and unambiguously directed to addressing the problems created by the underground storage tanks currently "in the state" which "may be leaking", and not to tanks that have been long since removed and are no longer either "in the state" or in existence. Significantly, this

prospective intent is also articulated in the implementing regulations adopted by the SWRCB. Section 2620 of the California Code of Regulations provides, for example, that: "The regulations in this chapter are intended to protect waters of the state from discharges of hazardous substances from underground storage tanks. . . ." (See C.C.R. §2620 (emphasis added)).[1]

While there do not appear to be any civil or SWRCB[2] cases in California which specifically address the retroactivity of the Act,[3] similar underground storage acts in other states, under less compelling circumstances, have been held not to apply retroactively. In Wilson v. Triangle

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[1] The language of the Code of Regulations is also consistent with a legislative intent that the Act and implementing regulations apply only to existing and future tanks, not tanks which have been physically removed before the enactment of the Act. This can be seen, for example, in the way in which the SWRCB has chosen to define the term "decommissioned tank". One would logically assume that if a tank is no longer in existence, and cannot therefore be included under the definition of an "existing underground storage tank", that it should fall within the definition of a "decommissioned tank". But Section 2611 limits the definition of a "decommissioned tank" to "an underground storage tank which cannot be used for one or more of the following reasons: 1) the tank has been filled with an inert solid, 2) the fill pipes have been sealed; or 3) the piping has been removed."

[2] Texaco has cited Petition of Alvin Bacharach and Barbara Borsuk, SWRCB Order No. WQ 91-07, 1991 Cal. Env. Lexis 17 (June 20, 1991) to show that the SWRCB has applied the Act retroactively, but that case does not stand as authority for doing so since the issue of retroactivity was never raised.

[3] But see Selma Pressure Treating Co. v. Osmose Wood Preserving Co. (1990) 221 Cal.App.3d 1601, 1607 [271 Cal.Rptr. 596] (in which reference is made to the lower court's finding that provisions of the Water Code and Health and Safety Code which provided the basis for the State's claims for civil penalties could not be applied retroactively to acts or conduct preceding their enactment).

Oil Company (1989) 566 A.2d 1016, for example, the Delaware Underground Storage Act was held not to apply retroactively to allow recovery of cleanup costs and civil penalties against company which had divested itself of all interest in the real property and underground storage tanks in question prior to enactment of statute. Unlike this case, however, in the Wilson case the underground storage tanks were still in the ground.

D. The UST Cleanup Trust Fund Act Has Substantially Changed the Legal Effect of Past Events for the Calleris:

While it has been argued below that the adoption of the UST Cleanup Trust Fund Act has not substantially changed the legal effect of past events for the Calleris, since there were other laws in effect during their ownership of the property -- such as Water Code §13304 -- which would have given the Regional Board authority to name them as responsible parties and to require them to prepare technical reports, this is untrue. Based on the evidence before the Regional Board, the Calleris could not have been found liable under either Water Code §13304 or the general nuisance statutes which pre-dated the UST Cleanup Trust Fund Act.

(i) Burden of Proof:

Whether under the Act or under prior law, in order for the Regional Board to hold the Calleris' accountable for the contamination which currently exists at the site, they would have to be able to find that there was substantial evidence to support a finding that the Calleris were

responsible for the contamination. (See Petition of Exxon Company, U.S.A., SWRCB Order No. 85-7, 1985 Cal. Env. Lexis 10, 16-17 (August 22, 1985)). According to the SWRCB, this means "credible and reasonable evidence which indicates the named party has responsibility." **(ii) Insufficient Evidence to Rely on Water Code §13304:**

While Water Code §13304 was adopted prior to the date the Calleris lost the Property in foreclosure, as discussed below, insufficient evidence exists on which to find the Calleris liable under Section 13304. That Section provides, in pertinent part, that:

> "(a) Any person who . . . has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board clean up such waste or abate the effects thereof . . .."

Water Code §13304 (emphasis added). There is absolutely no evidence that the Petitioners "caused" or "permitted" the contamination.

