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July 14, 1995

Scott O. Seery
Senior Hazardous Materials Specialist
Environmental Protection Division
Alameda County Health Care Services Agency
1131 Harbor Bay Parkway, Room 250
Alameda, California 94502-6577

Re: Linda Shell, 15595 Washington Avenue
San Lorenzo, Alameda County

95 JUL 17 AM 9:07

Dear Mr. Seery:

I enclose Texaco Inc.'s Memorandum Re Designation of Responsible Parties, along with Appendices of Authorities and Exhibits.

I look forward to discussing this matter with you and the Pre-Enforcement Review Panel.

Please do not hesitate to contact me with any comments or questions you may have.

Very truly yours,

James Wesley Kinnear

Enclosures

cc: Gil Jensen, Senior Deputy District Attorney w/ encls.
Sandra R. McIntosh w/ encls.
Mary J. Swanson w/encls.
Bertram Kubo w/ memorandum and exhibits
Douglas A. Gravelle w/ encls.

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G.J. LEASING CO., INC., Slay Transportation Co., Inc., S.I. Warehousing Co., Inc., d/b/a Bi-State Warehousing, and S.I. Enterprises, L.P., Plaintiff,

v.

UNION ELECTRIC CO., Defendants.

Civ. No. 91-158-JPG.

United States District Court, S.D. Illinois, Benton Division.

July 9, 1993.

Purchaser of outdated power plant brought environmental suit against former owner, seeking, inter alia, damages for response costs incurred as result of alleged release or threat of release of hazardous substances and seeking determination that former owner was liable for future costs. The District Court, Gilbert, J., held that: (1) fact issues precluded summary judgment on issue of limitations periods under CERCLA and Illinois law; (2) potential of developing illness due to asbestos exposure was not an injury in fact for purposes of negligence claim; and (3) fact issues precluded summary judgment on whether demolition of power plant was ultrahazardous activity.

So ordered.

1. Federal Civil Procedure ⇐2470.4

Court may grant summary judgment only if movant demonstrates that no genuine issue of fact exists for trial and that movant is entitled to judgment as matter of law. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

2. Federal Civil Procedure ⇐2544

If summary judgment movant fails to meet its strict burden of proof, summary judgment cannot be entered even if opposing party fails to respond to the motion. Fed. Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

3. Federal Civil Procedure ⇐2470.4

If parties do not dispute factual basis for summary judgment motion, court's only inquiry is whether judgment should issue as matter of law. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

4. Federal Civil Procedure ⇐2470.2

Summary judgment is inappropriate if parties disagree about inferences to be reasonably drawn from undisputed facts. Fed. Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

5. Federal Civil Procedure ⇐2544

When parties to summary judgment motion dispute facts, parties must produce documentary evidence to support their contentions; parties cannot rest on mere allegations in pleadings or upon conclusory allegations in affidavits. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

6. Federal Civil Procedure ⇐2543

Court must view evidence and any permissible inferences from materials before it in favor of party not moving for summary judgment. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

7. Federal Civil Procedure ⇐2470.1

Party not moving for summary judgment must show that the disputed fact is "material"; that is, it must be outcome-determinative under the applicable law. Fed. Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

8. Limitation of Actions ⇐32(1)

Under Illinois law, actions to recover damage to property, real or personal, must commence within five years after cause of action accrues. Ill.Rev.Stat.1991, ch. 110, ¶ 13-205.

9. Limitation of Actions ⇐95(7)

Under Illinois law, to determine, for statute of limitations purposes, commencement date of cause of action for damages to real or personal property accrues on date upon which plaintiff knew or should have known of allegedly defective condition of property. Ill.Rev.Stat.1991, ch. 110, ¶ 13-205.

10. Limitation of Actions ⇐95(7)

Under both Illinois statute of limitations for property damage actions and under

CERCLA statute of limitations, to successfully argue that cause of action is barred, defendant must prove that plaintiff knew or should have known of injury to property that was caused or contributed to by the hazardous substance or pollutant or contaminant concerned, and that the contamination resulted from another's conduct. Ill.Rev.Stat.1991, ch. 110, ¶ 13–205; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 309(a)(1), as amended, 42 U.S.C.A. § 9658(a)(1).

11. Federal Civil Procedure ⇐2481

Material issues of fact as to when corporation knew or should have known of presence of hazardous substances at power plant precluded summary judgment on issue of when burden shifted to corporation to begin to ask questions for purposes of corporation's environmental claims against others involved in the real estate transactions.

12. Negligence ⇐29

Under Illinois common law, landowner had no duty to subsequent owner of the land as to disposal of hazardous substances on the land, even though such a duty may be based on federal statute or federal regulation; thus, corporation had no cause of action against previous landowner for "negligence liability for sale of real estate" based on environmental contamination of the property.

13. Damages ⇐36

Under Illinois law, in negligence action plaintiff may seek personal and property damages, but not economic loss; "economic loss" includes damages for inadequate value, costs of replacement or repair of defective part, as well as decrease in value.

See publication Words and Phrases for other judicial constructions and definitions.

14. Damages ⇐6, 32

Under Illinois law, subsequent landowner's alleged personal injury described as the potential of developing an illness due to exposure to asbestos was not an injury in fact nor a sufficient foundation for a negligence claim against the previous landowner.

15. Negligence ⇐136(18)

Question of whether activity is abnormally dangerous activity is question of law for the court.

16. Negligence ⇐22

Factors used to guide courts to determine what is ultrahazardous or abnormally dangerous activity include existence of high degree of risk of some harm to the person, land or chattels of others, likelihood that harm that results from it will be great, inability to eliminate risk by exercise of reasonable care, extent to which activity is not matter of common usage, inappropriateness of activity to place where it is carried out, and extent to which its value to community is outweighed by dangerous attributes.

17. Federal Civil Procedure ⇐2481

Material issues of fact concerning, inter alia, likelihood of harm from demolition of power plant, including possibility of need for hazardous substance cleanup, precluded summary judgment on whether demolition of power plan was ultrahazardous activity.

18. Health and Environment ⇐25.5(5.5)

To establish liability under CERCLA, plaintiffs must prove that there are no genuine issues of material fact for each part of four part test—that site in question is a facility, that defendant is responsible person, that there was release or threat of release of hazardous substances, and that such release caused plaintiff to incur response costs. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., as amended, 42 U.S.C.A. § 9601 et seq.

19. Federal Civil Procedure ⇐2481

Material issues of fact concerning whether real estate vendor was "responsible person" within meaning of CERCLA environmental statutes precluded summary judgment on issue of whether vendor was liable to subsequent purchaser for alleged contamination on the property. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 1008(a), as amended, 42 U.S.C.A. § 9607(a).

20. Health and Environment ⇐25.5(10)

For state's underground storage tank (UST) program to have primary enforcement responsibility in that state, program must be found to be no less stringent that the federal UST program and state program must gain federal approval.

21. Health and Environment ⇐25.5(5.5)
States ⇐18.31

Illinois' underground storage tank (UST) program was preempted by federal law where state UST program had not gained federal approval, thus conflicting with federal statute. Solid Waste Disposal Act, §§ 9004, 9006, as amended, 42 U.S.C.A. §§ 6991c, 6991e; S.H.A. 415 ILCS 5/22.12.

22. Administrative Law and Procedure ⇐228.1

Doctrine of primary jurisdiction was designed to promote proper relationships between courts and administrative agencies charged with particular regulatory duties.

23. Administrative Law and Procedure ⇐228.1

Under the "doctrine of primary jurisdiction," courts defer to administrative agency's primary jurisdiction where there is need for agency's expertise and special knowledge in complex areas not within the conventional experience of judges.