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a) **No evidence Calleris "Caused" Contamination:**

While there is evidence that small levels of contamination were present at the site three years after the Calleris' lost the Property to foreclosure, there is no evidence that it arose during the Calleris ownership of the property. The contamination could have arisen either prior to or after their ownership of the Property.

While the Regional Board has apparently accepted Texaco's argument that it did not operate the station and was therefore not directly responsible for causing the contamination, little is known about the three year period during which Texaco owned the property. Aerial photographs with Pacific Aerial Surveys indicate that there were cars parked at the pump station during Texaco's ownership of the property. An unauthorized leak clearly could have occurred during that time.

Even if one assumes, for the sake of argument, that the contamination occurred prior to Texaco acquiring title to the property in 1983, the contamination could easily have pre-dated the Calleris ownership of the Property. Neither the County nor the Regional Board had to address this issue under 23 C.C.R. §2720, but it is an issue that would have to be addressed under Water Code §13304 and the other laws in existence during the Calleris' ownership of the Property. The Calleris submit that if that issue had been addressed, the County and Regional Board would have to have concluded that they did not have enough evidence -- and certainly not

"substantial evidence" -- to establish that the unauthorized release occurred during the Calleris' ownership of the property. While on the one hand, Groundwater Technology's 1986 report states that "[t]he contamination present at the site appears to be an older leak of gasoline from around the pump island," the 1986 Report does not speculate as to the age of the leak, and no other evidence of its age was presented below. **What is in the record is evidence that the first generation of tanks and pumps on the property, which were installed by Gulf Oil in March of 1965, were removed less than four and a half (4 1/2) years later on September 10, 1969.** (See Chronology and documents cited therein, in record below). It appears that neither the County nor the Regional Board have ever determined why the first generation of tanks and pumps -- which should have had a useful life of at least 20 years -- were removed and replaced in less than five years. A reasonable presumption is that Gulf Oil had a problem with those tanks and pumps. This presumption is bolstered by the fact that Gulf Oil continued to operate the site as a service station for an additional five years after installing the second generation of tanks and pumps before selling the property to the Calleris and the Longs. Significantly, the record establishes that there were no reports of unauthorized releases or code violations with the County or Fire Department during the Calleris' ownership of the property; and that the Calleris never observed or became aware of any unauthorized release or contamination during their ownership of the

Property. In short, no evidence exists that the Calleris "caused" the contamination at the site.

b) **No evidence Calleris "Permitted" Contamination:**

Nor is there any evidence that they "permitted" the contamination. For one to "permit" a discharge or deposit of contamination, one must have some knowledge of it.

While the State Board has previously found that actual knowledge is not necessary for one to "permit" a discharge or deposit (see Petition of John Stuart, SWRCB Order No. 86-15, 1986 Cal. Env. Lexis 17 (September 18, 1986)), Petitioners contend that, nonetheless, sufficient facts must still exist to give the person being charged with "permitting" a discharge or deposit "reason to know" of the discharge or deposit of waste. Otherwise, the Legislature would not have used the word "permitted" -- with all that it implies. The Legislature could easily rewritten Section 13304 to remove any element of knowledge by providing that:

> "Any person who . . . has an interest in land on which any waste has been or is being discharged or deposited where it is, or will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board clean up such waste or abate the effects thereof . . .."

In the late 1970s and early 1980s, the problem with leaking underground tanks was not yet common knowledge, and absent some other evidence putting the Petitioners on notice of the fact that the property was contaminated, substantial evidence does not exist that they "permitted" discharge or deposit of waste during their ownership of the subject property.

(iii) Insufficient Evidence to Rely on Nuisance:

Just as there is insufficient evidence for the Regional Board to establish liability against the Petitioners under Water Code §13304, there is also insufficient evidence to establish a nuisance claim against the Petitioners.

Since there is no evidence that Petitioners caused the contamination during their ownership of the property, their only exposure might be as a subsequent owner under Civil Code §3483. That Section provides that:

> "Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by the former owner, is liable therefor in the same manner as the one who first created it."