See publication Words and Phrases for other judicial constructions and definitions.

24. Administrative Law and Procedure ⇐228.1
Health and Environment ⇐25.15(3.2)

Federal district court would not defer on issue concerning potential for hazardous substances in underground storage tank to the Office of the Illinois State Fire Marshal (OSFM) under doctrine of primary jurisdiction where federal law on underground storage tanks applied, and, thus, OSFM's decision would have been of little guidance in ultimate resolution of matter.

25. Health and Environment ⇐25.5(5.5)

For purposes of determining whether underground storage tank was "in use" within meaning of federal underground storage tank (UST) program, "in use" means that whatever use is being made of tanks must be a conscious use; definition does not encompass unconscious acts. Solid Waste Disposal Act, § 9001(3), as amended, 42 U.S.C.A. § 6991(3).

Joseph G. Nassif, Ronald L. Hack, Coburn & Croft, St. Louis, MO, for plaintiff.

Paul Venker, Edwin Noel, Susan Knowles, Armstrong, Teasdale, Schlafly & Davis, St. Louis, MO, for defendants.

MEMORANDUM AND ORDER

GILBERT, District Judge:

Pending before this Court are three motions for partial summary judgment. The first was filed by the defendant (Document No. 69), the second was filed by the plaintiffs (Document No. 74) and the third was filed by the defendant (Document No. 97).

BACKGROUND

This is a five count civil suit concerning environmental issues at a certain site located at # 2 Monsanto Avenue, Sauget, Illinois ("the Sauget site"). In Count I the plaintiff seeks damages for violations of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq. The relief sought by the plaintiffs include damages amounting to the plaintiffs' response costs incurred as a result of the release or threatened release of hazardous substances at the site, plus interest, as well as attorney's fees and costs; and a declaratory judgment in the plaintiffs favor and against Union Electric ("U.E.") holding that U.E. is liable for all response costs to be incurred by the plaintiffs in the future. Count II is a common law negligence claim premised on U.E.'s duty to the general public and to future owners of the Sauget site to exercise reasonable care in disposing of the hazardous substances on the Sauget site and/or to disclose the unreasonable risk created by the disposal to subsequent vendees. Count III is a willful and wanton conduct claim premised on the same conduct as Count II. Count IV is an ultrahazardous

activity claim which alleges that U.E.'s disposal of hazardous substances at the Sauget site was an abnormally dangerous and ultra-hazardous activity. And finally, Count V is brought pursuant to the Resource, Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6903, et seq. This Count requests the Court to enjoin U.E. from further violations of RCRA; enter judgment in the plaintiffs favor and order U.S. to notify the proper Illinois state agency of the existence of the underground storage tanks at the Sauget site and to properly close the tanks; and to order U.E. to pay the plaintiffs' costs of this litigation. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, § 113 of CERCLA, 42 U.S.C. § 9613(b), 28 U.S.C. § 1367(a), and 42 U.S.C. § 6972(a)(1)(A).

FACTS

Union Electric ("U.E.") generated electricity at its Cahokia Power Plant ("the Site") for over fifty years at Sauget, Illinois. The Sauget site was decommissioned in 1976 due to economic factors. (U.E. Ex. 1, Statement of Uncontroverted Facts, ¶¶ 4, 5; U.E. Ex. 5, Phased Unmanning of Cahokia Power Plant Report; U.E. Ex. 6, Baker Depo. pg. 40; U.E. Ex. 7, Arras Depo. pg. 86–89). In 1978, U.E. issued bid invitations for the purchase of the Sauget site (U.E. Ex. 9, Union Electric Bid Invitation for Cahokia Power Plant Facility, pg. 1) and included a bid specification memorandum that stated all proposed work under any arrangement where U.E. was to retain ownership was to comply with OSHA and EPA rules and regulations (U.E. Ex. 10, Bid Specifications for Disposition of Cahokia Power Plant at C–3). Also, equipment that contained any material that was declared hazardous, i.e., PCBs, asbestos, etc. was to be disposed of by legally accepted means (U.E. Ex. 10, Bid Specifications for Disposition of Cahokia Power Plant at C–1). The bid specifications went on to clarify that all "improvements and equipment" were to be purchased "as is—where is"; that U.E. "does not warrant that the property is of merchantable quality nor that it can be used for any particular purpose;" that the purchaser "accepts the property in place and its present condition, and recognizing the hazards involved"; and that "no consideration will be granted for any misunderstanding of the site conditions, material or equipment, construction and features of the structures" (U.E. Ex. 10, Bid Specifications for Disposition of Cahokia Power Plant at pg. 1, D–1, D–2).

Nineteen prospective bidders responded to U.E.'s solicitation and were allowed to inspect the Sauget Site. Out of twelve proposals to purchase the property and the nonexcluded equipment in its entirety, the ultimate purchaser with a bid of nearly $1,600,000.00 was, G & S Motor Equipment Company ("G & S"). Prior to bidding on the project G & S and its joint venturer Sarnelli Brothers ("Sarnelli") toured the Sauget site as well as did Eugene Slay, representing G.J. Leasing. In connection with the Slay's proposal, Slay had retained the services of William Uhrig of Remelt, Inc. of Englewood, Colorado, an experienced salvage contractor (U.E. Ex. 15, Eugene Slay Depo. 3/30/92, pg. 31, 32 & 58; U.E. Ex. 2, Eugene Slay Depo. 3/16/92, pg. 63). During Slay's personal tour of the facility he described its condition as being in excellent condition—a "nine" on a scale of one to ten (U.E. Ex. 15, Eugene Slay Depo. 3/30/92 pg. 25–29, 60, 62, 80–82).

Prior to the closing transaction with U.E., and after the G & S was awarded the winning bid, G & S received several proposals concerning the property including an offer from Eugene Slay ("Slay") who had unsuccessfully submitted a bid to U.E. (U.E. Ex. 14, Sarnelli Depo. pg. 11).

On December 21, 1978, U.E. entered into an executory contract with G & S for the sale of the Sauget Site pending Illinois Commerce Commission ("ICC") approval (U.E. Ex. 17, G & S—Union Electric Real Estate Sale Contract, pg. 11, ¶ 15). On May 29, 1979, after receiving ICC approval, the U.E. and G & S sale transaction was finalized (U.E. Ex. 17, G & S—Union Electric Real Estate Sale Contract; U.E. Ex. 18, Union Electric Quit Claim Deed to G & S Motor Equipment Company Bill of Sale; and U.E. Ex. 20, Assignment and Assumption).

On March 29, 1979, prior to the consummation of the U.E. and G & S transaction, Slay entered into a Letter of Intent with G & S and Sarnelli for the purchase of the Site

(U.E. Ex. 1, Statement of Uncontroverted Facts, ¶ 6; U.E. Ex. 21, Letter of Intent). It was later formalized into a real estate contract dated April 23, 1979, (U.E. Ex. 22, Slay Warehousing Company and G & S Motor Equipment Company Real Estate Contract) that was contingent upon the U.E./G & S sale transaction.

Immediately following closing, G & S sold the property and equipment to Slay by quitclaim deed and the personal property and fixtures were sold "as is", expressly excluding warranties of "merchantable quality" or for "particular purpose" (U.E. Ex. 24, Bill of Sale Between G & S Motor Equipment Company and Eugene P. Slay and Joan Slay, pg. 2–3).

Following the conveyance, Sarnelli entered into a lease agreement with Slay to maintain salvage operations on the Sauget Site. Pursuant to that lease agreement, Sarnelli was to remove the smokestacks and level the floors in the power house building, remove all debris and all of its materials and equipment (U.E. Ex. 25, Lease and Easement Agreement, ¶ 4). If Sarnelli failed to remove any covered property, Slay reserved the right to remove the property at Sarnelli's expense (U.E. Ex. 25, Lease and Easement Agreement, ¶ 1(b)).

Prior to starting salvaging operations, Sarnelli informed Slay's Chief Operating Officer and in-house lawyer, Ted Tahan, that he would be removing asbestos at the Sauget site and thereafter advised EPA and his bonding company (U.E. Ex. 14, Sarnelli Depo. pg. 24–25). Thereafter, on July 2, 1979, Sarnelli advised EPA that he was removing asbestos from the site and simultaneously informed his bonding company and Slay (U.E. Ex. 14, Sarnelli Depo. pg. 24; U.E. Ex. 27, Letter from Sarnelli Brothers, Inc. to EPA). Mr. Slay admitted receiving the letter and stated that he probably would have sent it to Ted Tahan (U.E. Ex. 15, Eugene Slay Depo. 3/30/92, pg. 88–89).

In 1985, nearly eight years after they purchased the property, the Slay's began rehabilitating the building to convert it into a warehouse for general storage (U.E. Ex. 28, Schwartz Depo. pg. 16–17; U.E. Ex. 26, Lueken Depo. pg. 14–20). In doing so, Slay's removed the remnants of Sarnelli's salvaging. The remnants contained scrap metal, insulation, piping and equipment that was abandoned by Sarnelli, however, no attempt was made to test the insulation for asbestos containing materials prior to taking action (U.E. Ex. 26, Lueken Depo. pg. 34). Slay contends that he had no knowledge of the extensive amounts of hazardous materials on the Sauget Site and thus, was out additional amounts of money to remove it in response.

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

[1, 2] A Court may grant summary judgment only if the party seeking summary judgment demonstrates that no genuine issue of fact exists for trial and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(e); *Wilson v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 841 F.2d 1347, 1354 (7th Cir.1988). If that showing is made and the motion's opponent would bear the burden at trial on the matter that forms the basis of the motion, the opponent must come forth with evidence to show what facts are in actual dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Donald v. Polk County*, 836 F.2d 376, 379 (7th Cir.1988). Where the moving party fails to meet its strict burden of proof, summary judgment cannot be entered even if the opposing party fails to respond to the motion. *Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1222 (7th Cir.1984).

[3, 4] When the parties do not dispute the factual basis of a motion for summary judgment, the court's only inquiry is whether judgment should issue as a matter of law. The burden of proof on this matter rests with the moving party. Summary judgment is inappropriate, however, if the parties disagree about inferences reasonably to be drawn from undisputed facts. *Bowyer v. United States Dep't of Air Force*, 804 F.2d 428, 430 (7th Cir.1986).

[5–7] When the parties dispute the facts, the parties must produce proper documentary evidence to support their contentions.

The parties cannot rest on mere allegations in the pleadings, *Borucki v. United States*, 803 F.2d 1421, 1428 (7th Cir.1986), or upon conclusory allegations in affidavits. *First Commodity Traders, Inc. v. Heinold Commodities*, 766 F.2d 1007, 1011 (7th Cir.1985). The Court must view the evidence and any permissible inferences from the materials before it finds in favor of the non-moving party, *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588–89, 106 S.Ct. 1348, 1357, 89 L.Ed.2d 538 (1986). The non-moving party must show that the disputed fact is material; that is, it must be outcome-determinative under the applicable law. *Wainwright Bank & Trust Co. v. Railroadmens Fed. Sav. & Loan Ass'n*, 806 F.2d 146, 149 (7th Cir.1986).

DEFENDANT'S FIRST MOTION FOR SUMMARY JUDGMENT

U.E. has moved for partial summary judgment on the following grounds:

(1) Plaintiffs' common law counts are barred under the applicable statute of limitation because plaintiffs knew or should have known of the presence of asbestos and the condition of the property as early as 1978 and no later than 1985.

(2) Illinois law simply does not recognize plaintiffs' proposed theory of negligence liability for the sale of real estate.

(3) Plaintiffs have not established a claim based on ultrahazardous activity.

(4) Plaintiffs' claim for recovery of costs for asbestos abatement is jurisdictionally barred under CERCLA, because when U.E. sold the property to G & S Motor Equipment Company the asbestos was part of the structure of the building.

1. The Statute of Limitations

The first argument that this Court will exam is that Counts II, III, and IV are barred by the applicable statute of limitations. Defendant U.E. states that the motion for partial summary judgment should be granted because plaintiff's common law claims are barred by the statute of limitations. The defendant argues that under both Illinois law and CERCLA's federally imposed discovery rule for common law causes of action, plaintiffs should have brought their negligence and ultrahazardous claims against U.E. within five years from the date they knew or should have known of the allegedly defective condition of their property.

[8, 9] In Illinois, actions to recover damage to property, real or personal, must commence within five years after the cause of action accrues. Ill.Rev.Stat., ch. 110, ¶ 13–205. In determining the commencement date of the cause of action, Illinois law adopts a discovery rule *Jackson Jordan v. Leydig, Voit, & Meyer*, 199 Ill.App.3d 728, 145 Ill.Dec. 755, 759, 557 N.E.2d 525, 529 *on appeal*, 133 Ill.2d 558, 149 Ill.Dec. 322, 561 N.E.2d 692 (1990), citing *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 58 Ill.Dec. 725, 430 N.E.2d 976 (1981), *Nolan v. Johns–Manville Asbestos*, 85 Ill.2d 161, 52 Ill.Dec. 1, 421 N.E.2d 864 (1981), *Witherell v. Weimer*, 85 Ill.2d 146, 52 Ill.Dec. 6, 421 N.E.2d 869 (1981), *McLane v. Russel*, 159 Ill.App.3d 429, 111 Ill.Dec. 250, 253, 512 N.E.2d 366, 369 (1987), *Lincoln–Way Community College v. Village of Frankfort*, 51 Ill.App.3d 602, 9 Ill.Dec. 884–890, 367 N.E.2d 318, 324 (1977) which holds "that a cause of action accrues the date upon which plaintiff knew or should have known of the allegedly defective condition of the property". Further, in *Witherell*, the court stated that, "where only a single conclusion can be drawn from undisputed facts, it is for the court to decide when the plaintiff knew or reasonably should have known about his injury."

Plaintiffs respond to defendant's construction of the claims being time barred by arguing that the Illinois statute of limitations may be preempted by CERCLA Section 309(a)(1), 42 U.S.C. § 9658(a)(1) which provides:

> In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, pollutant or contaminant released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period

shall commence at the federally required commencement date in lieu of the date specified in such State statute. *See Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1436 (7th Cir.1988); *Soo Line R. Co. v. B.J. Carney & Co.*, 797 F.Supp. 1472, 1487 (D.Minn.1972); *Merry v. Westinghouse Electric Corp.*, 684 F.Supp. 852, 854–55 (M.D.Pa.1988). The federally required commencement date is defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4).

Plaintiffs argue that the statute effectively creates a federally mandated discovery rule for the accrual of state law claims involving releases of hazardous substances that cause or contribute to personal injury or property damage. *Soo Line R. Co.*, 797 F.Supp. at 1487; *see also Bolin v. Cessna Aircraft Co.*, 759 F.Supp. 692, 704, (D.Kan.1991). Plaintiffs further the premise, that under the statute, any state statute of limitations for an action seeking compensation for property damage caused by exposure to a hazardous substance will not commence running until any consequent injury is discovered, regardless of preexisting state law. *Bolin* at 704; *Electric Powerboard of Chattanooga v. Monsanto Co.*, 879 F.2d 1368, 1371 (6th Cir.1989), *cert. denied*, 493 U.S. 1022, 110 S.Ct. 724, 107 L.Ed.2d 743 (1990).