Significantly, it has been held that it is a prerequisite to the imposition of liability against a person who merely passively continues a nuisance created by another that he should have notice of the fact that he is maintaining

a nuisance and be requested to remove or abate it, or at least that he should have knowledge of the existence of the nuisance. (See Reinhard v. Lawrence Warehouse Co. (1940) 41 Cal.App.2d 741, 746 [107 P.2d 501]; Shurpin v. Elmhirst (1983) 148 Cal.App.3d 105 [195 Cal.Rptr. 743]). As discussed above, there is no evidence that Petitioners had such knowledge in this case.

Accordingly, it is clear that the adoption of the UST Cleanup Trust Fund Act did substantially changed the legal effect of past events for the Calleris.

E. Conclusion:

Given that the Legislature did not expressly provide that the Act was to be given retroactive effect, and there is nothing in either the language of the statute, or its legislative history, which supports a finding that the Legislature clearly and unambiguously intended for the Act to be given retroactively effect, the Calleris respectively submit that neither the Act, nor the corrective action provisions contained therein, should be applied retroactively to them. Not only was the Act enacted over six years after the Calleris lost the property to foreclosure, but it was enacted over three years after the subject tanks were purportedly removed from the property.

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II. THE REGIONAL BOARD DOES NOT HAVE AUTHORITY TO ISSUE A CORRECTIVE ACTION ORDER TO THE CALLERIS BECAUSE THEY ARE NOT "RESPONSIBLE PARTIES", AS THAT TERM IS DEFINED IN SECTION 2720 OF THE CALIFORNIA CODE OF REGULATIONS

The Calleris' second contention is that the Regional Board does not have any authority to issue a corrective action order against them, because they are not "responsible parties", as that term is defined in Section 2720 of the California Code of Regulations.

A. Statutory Authority for Corrective Action Orders:

Health & Safety Code Section 25299.37(a) requires "each owner, operator, or other responsible party" to take corrective action in response to an unauthorized release. If any of the designated parties fails to take corrective action, subsection (c) of Section 25299.37 authorizes the local regulatory agency to issue a corrective action order to the "owner, operator, other responsible party requiring compliance with this section . . .."

While the Legislature has failed to give any guidance in the Act as to what it meant by "other responsible party", the regulations adopted by the SWRCB to implement the corrective action provisions set forth a very specific definition of who the Board considers as "responsible parties." (See C.C.R. §2720).[4]

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[4] The Legislature's failure to clarify what it meant by "other responsible parties" opens the statute up to constitutional challenges, both on vagueness and on improper delegation of powers grounds.

B. **Definition of "Responsible Party":**

Section 2720 of the California Code of Regulations provides that "responsible party" means one or more of the following:

1. Any person who owns or operates an underground storage tank used for the 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.

(C.C.R. §2720).

C. **Application of Definition to Relevant Facts.**

In this case, since the Calleris do not currently own or operate the underground storage tanks or property in question, and it is unknown when the alleged unauthorized release of hazardous substance occurred, they cannot be named as "responsible parties" under Paragraphs 1 or 3 of Section 2720, and should not have been named under Paragraph 4. The

real question is whether they can be named under Paragraph 2. The Regional Board contends they can, while the Calleris adamantly disagree.

In analyzing who is correct, it is important to understand that the SWRCB has established a two-tier test for local agencies in evaluating whether a person falls within the scope of Paragraph 2 of Section 2720.

The SWRCB has taken the position that if the owner or operator of the tank, which is suspected of being responsible for the unauthorized release, discontinued their use of the subject tank before November 8, 1984, then the regulatory agency does not need to have substantial evidence to show that the unauthorized release occurred before the discontinuance of use.

On the other hand, if the owner or operator of the tank, which is suspected of being responsible for the unauthorized release, discontinued their use of the subject tank on or after November 8, 1984, then the regulatory agency does need to have substantial evidence to show that the unauthorized release occurred during or prior to the time that the person was an owner, operator or otherwise had control of the tank or property. (See Letter from Mike McDonald of the SWRCB to Local Oversight Program (LOP) Agencies, dated January 25, 1994, pp. 2-3).