Plaintiffs add that other courts have held that the CERCLA statute of limitation begins to run when the plaintiffs knew or reasonably should have known that their property was contaminated *and* that the contamination resulted from defendant's conduct. *See Merry*, 684 F.Supp. at 855 (emphasis added); *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 58 Ill.Dec. 725, 730, 430 N.E.2d 976, 981 (1981); *Nolan v. Johns–Manville Asbestos*, 85 Ill.2d 161, 52 Ill.Dec. 1, 5, 421 N.E.2d 864, 868 (1981); *Witherell v. Weimer*, 85 Ill.2d 146, 52 Ill.Dec. 6, 11, 421 N.E.2d 869, 874 (1981). "The question of when a party knew or should have known both of an injury and its probable wrongful cause is one of fact, unless the facts are disputed and only one conclusion may be drawn from them." *Nolan*, 52 Ill.Dec. at 5, 421 N.E.2d at 868. In this action, the plaintiffs argue that U.E. is unable to establish that the plaintiffs knew of the contamination at the Cahokia site and that it was the result of U.E.'s wrongful conduct at any time sooner than that alleged in the Plaintiff's Complaint, July 11, 1988.[1]

[10] This Court finds that the Illinois statute of limitations and the CERCLA statute of limitations require the same amount of knowledge under the discovery rule. Under both statutes, in order to successfully argue that a cause of action is barred by the statute of limitations, the defendant must prove 1) that the plaintiff knew or should have known of an injury to their property (and in cases such as this it is added "that was caused or contributed to by the hazardous substance or pollutant or contaminant concerned) and 2) that the contamination resulted from another's conduct. *See, Witherell v. Weimer*, 52 Ill.Dec. at 11, 421 N.E.2d at 874 (concerning the discovery rule as it applies to Illinois statute of limitations); and *Merry v. Westinghouse Elect. Corp.*, 684 F.Supp. at 855 (concerning the discovery as it applies to the CERCLA statute of limitations). Accordingly, the Court must now examine the facts of this case and determine whether a genuine issue of material fact presents itself concerning the date upon which the plaintiffs obtained this knowledge or should have obtained this knowledge and therefore were under an obligation to inquire further to determine whether an actionable wrong was committed.

The defendant argues that the plaintiffs had notice of this possibility long before July of 1988 and the first instance of such notice was in the bid document. In the bid invitation, the specifications specifically advised all potential purchasers or salvagers of the possible presence of "material which has been declared hazardous" including "PCBs, asbestos, etc." at the site (U.E. Ex. 11, Bid Specifications for Disposition of Cahokia Power Plant at C–1). The defendant argues that

1. Slay alleges that he did not "learn of the significance of hazardous substances" until July 11, 1988, when his attorneys conducted an environmental audit of the Cahokia Facility.

this is sufficient notice that there may be PCB's and asbestos in the building. The plaintiffs' expert, David Schau, even testified that the specifications would "have given him notice that there may be PCBs and asbestos in the building." (U.E. Ex. 29, Schau Depo. pg. 133–136).

Also, as a part of the bidding process, all potential purchasers were required to tour the site. During this bidding process not only did the ultimate purchaser, G & S, tour the site, but Slay also toured the site. (U.E. Ex. 15, Eugene Slay Depo. 3/30/92, pg. 60). The defendant argues that the disclosures in the bid and the inspections were clearly sufficient notice to place a reasonable person on notice as to the building's condition. Sarnelli, the Slay's lessee for the purpose of salvaging, testified that from the information given, and his personal experience, he was well aware of the presence of asbestos and possible PCBs in the power plant building at the time of the purchase. (U.E. Ex. 14, Sarnelli Depo. pg. 25).

The defendant argues that the second instance of clear notice being given to the plaintiffs that asbestos was on this property was July 3, 1979. At that time Sarnelli notified the EPA and Eugene Slay that salvaging activities were being conducted at the site and that he was aware of special EPA and Illinois requirements regarding asbestos removal. (U.E. Ex. 27, Letter from Sarnelli Brothers, Inc. to EPA). Moreover, Slay acknowledged the receipt of this letter and stated that he probably would have sent it to Ted Tahan (U.E. Ex. 15, Eugene Slay Depo. 3/30/92, pg. 88–89).

Finally, U.E. contends that plaintiffs continued operations on the site for more than a decade after salvaging ceased and prior to filing the lawsuit, imputes knowledge to the plaintiffs. The defendant cites the *Koenig* case for the proposition that Illinois law imputes to an owner knowledge of the hazardous condition of his property after an extended ownership. *Koenig v. National Supermarkets*, 231 Ill.App.3d 665, 173 Ill.Dec. 450, 454, 596 N.E.2d 1329, 1333 (1992).[2]

The plaintiffs' response to these allegations of notice received is that they do not dispute that some notice was given, but what they do dispute is the extent of the notice received. The plaintiffs argue that the notice given in the bid specifications was that there *may* be *equipment* at the power plant that *may* contain PCBs or asbestos. The plaintiff argues that this warning is not only limited, but it is deceptive, in light of the indepth knowledge U.E. had regarding the extensive quantity of hazardous material that was present on the site.

U.E. knew the powerhouse was loaded with asbestos not only contained in equipment, but also surrounding pipe running throughout the building and contained in transite insulating board (Dille Depo., pg. 46; Hoag Depo., Ex. 2). U.E. also knew that transformers, which were located in a remote area of the roof of the powerhouse, contained high levels of PCBs (Wagner Depo. pg. 9–10, 20–21; Wagner Depo. Ex. 1). Plus, U.E. told Sarnelli that none of the transformers at the site contained over 50 ppm PCBs (Sarnelli Depo., pg. 43).[3]

As for the argument that the Slays went on a walk-through of the plant and therefore inspected the plant visually, the plaintiffs state that there is clear testimony that neither Mr. Slay nor his attorney, Ted Tahan, had any experience in inspecting commercial

2. The facts of the *Koenig* case address this issue of knowledge based upon length of time a condition is present on a much different scale than what is presented in the case at bar. In *Koenig*, a shopper slipped and fell on a puddle of water. The Court there held, "In a situation such as the one presented here, the general rule is that liability will be imposed where a business invitee, such as plaintiff herein, is injured by slipping on a substance on the premises if (1) the substance was placed there by the negligence of the proprietor, or (2) the defendant knew of its presence, or (3) the substance was there a sufficient length of time so that proprietor had constructive notice of it. (citation omitted)."

3. PCBs were used extensively prior to the 1970s as a fire retardant. PCBs are regulated by the Toxic Substance Control Act ("TSCA") and its regulations are found at 40 C.F.R. § 761. Under the regulations, transformers containing less than 50 parts per million ("ppm") PCBs in their insulating oil are not regulated. Transformers containing 50–500 ppm are regulated to some extent and transformers containing over 500 ppm are highly regulated.

real estate or in salvaging such property and could not, from a walk through of the property, visually identify hazardous materials or contamination. (3/30/92 Eugene Slay's Depo., pg. 13–14, 15–17, 23–29; Tahan Depo., pg. 27–29, 42–43, 56–58, 60–62). Also, in regards to the suggestion that Slay's people supervised Sarnelli's salvaging operation, and therefore this supervision provided notice, the plaintiffs point out that none of the testimony cited by U.E. supports the assertion that any of the plaintiffs' people supervised Sarnelli's work. Moreover, based on the rights Sarnelli retained in its lease, it would have been totally inappropriate for the plaintiffs to do so.

As for Sarnelli's notice by his letter to the EPA, the plaintiffs' argue that U.E. is trying to make this notice into a notice to the plaintiffs of the presence of all of the asbestos at the Site, when this notice only confirmed what U.E. had vaguely referred to in its Bid Specification, that is, of the possible existence of asbestos in some equipment. The plaintiffs state that Sarnelli's notice, at the most, put Plaintiffs on notice that asbestos on equipment to be salvaged was removed and disposed of off Site. It gives absolutely no notice that there was more asbestos at the Site than what was on the equipment removed by Sarnelli, let alone disclosed the existence of PCBs and other hazards at the Site.

As for U.E.'s accusation that the plaintiff did not test the insulation for asbestos prior to its cleanup of the Site, the plaintiffs argue that U.E. fails to explain why Plaintiffs should have conducted tests when they had no knowledge that asbestos remained after Sarnelli's work was complete.

[11] Based upon the foregoing, the Court finds that the question of when the plaintiff knew or should have known of the presence of the hazardous substances in this instance is one for the jury to decide. It is not clear to the Court that only one conclusion can be drawn from the facts. The specification in the bid referred to equipment only; the visual inspection, without the proper training, is not necessarily helpful and Sarnelli's notice could be understood by the plaintiff to mean that all asbestos he would come upon he would remove. The Court is unable to state with certainty what date the plaintiff should have been aware of the situation on the site so as to shift the burden to the plaintiff to begin to investigate and ask questions.

2. The Plaintiff's Theory of Negligence

The second argument made by the defendant is that Illinois law simply does not recognize plaintiffs' proposed theory of negligence liability for the sale of real estate. The defendant states that in the plaintiffs' complaint plaintiffs are asserting that by selling the property to a purchaser in the demolition/salvage industry (G & S), U.E. negligently disposed of hazardous substances and failed to disclose the purported risk created by such "disposal" to plaintiffs. The defendant argues that the plaintiffs couched this claim in terms of negligence because a breach of contract or warranty action for environmental conditions allegedly existing on the property is clearly not viable under the constraints of Illinois law because the plaintiffs lack privity with U.E.

The defendants state that the plaintiffs are, in effect, asking this Court to vitiate Illinois' personal injury requirement and expand the parameters of vendor negligence liability to include any commercial transaction involving hazardous substances irrespective of whether those substances pose a real threat to the health or safety of the vendee or third party. The defendants add that, although the plaintiffs may be able to point to other states' laws, they will not be able to find any Illinois authority for the proposition that a vendor is liable in negligence for diminution in value to the property. The reason is because such risks are allocated by the written contract with the exception of personal injury. The plaintiffs attempt to avoid this result by arguing that G & S or Sarnelli acted as U.E.'s agent.

The issue presented by the defendant, simply stated, is that the plaintiff cannot prove a cause of action in negligence, because in order to do so the plaintiff must prove the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting from that

breach. *Dinges v. Gabardi*, 202 Ill.App.3d 732, 147 Ill.Dec. 873, 560 N.E.2d 21 (1990); *Durr v. Stille*, 139 Ill.App.3d 226, 93 Ill.Dec. 715, 487 N.E.2d 382 (1985). The first element to exam is whether or not a duty can be shown to be owed by the defendant to this plaintiff.

Whether or not a duty exists between two parties is a question of law. *Orrico v. Beverly Bank*, 109 Ill.App.3d 102, 64 Ill.Dec. 701, 440 N.E.2d 253 (1982). In this case, the plaintiff alleges negligence on the part of the defendant in two ways: first, by negligently disposing of hazardous substances by selling the property to a demolition/salvager; and second, by negligently failing to disclose the unreasonable risk created by the disposal to subsequent vendees. Third Amend Complaint, ¶ 80. Therefore, as to each of these allegations of negligence there must be a duty, by the defendant to the plaintiff, to not be negligent in their actions.

As to the alleged negligent disposal of the hazardous substances, the Court finds that the plaintiff has not proven that a duty exists under common law to not dispose of these hazardous substances in the manner chosen by the defendant. It is true that there may be a duty based upon a federal statute or federal regulation, such as CERCLA, however, such duty would be filed under a separate cause of action.

The plaintiff argues that the law set forth in *Orrico v. Beverly Bank*, 109 Ill.App.3d 102, 64 Ill.Dec. 701, 440 N.E.2d 253 (1982) should apply to this situation. In that case the Court held,

> We do not believe that this case falls into the category of a landowner's duty to warn of or make safe dangerous conditions on his premises; rather, the case is governed by the more general principle that a defendant owes a duty not to increase foreseeable risk of harm to another. (citation omitted) *But this duty to act with reasonable care does not, as plaintiff suggests, extend to the world at large.* Rather it is defined and limited by various considerations such as the relation between the parties, the gravity and foreseeability of the harm, the utility of the challenged conduct and the burden of guarding against it.

Id. 64 Ill.Dec. at 704, 440 N.E.2d at 256 (emphasis added). In opposition to this argument the defendant argues that the type of relationship that the Court was contemplating between the parties in this case is simply not present in the case at bar. The *Orrico* case did not concern a vendor/vendee or a vendor and a subsequent purchaser, but rather concerned a mentally impaired depositor and a bank ordered by the Court to conduct all of her affairs. The Court sees this as an important distinction. The bank and the mentally impaired woman had a definable relationship to which an end could be seen. In the instant case, however, making the defendant liable to the plaintiff would be stating that a vendor of property can be liable to any subsequent purchaser for a negligent act at the time of the original purchase. The Court understands that hazardous substances can cause very grave injuries, however, the Court is not inclined to extend liability for a negligent act of disposal indefinitely, especially when there are other causes of action that this plaintiff may file in order to be made whole.

[12] Accordingly, the Court finds that the defendant is correct in asserting that this defendant has no duty to the plaintiff as to the disposal of hazardous substances.

As to the claim of negligence by failing to disclose the unreasonable risk created by the disposal to subsequent vendees, the defendant argues that based upon Illinois case law, a vendor cannot be sued for negligence, citing *Sparling v. Peabody Coal Company*, 16 Ill.App.3d 301, 306 N.E.2d 79 (1974). However, this case goes on to state that the duty is not an ordinary negligence duty, but rather derives from a condition upon the land, whether natural or artificial, which involves unreasonable risks to persons on the land, known to the vendor. This language takes a case of ordinary negligence against a vendor and creates a case which implicates the law set forth in the Restatement (Second) of Torts, § 353.

Section 353 discusses the duty of a vendor to the vendee "and others upon the land with the consent of the vendee" concerning undisclosed dangerous conditions known to the

vendor. The notes to this section define "others upon the land with the consent of the vendee" as "not only those who are there by the consent of the vendee as his licensees but any person to whom he subsequently sells or leases the land." Therefore, this section applies to the plaintiff in this action. Based upon this finding, the Court finds that the plaintiff may be able to prove that a duty was present and therefore a genuine issue of material fact presents itself.

[13, 14] However, the problem that the Court sees with the negligence claim concerning negligent failure to disclose, is that the plaintiff cannot prove damages which are recoverable in a negligence action. In a negligence action a plaintiff may seek personal and property damages, but not economic loss. *Moorman Mfg. Co. v. National Tank Co.*, 91 Ill.2d 69, 61 Ill.Dec. 746, 435 N.E.2d 443 (1982). Economic loss includes damages for inadequate value, costs of replacement or repair of the defective part, as well as diminution in value. *Id.* In Count II of their complaint the plaintiffs state,

> 82. As a direct result of the negligence of U.E. Plaintiffs have suffered damages, including but not limited to diminution of property value and costs of investigation, testing, sampling, removal, oversight, and legal fees and cost, all in excess of $300,000, and Plaintiffs may be required to incur additional costs in the future.