Without "substantial evidence" or a "reasonable basis" for concluding that an unauthorized release occurred during or prior to the time that the person was an owner,

operator or otherwise had control of the tank or property, a person cannot be named as a responsible party by the regulatory agency. The rationale is that it would be fundamentally unfair to name someone simply because they are in the chain of title to the property without sufficient evidence that the person's action contributed to the unauthorized release or that they had any control over the property or tank at the time of or following the release.

1. Texaco was the Last Party to Own or Operate the "Second Generation" of Tanks Immediately Before the Discontinuation of Their Use:

The Calleris' content that since Texaco marketed the property as a service station with the second generation of tanks in place for over three years before deciding to remove the tanks, it was Texaco who was the last party to "own or operate the tanks immediately before the discontinuation of their use".

Significantly, both the UST Cleanup Trust Fund Act, and the corresponding regulations adopted by the SWRCB, distinguish between the temporary and permanent closure of tanks based on the owner's or operator's "intent" with respect to the future operation or use of the tanks.[5] The legislation also make clear that a tank being "in use" is not the same as it "containing or dispensing product". Health & Safety Code §25298, for example, provides that an underground storage tank which has been "temporarily taking out of service, but which

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[5] See also Alameda County Uniform Fire Code, Section 15.205.

the operator intends to return to use, shall continue to be subject to all the permit, inspection, and monitoring requirements" of that chapter. (See Health & Safety Code §25298(b) (emphasis added)). While Sections 2670-2672 of the California Code of Regulations, distinguishes between the "temporary closure" of underground storage tanks, "in which the storage of hazardous substances has ceased but the underground storage tank will again be used for the storage of hazardous substances within the next 12 consecutive months" and the "permanent closure" of underground storage tanks, "in which the storage of hazardous substances has ceased and the tanks will not be used, or are not intended for use, for the storage of hazardous substances within the next 12 consecutive months." (Id. (emphasis added)).

Since the Calleris were forced from the property by a foreclosure action, and never consciously intended to discontinue their use of the tanks, they do not fall within the second definition of "responsible party" set forth in Code of Regulations §2720. Texaco, on the other hand, does fall within that definition. While Texaco has mysteriously misplaced virtually all of its records concerning its ownership and use of the subject property between August 8, 1983 and December 31, 1986, its counsel readily admitted at the Pre-Enforcement Review Panel Hearing on February 28, 1995, and in its Memorandum re Designation of Responsible Parties, that during Texaco's ownership of the property, Texaco actively marketed the property as a service station with the

second generation of tanks in place. (See Texaco Memorandum re Designation of Responsible Parties). While Texaco now argues that it had "no use for the Property" after it acquired it, and placed the Property on its surplus property list, even assuming that this is true, it does not change the fact that Texaco had an ongoing use for the tanks in marketing the property as a service station. In short, even if Texaco did not physically use the tanks, they did manifest an intent that the tanks be used in the future.

The Calleris' contention that Texaco was the last party to own or operate the tanks immediately before the "discontinuation of use" is also supported by the interpretation of that phrase adopted by the SWRCB. (See Letter from Mike McDonald of the SWRCB to Local Oversight Program (LOP) Agencies, dated January 25, 1994). The SWRCB has defined "discontinuance of use" to mean that:

> "(1) product was neither placed in the tank nor removed from the tank (except for product removal at the time of tank closure) and (2) circumstances indicated that there was no further intent to use the tank.

(Id. at page 3 (emphasis added)). According to the SWRCB, among the circumstances which indicate no further intent to use the tank are the following factors:

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(a) The tank is filled with an inert solid or otherwise rendered unusable;

(b) The owner abandoned the tank and no one else has used it;

(c) The intakes and vents are paved over;

(d) Access piping is disconnected or removed; and

(e) The tank was sold to a person who had no use for the tank (such as a residential real estate developer).