All of the damages listed fit the definition of economic loss. As for the argument that personal injury is involved, the plaintiff offers the Court a reason for why no such injury has been shown. In the plaintiff's response to defendant's motion for summary judgment, at footnote 11, the plaintiff states,

> U.E. emphasizes the fact that Plaintiffs have not alleged injury. But U.E. knew as early as 1972 that injuries involving hazardous substances have a long manifestation period. For example, U.E. knew in 1972 that asbestos injuries are not manifested for twenty to thirty years. Hoag Depo. Exh. 3.

The Court construes this as arguing that the personal injury alleged by the plaintiff is the potential of developing an illness due to exposure to asbestos. This is not an injury in fact and the plaintiff has cited no cases, nor is the Court aware of any cases, which state that the probability of contracting an illness in the future is a sufficient foundation for a negligence claim.

The plaintiff argues that because these plaintiffs do not have a contract with these defendants they cannot fall back on a breach of contract action to seek economic loss. Based upon this distinction, the plaintiff argues that this case should be distinguished from the cases that hold that economic loss is unavailable in a negligence action. However, in the instant case, the plaintiff does have a cause of action by which they can seek economic loss and that is under CERCLA.

Based on the finding that there is no genuine issue of material fact regarding the lack of a duty owed to this plaintiff by the defendant under the common law in the disposal of the hazardous waste and the plaintiff's inability to prove a person or property injury as a result of the defendant's alleged failure to disclose this disposal, the Court will grant the defendant's motion for summary judgment as to Count II of the Third Amended Complaint as well as Count III. Count III seeks damages for willful and wanton activity and since a claim of willful and wanton conduct is merely an aggravated form of negligence, *See Corgan v. Muehling*, 167 Ill. App.3d 1093, 118 Ill.Dec. 698, 700, 522 N.E.2d 153, 155 (1988), the defendant is entitled to summary judgment on this count also.

3. Ultrahazardous activities

[15, 16] The third argument made by the defendant is that the plaintiff cannot establish a prima facie case of abnormally dangerous activity and therefore the defendant is entitled to summary judgment on Count IV. The determination of whether an activity is an abnormally dangerous activity is a question of law for the court. *Indiana Harbor Belt R. Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1176 (7th Cir.1990). The *Indiana Harbor* case also makes clear that the Seventh Circuit finds that there is substantial support that the Supreme Court of Illinois would treat as authoritative the provisions of the Restatement governing abnormally dan-

gerous activities. Therefore, this Court will begin this analysis by reviewing the six factors designed to guide courts in the determination of what is an ultrahazardous or abnormally dangerous activity:

(1) existence of a high degree of risk of some harm to the person, land or chattels of others;

(2) likelihood that the harm that results from it will be great;

(3) inability to eliminate the risk by the exercise of reasonable care;

(4) extent to which the activity is not a matter of common usage;

(5) inappropriateness of the activity to the place where it is carried out; and

(6) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts § 520.

The central idea behind the defendant's argument is that "[u]nder no stretch of Illinois law can the sale of an industrial building containing asbestos materials commonplace at the time be construed as an abnormally dangerous or ultrahazardous activity." **Suggestions in Support of Defendant's Motion for Summary Judgment, pg. 29.** The main response the plaintiff has to this argument is that it is not the sale alone that was the abnormally dangerous activity but rather the sale for the purpose *of demolition* when it was full of useless equipment containing large amounts of hazardous substances.

The defendant discusses that historically, this theory of strict liability has been restricted to such activities as the use or storage of explosives and flammable materials. *See, Continental Building Corporation v. Union Oil Company*, 152 Ill.App.3d 513, 105 Ill.Dec. 502, 504, 504 N.E.2d 787, 789 (1987) (adopting § 520 of the Restatement (Second) of Torts). The defendant goes on to argue that the mere presence of hazardous materials does not constitute an abnormally dangerous activity for which strict liability should be imposed. *Arawana Mills Co. v. United Technologies Corp.*, 795 F.Supp. 1238 (D.Ct. 1992). Also, whether or not an activity should be deemed abnormally dangerous is not tested by the substance itself, but by the activity alleged to be abnormally dangerous. *Indiana Harbor*, at 1177.

It does not appear that the plaintiff is disputing that the activity is what the Court needs to focus upon, but rather the plaintiffs emphasis that the activity is not the sale alone, but rather the sale for the purpose of demolition. There are two arguments presented to the Court to show that the demolition of such a site is an ultrahazardous activity. The first is that the testimony of the plaintiffs' expert, David Schau, was that "selling a power plant for demolition is probably one of the most dangerous activities that [he could] think of." (Schau Depos., pg. 31) And second, although no Illinois courts have yet to address this issue, the plaintiffs cite to cases in other jurisdiction that the plaintiffs argue deal with the issue presented here. *See, Amland Properties Corp. v. Aluminum Co. of America*, 711 F.Supp. 784 (D.N.J. 1989); *T & E Industries v. Safety Light Corp.*, 227 N.J.Super. 228, 546 A.2d 570 (1988) and *N.J. v. Ventron Corp.*, 94 N.J. 473, 493, 463 A.2d 150 (1983), *quoting* 3 Restatement, Torts (Second) § 520, comment h, at 39 (1976).

In reviewing the parties arguments, and by doing its own research, the Court has determined the relevant issues presented here. The first issue is whether the Illinois Supreme Court would impose strict liability as between successive landowners for the undertaking of an abnormally dangerous activity. Second, whether the injury claimed by the plaintiffs is an injury contemplated by Illinois courts which decided that demolition of buildings in a metropolitan area is inherently dangerous as a matter of law. If the Court finds that this injury is not one that was contemplated by the Illinois courts, then is this demolition an ultrahazardous activity under the Restatement, rather than as a matter of law. If there is a question of material fact at this stage, the inquiry should stop here. However, this Court will also examine whether this sale is a disposal of hazardous substances, and whether such a disposal would be an ultrahazardous activity under Illinois law.

The Courts have been unable to find, and the parties have not cited, any Illinois cases dealing with the issue of whether or not a successive landowner may sue a remote vendor for an ultrahazardous activity the vendor performed on the land. However, the plaintiffs have cited a New Jersey case that directly deals with this issue. *Amland Properties Corp. v. Aluminum Co. of America*, 711 F.Supp. 784 (D.N.J.1989). This Court finds that based upon the reasoning set forth in the *Amland* case, the Illinois Supreme Court would impose liability on successive landowners in this situation.

The *Amland* Court, after reviewing two other New Jersey cases on point, concluded that there are no practical or legal distinctions between the rights of a successor in title to enjoy its land and the rights of a neighboring property owner. The Court went on to add that even the ability of successor in title to contractually fix its right in the course of its purchase of the property is simply not sufficient to overcome the imposition of strict liability resulting from an abnormally dangerous activity. This Court finds that the Illinois Supreme Court would agree with this reasoning and therefore this plaintiff is a proper plaintiff to ask this Court to impose strict liability on this defendant.