(Id., citing G.J. Leasing v. Union Electric 825 F. Supp. 1363 (S.D.Ill. 1993)).

According to the Calleris, they never rendered the tanks unusable; never paved over the intakes and vents; and never disconnected or removed the access piping. Nor did they ever intentionally abandon the tanks -- their interest in the property was foreclosed upon. While the tanks were sold, along with the underlying property, in the foreclosure action, it can hardly be argued that the tanks were sold to a company that did not have any use for them, since Texaco was in the business of operating service stations and marketed the Property as a service station. In summary, it was Texaco, not the Calleris, who discontinued the use of the second set of tanks.

While Texaco has argued that it is unfair to hold it responsible for the alleged unauthorized release of product from the second generation of tanks since it did not actually operated the station during its three and a half year

ownership of the property, and it did not consider the tanks to add any value to the property, the fact of the matter is that a some level Texaco made a conscious decision to maintain the tanks in operational condition while it marketed the property, when it could have either decommissioned the tanks or removed them shortly after it purchased the property, thus avoiding the position it now finds itself in. Had Texaco done this, not only would it have been able, but all of the other parties would have been able, to determine whether any contamination existed on the property prior to Texaco's acquiring title to the property in August of 1983. Indeed, much of what Texaco has done suggests that it has not acted with clean hands in this matter. Had Texaco's turned over the 1986 Groundwater Technology report to the County in a timely manner, and maintained its records concerning (i) its ownership (and possible operation) of the property and (ii) its alleged removal of the tanks, the Calleris and all the other parties would be in a much better position then they now are to respond to the County and Regional Board's allegations against them.[6] By not turning over the 1986 Groundwater

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1986

[6] For example, Groundwater Technology's October 17, 1983 report concludes that "the lack of any detectable contamination in the downgradient wells suggests that a small localized loss likely occurred at the pump island". Had this report been made available to the Calleris shortly after it was prepared in 1986, the Calleris may have been able to determine the cause and source of the alleged contamination. Indeed, they might have even been able to obtain the records, which have now long since been destroyed, to prove that Texaco was operating the service station and/or that the alleged contamination was a resulted Texaco or other people using the service station during Texaco's ownership as a dumping ground for oil and fuel during the three and a half years that Texaco

Technology report and maintaining its records, Texaco's position has been improved. In balancing equities, the scale weighs heavily in favor of the Calleris.

2. The Regional Board Does Not Have a Reasonable Basis for Concluding that an Unauthorized Release of Hazardous Waste Occurred During or Prior to the Calleris' Ownership of the Tanks or Property:

Having concluded that it was Texaco, and not the Calleris, who discontinued the use of the second set of tanks; it is Texaco, not the Calleris, who should have been named as responsible parties under Paragraph 2 of 23 C.C.R. §2720. The only remaining question as far as the Calleris are concerned is whether the Regional Board had a reasonable basis to conclude that an unauthorized release occurred during or prior to the Calleris' ownership of the subject property. They think not.

The SWRCB has defined a "reasonable basis" to include:

> ". . . such factors as hydrogeologic information, physical evidence, unauthorized release reports and complaints, agency records of discharges and, in limited cases, circumstantial evidence. In all cases, there must be

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owned the property. As has been previously pointed out to Mr. Seery, the aerial photographs of the property during Texaco's ownership reflect numerous cars and trucks on the property, at least some of which were parked at the pump station.

> evidence to support the action taken. A reasonable basis does not include the mere fact that a person owned, operated, or controlled the tank or property at sometime in the past without evidence that the release occurred during or prior to that person's ownership, operation, or control of the property or tank."

(See Letter from Mike McDonald of the SWRCB to Local Oversight Program (LOP) Agencies, dated January 25, 1994, at page 2).

In this case, the only basis for the Regional Board concluding that an unauthorized release occurred during or prior to the Calleris' ownership of the subject property is the report prepared by Groundwater Technology, Inc. on October 17, 1986 -- over three years after the Calleris' lost the property in foreclosure. The report was prepared at Texaco's request for marketing purposes and reflected low levels of contamination on the property.