The next inquiry is whether this type of injury is the type contemplated by the Illinois courts that demolition of buildings in a metropolitan area is inherently dangerous as a matter of law. In *Clark v. City of Chicago*, 88 Ill.App.3d 760, 43 Ill.Dec. 892, 410 N.E.2d 1025 (1980), the Court held that under Illinois precedent the demolition of a five-story building within the city of Chicago was an inherently dangerous activity, as a matter of law. (*See, Sherman House Hotel Co. v. Gallagher*, 129 Ill.App. 557 (1st Dist.1906); *Van Auken v. Barr*, 270 Ill.App. 150 (2nd Dist.1933)). In the *Clark* case, the plaintiff was suing for injuries sustained when a crane fell on him during the demolition. In other cases, the injury has been from the use of explosives in the demolition and flying debris. *City of Joliet v. Harwood*, 86 Ill. 110 (1877).

In the instant case, the plaintiff is suing for the costs of cleanup of hazardous substances and the diminution of their property. This Court sees these damages as distinctly different from the damages sought in a "usual" demolition case. This Court does not believe that the Illinois Courts were contemplating hazardous substance cleanup as potential damages when the decision to view the demolition of a building in a metropolitan area as inherently dangerous as a matter of law. Instead, this Court believes the damages contemplated were along the order of cranes falling, debris flying, and buildings falling into other buildings. Therefore, this Court finds that the Illinois Supreme Court would not rule this demolition a dangerous activity as a matter of law. Based upon this finding, the Court now must review the Restatement factors to determine whether or not a question of material fact is in dispute. In their memorandum neither party directly addresses each of these six factors. The defendant argues since the plaintiffs have occupied this site for over a decade with the asbestos, PCBs and underground tanks and no serious incidents have occurred, there is evidence that this is not an abnormally dangerous activity. The defendants go on to state that there are no regulations mandating the removal of asbestos and that the mere presence of the asbestos in the building is not a hazard. The defendants add that the plaintiffs have been unable to prove any "high degree of risk" as air monitoring showed that the asbestos levels in the air were well within acceptable regulatory levels. (U.E. Ex. 40, Guy Slay Letter to IEPA, pg. 1). The defendant then argues that public policy is against this activity being construed as an ultrahazardous activity simply because there are so many buildings which have asbestos in them.

The plaintiff argues that their expert in the field clearly stated that the demolition of a power plant was one of the most dangerous activities that he could think of. Then the plaintiffs present their policy argument that U.E. should be made an example so that future utility companies will design alternative disposal methods when ceasing ownership and operation of an outdated power plant.

[17] Since neither party addressed the facts required by the Restatement's factors, this Court is not in the position to determine whether or not this activity was an ultrahazardous activity. Therefore, the Court finds that a genuine issue of material facts does preclude summary judgment on this issue.

4. Recovery of asbestos abatement under CERCLA

The final issue raised in the defendant's first motion for summary judgment is that under CERCLA the plaintiff cannot recover the costs of asbestos abatement. U.E. states that the plaintiffs are simply ignoring the fundamental fact that asbestos abatement actions are jurisdictionally barred under CERCLA. "Courts have categorically held that asbestos contaminants resulting from products which are part of the structure of residential or commercial buildings are beyond the purview of CERCLA. *See, Anthony v. Arthur Belch,* 760 F.Supp. 832 (D.Cal. 1991) (Congress' intent to prohibit asbestos removal actions extends to asbestos dust emanating from fire damaged material which were part of a building's structure) *aff'd.*" **Suggestion in Support of the Motion for Summary Judgment, pg. 37.**

The plaintiffs, on the other hand, appear to be arguing that since this site was not just sold, but was sold for the purpose of demolition, the above rule does not apply. In *CP Holdings v. Goldberg-Zoino & Associates,* 769 F.Supp. 432 (D.N.H.1991) held that a party who sells a building for demolition does not fall under the traditional rule of selling a property that has asbestos in the structure and later the vendee or subsequent purchaser must remove the asbestos due to their work on the site, such as renovation.

The plaintiffs cite *AM International v. International Forging Equipment Corp.,* 982 F.2d 989, 997, in which the Sixth Circuit reiterated that a disposal requires an affirmative act, and that a disposal does not occur where there has been "a conveyance of a 'useful, albeit dangerous product, to serve a particular, intended purpose.' *Prudential Ins. Co. v. United States Gypsum,* 711 F.Supp. 1244, 1255 (D.N.J.1989)." *AM International,* at 997. This case does not directly deal with the issue of asbestos attached to a structure, but it does help the Court to define the full definition of a disposal.

The question that is now before the Court is whether this site was sold simply as a real estate transaction or for the purpose of demolition. In reviewing the relevant documents, it is clear by the Bid Specifications for Disposition of the Cahokia Plant (U.E. Ex. 10), that U.E. was seeking bids for demolition of the site.[4] However, in the original sales contract for the site executed by U.E. and G & S, the contract appears to be a normal commercial real estate contract. (U.E. Ex. 17). The determination of this issue appears to be the focal point of this issue. Based upon the evidence presented, the Court is inclined to find that U.E. sold this site for the purpose of demolition. Accordingly, the defendant has not met its burden of proof on this matter. Therefore, at the very least the Court finds that there is a genuine issue of material fact which precludes summary judgment on this issue.

In conclusion, the defendant's first motion for summary judgment (Document No. 69) is **DENIED IN PART AND GRANTED IN PART.** Summary judgment is granted to the defendant on Count II and Count III. Summary judgment is denied as to Count IV and as to the asbestos abatement portion of Count I.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

In the plaintiffs' partial motion for summary judgment (Document No. 74), the plaintiffs request summary judgment on the issue of U.E.'s liability under 42 U.S.C. § 9607(a). The plaintiffs are not requesting this Court to decide the issues of: costs,

4. Page C-2 of the bid specifications has a section entitled *DEMOLITION.* This section begins with, "In general, all structures, walls, foundations, anchor bolts, reinforcing steel, structural and misc. iron and steel, piping, conduit, cable, etc. shall be removed below the adjacent yard grade.... All tunnels, basements, manholes, pits, voids, etc. below grade shall be filled with either rubble or other material resulting form the demolition...."

incurred to date responding to the release of hazardous substances, the appropriateness of the cleanup undertaken by the plaintiffs, or the extent of U.E.'s liability for these costs. The plaintiffs want these issues left for trial. The plaintiffs argue that there are no genuine issues of material fact regarding U.E.'s liability under CERCLA and therefore, they are entitled to judgment as a matter of law.

[18, 19] To establish U.E.'s liability under CERCLA, the plaintiffs must prove that there are no genuine issues of material fact for each part of the four part test. These four parts are:

(1) that the site in question is a "facility" as defined by § 9601(9);

(2) that the defendant is a "responsible person" under § 9607(a);

(3) that there was a release or threat of release of a hazardous substances; and

(4) that such release caused the plaintiff to incur response costs.

See Environmental Transportation Systems, Inc. v. ENSCO, Inc., 969 F.2d 503, 506 (7th Cir.1992); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir.1989); *U.S. v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989). If the plaintiff establishes each of these elements, the defendant may try to establish one of the defenses listed in § 9607(b). These defenses include:

> To establish a defense to CERCLA liability a "person" must show by a preponderance of the evidence that the release or threat of release of a hazardous substance and the resulting damages were caused solely by—(1) an act of God; (2) an act of war; or (3) an act or omission of a third party other than an employee or agent of the defendant, other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant....

Environmental Transportation, 969 F.2d at 507.

In the instant case, there is no dispute that the Sauget site was a facility.

To be a "responsible party" the defendant must be in of the following categories:

> (1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance....