Significantly, in carefully reviewing the 1986 Groundwater Technology report, it is clear that the methods used by Groundwater Technology for drawing and testing soil and groundwater samples were so flawed that the report has little, if any, evidentiary value in establishing either the origin or extent of the alleged contamination. Out of six soil samples and six groundwater samples, only two of the groundwater samples indicated that there may be low levels of

hydrocarbon contamination on the property. Those samples, from SB-1 and MW-1, reflected the following:

SB-1	0.22 ppm benzene
	0.39 ppm toluene
	0.86 ppm xylene
MW-1	0.82 ppm xylene

(See 1986 Report, Appendix IV). However, since the groundwater sample from SB-1 was recovered from the boring immediately following drilling and was not collected according to approved EPA or Groundwater Technology guidelines, it is totally suspect. (Id. at page 6). Even Groundwater Technology acknowledges this fact. On pages 8 and 10 of its report, Groundwater Technology states that the sample collected from SB-1 was "drawn prior to developing a good hydraulic communication with the aquifer" and ". . . contamination could have been introduced during drilling." The groundwater sample from MW-1 is equally suspect because of Groundwater Technology's failure to properly sequence the gathering of samples and its laboratory's delay in testing samples. (There are other aspects of Groundwater Technology's 1986 report that appear suspect, but since the parties involved in preparing the report and the test samples are no longer available to challenge, the Calleris can neither confirm nor deny that the rest of the report is flawed).

Casting further doubt on Groundwater Technology's 1986 report, are the results of the more recent groundwater testing done at the property. Where the 1986 report reflected

that xylene concentrations were slightly higher than the concentrations of the more volatile benzene and toluene;[7] the more recent reports indicate to the contrary. (See Groundwater Technology Report, dated December 4, 1992 (Table 2) and Blaine Tech Services, Inc. Report, dated March 24, 1994 (Table 2)). Since the more volatile substances are allegedly showing up in greater amounts, this suggests that the current actionable levels of contamination are from the third, not second, generation of tanks. This theory is bolstered by the recent revelation that the existing underground storage tanks are not being operated in compliance with the owners five year permit and are in violation of Title 23 of the California Code of Regulations, among other laws and regulations. (See Letter from Don Atkinson-Adams to Mehdi Mohammadian and Dan Kirk, dated Mary 21, 1995).

The bottom line is that absolutely no credible evidence exists that the contamination which currently exists on the property arose prior to or during the Calleris ownership of the property. Indeed, all of the agency records which are presently available for review from the Eden Consolidated Fire District and the Air Quality Control Board,

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[7] While in 1986, Groundwater Technology speculated that the higher levels of xylene, than the more volatile benzene and toluene, suggested that the contamination in 1986 was probably due to an older leak; it never defined what it meant by an "older" leak. Nor did it hazard to guess when the leak likely occurred -- during Texaco's three year ownership of the property or before. For the regulatory agencies to attempt to interpret what Groundwater Technology meant by "older leak", nine years after the fact, when Groundwater Technology's opinion as to the age of the contamination was speculative to begin with, would be fundamentally unfair to the Calleris.

reflect that during the Calleris' ownership of the property, the service station was properly permitted and in complete compliance with all of the then-existing governmental codes and regulations. The Fire District's records, for example, show that during the random inspections by Captain Scallin and others, no code violations were noted. Nor are there any records of unauthorized release reports and complaints during the 1974-1983 period that the Calleris owned the property. While the Air Quality Control Board records available by telephone only go back to 1982, they reflect that the station operator held a valid permit through the period the station was closed.

D. Conclusion.

Based on the foregoing, the Calleris respectfully submit that the Regional Board does not have substantial evidence that they fall within any of the definitions of "responsible party" set forth in Section 2720, and, consequently, the Regional Board does not have any authority to issue a corrective action order against them.

III. ANY ACTION BY THE REGIONAL BOARD AGAINST THE CALLERIS FOR CORRECTIVE ACTION HAS BEEN DISCHARGED IN BANKRUPTCY

The Calleris third contention is that the Regional Board is barred from issuing a corrective action order against them because all of the Regional Board's environmental claims against the Calleris with respect to the subject property have been discharged in bankruptcy.

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A. **Summary of Relevant Facts.**

On May 21, 1984, Mr. Calleri filed a Chapter 7 bankruptcy proceeding with the United States Bankruptcy Court for the Northern District of California, as Case No. 484-1639 HN. Notice of that bankruptcy filing was given to numerous parties, including the Greg R. Gibson of the District Attorney's office in Hayward and Matthew Walker of the Environmental Protection Agency ("EPA").

Archived Bankruptcy Court records reflect that a Meeting of Creditors was held on June 26, 1984, at which Mr. Calleri appeared with his counsel. Also in attendance with Mr. Walker of the EPA and Jack North.

Mr. Calleri was granted a discharge in bankruptcy on September 20, 1984, and on May 3, 1988 the Trustee issued his report that there were no assets to distribute over and above exempted or abandoned assets. On February 4, 1991, the case was reopened in order to vacate liens and, it appears that it was subsequently re-closed on April 3, 1991.

B. **Bankruptcy Code Provisions re Discharge of Claims.**

The principal goal of most debtors who seek relief in bankruptcy is to obtain a discharge of their pre-petition debts under the broad discharge provisions contained in Sections 727, 1141 and 1328 of the Bankruptcy Code.

Under those Sections, only "debts" which are defined as "liabilities on claims" which arise before the date of the debtors' order for relief or confirmation orders are discharged. Bankruptcy Code Section 101(5) defines a "claim"

as a:

1. A right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured or unsecured; or

2. A right to an equitable remedy for breach of performance if that breach gives rise to a right to payment, whether or not the right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

Because the Bankruptcy Code's definition of "claim" broadly encompasses all legal obligations of the debtor, no matter how remote or contingent, it has often been difficult to apply to environmental liabilities and to define the point at which contamination gives rise to a "claim".

The Ninth Circuit has adopted a "fair contemplation" approach. Under the fair contemplation approach, only future response costs which are based on pre-petition conduct and which could be "fairly contemplated" by the parties prior to the close of bankruptcy proceedings are dischargeable claims. (See In re Jensen 995 F.2d 925 (9th Cir. 1993); citing In re National Gypsum 139 B.R. 397 (N.D. Tex. 1992)).

C. Discharge of Environmental Claims against Calleri.

In this case, for the Regional Board to name the Calleris as responsible parties, it will have to show that an

unauthorized release occurred prior to or during the Calleris' ownership of the subject property. (See Part II, above). Since the Calleris lost the property to foreclosure in August of 1983, prior to the May 1984 bankruptcy filing, any of the Regional Board's claims against them would have arisen from pre-petition conduct.

The Calleris argue that since the District Attorney's office and the EPA[8] were given actual notice of Mr. Calleri's Chapter 7 proceeding; knew the locations of the various service stations that the Calleris had owned or provided Texaco fuel to in the past; and knew, or should have known, of the condition of the subject property from the permitting and inspection records maintained by the County, any environmental claims were "fairly contemplated" by the Regional Board before Mr. Calleri's bankruptcy was finally discharged in April of 1991.

D. Conclusion.

Based on the foregoing, the Calleris respectfully submit that the Regional Board is barred from issuing a corrective action order against them since all pre-petition environmental claims against the Calleris with respect to the subject property were discharged in bankruptcy.

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[8] The Calleris contend that, just as the knowledge of a California Water Board employee was imputed to the California Department of Health Services in the Jensen case, the knowledge of the District Attorney's office and EPA are imputed to the Alameda County Health Care Services Agency.

CONCLUSION

For the foregoing reasons, the Calleris respectfully request that the SWRCB remove them from the list of responsible parties, and set aside the Regional Board's order directing them to submit technical reports.

LAW OFFICE OF MARY J. SWANSON

Mary J. Swanson, Esq.
Attorney for Petitioners
Jessen and Agnes Calleri