42 U.S.C. § 9607(a). Whether or not the defendant is a responsible party is a hotly contested issue in this case. The category that the plaintiff claims U.E. falls into is category three, "any person who by contract, agreement, or otherwise arranged for disposal..." *Id.*

In *United States v. A & F Materials Co., Inc.*, 582 F.Supp. 842, 845 (S.D.Ill.1984), the Court held that the language "or otherwise arranged for disposal" is very broad, and that the relevant inquiry is "who decided to place the waste into the hands of a particular facility that contains hazardous wastes." However, the Court added, "liability for releases under § 9607(a)(3) is not endless; it ends with that party who both owned the hazardous waste and made the crucial decision how it would be disposed of or treated, and by whom." *Id.*

In the instant case, the plaintiffs' and defendant's arguments can be concisely stated. The plaintiffs believe that U.E. "arranged for the disposal" of the hazardous substances by the sale of the property to G & S. They argue that it was quite clear from the bids requested, from the fact that the facility was outdated and therefore obsolete, and from the full knowledge of U.E. as to the extent of

the hazardous substances that the sale of the property for demolition was an arrangement for disposal.

On the other hand, U.E. argues that the sale was simply a real estate transaction. The disposal occurred when the Slays leased the property to Sarnelli to be salvaged. U.E. argues that this was the time of the disposal, not the sale of the property. As for the PCBs, the defendant asserts that the plaintiff is arguing that the abandonment of use of the transformers in 1965 was the disposal. However, the Court understands this portion of the plaintiffs' argument as emphasizing that the equipment on the site was outdated and obsolete, not that the simple nonusage of the transformers was a disposal.

In part four of the defendant's motion for summary judgment, the Court has already made the determination that from the evidence before it there is still a genuine issue of material fact concerning whether this sale was simply a real estate transaction or a sale for the purpose of demolition. The Court now finds that the plaintiffs have not met their burden of proof regarding whether this sale was for the purpose of demolition, and therefore, a genuine issue of material fact precludes summary judgment on this issue.

Although the Court has made this determination, the Court will nevertheless analyze the remainder of the issues presented.

A release is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment...." 42 U.S.C. § 9601(22). However, to create liability under CERCLA there must be a release or a threat of release. The facts the plaintiffs assert to support the existence of a release are: when Sarnelli performed his work, releases occurred by allowing asbestos to drop to the floor as it was removed without proper enclosure procedures; asbestos was released during clean-up procedures; asbestos fell in grain stored in Cahokia Marine's powerhouse building; every time a person walks through the electric bay area, asbestos can be picked up on clothes and taken out of the building; and torn asbestos on the roof occasionally falls off the outside of the building. As for the release of PCBs the plaintiffs argue that the mere existence of the abandoned transformers in a precarious location constitutes a threatened release. **Plaintiff's Memorandum of Motion for Summary Judgment, pg. 23.**

The defendants argue that none of these facts constitute a release or a threat of release. The main thrust of the defendant's argument is that the plaintiffs' own conduct of not notifying any regulatory agency regarding the alleged threat of release, or not notifying their employees as to the alleged asbestos hazard, indicates there has been no release. The defendant also points to the Environmental Assessment conducted by plaintiffs' counsel and states that this undermines the credibility of the argument that a threat of release of asbestos has occurred. As for PCBs, the defendants argue that the presence of these transformers, without more, does not invoke CERCLA jurisdiction.

Courts have held that a broad reading should be given to the terms "release" and "threat of release." *See Amland Properties Corp. v. Aluminum Co. of America*, 711 F.Supp. 784 (D.N.J.1989). This Court agrees. Therefore, the Court finds that as to asbestos it does appear that at least a threat of a release exists at the site. The defendant's argument that the environmental tests show that there has not been a release of the substances sufficient so as to register on this test has no bearing on whether a "threat of a release" is present. Also, the defendant has cited no cases indicating that in order to show a threat of release, the plaintiffs must first follow all regulatory requirements. From the facts set forth by the plaintiffs, it appears clear that there is a "threat of release" of asbestos on this site.

As for PCBs, the defendants cite the case of *C. Greene Equipment Co. v. Electron Corporation*, 697 F.Supp. 983 (N.D.Ill.1988). to stand for the proposition that the sale of transformers containing PCBs, without more, does not invoke CERCLA's jurisdiction. However, that case does not discuss what constitutes a release for PCBs, but rather disposes of that case with the determination

that a disposal did not occur. The plaintiffs counter that the mere presence of PCB transformers in a building can be a threat of a release, citing *Amland, supra*. However, *Amland* states that the presence of the hazardous substances *plus* the unwillingness of a party to assert control over the substances, amounts to a threat of a release. Upon examination of the caselaw and evidence presented on this issue, the Court believes that there is a genuine issue of material fact as to whether or not a release or threat of release occurred concerning the PCBs and will leave this issue to be decided at trial.

The final element of a prima facie case under CERCLA is that the plaintiffs must have incurred response costs. U.E. argues that because the plaintiffs have not established that they have incurred response costs consistent with the National Contingency Plan ("NCP"), they have not established the elements of a prima facie case under CERCLA. The defendant then cites a string of cases which hold that the incurrence of response costs consistent with the NCP is a fundamental element of a private CERCLA plaintiff's prima facie case. The plaintiffs' response to this argument is that in the Seventh Circuit, the incurrence of response costs consistent with the NCP is not required.

The Court finds that there is a split of authority on this issue. The split involves when proof of costs and consistency with the NCP becomes a factor. The defendant is correct in asserting that there are a number of jurisdictions that agree that NCP costs are an element of a prima facie case under CERCLA. "For the reasons that follow, I hold consistency with the NCP is an element of Artesian's prima facie case under section 107 and that Artesian's response actions should be evaluated under the current NCP." *Artesian Water Co. v. Gov. of New Castle County*, 659 F.Supp. 1269 (D.Del.1987). *See* Def. Response at pg. 4–5 for string cites.

The plaintiff is also correct in that in the Seventh Circuit, consistency with the NCP appears to not be a factor in making a prima facie case under CERCLA. *Environmental Transportation Systems, Inc. v. ENSCO, Inc.*, 969 F.2d 503, 506 (7th Cir.1992). In listing the elements of a prima facie case, the Seventh Circuit cited the case of *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989). In *Amoco* the Court stated that the fourth requirement under CERCLA was "that the release or threatened release has caused the plaintiff to incur response costs." *Id.* at 668. Moreover, the Court states:

> If the plaintiff establishes each of these elements ... the plaintiff is entitled to summary judgment on the liability issue. (citation omitted) This is true even when "there is a genuine issue as to appropriate damages." (citation omitted).
>
> A plaintiff may recover those response costs that are necessary and consistent with the National Contingency Plan ("NCP") § 9607(a)(4)(B); *see* 40 C.F.R. Part 300 (1988). Thus, once liability is established, the court must determine the appropriate remedy and which costs are recoverable.

Id. This Court interprets the Fifth Circuit to say that a prima facie case may be made without proof that the plaintiffs response costs are consistent with the NCP. However, in order to recover damages, the plaintiff must prove consistency with the NCP.[5] The Court finds that because the Seventh Circuit cited the *Amoco* case with approval in *Environmental Transportation*, that the Seventh Circuit must agree with this reasoning.

Therefore, the plaintiff need not prove that their response costs were consistent with the NCP in order to make a prima facie case. However, the plaintiffs must make this connection at trial before damages may be recovered.

In U.E.'s memorandum in response to the plaintiffs' motion, U.E. raises an affirmative defense. U.E. asserts that a third party was the sole cause of the release or threatened

5. Also, in *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377, 1389–1390 (E.D.Cal.1991), the Court held, "In this circuit, however, it has been specifically held that a failure to comply with the NCP is not a defense to liability, but goes only to the issue of damages... Since under *Cadillac Fairview*, consistency with the NCP is not an element of liability, inconsistency is not a basis for granting summary judgment on the liability question."

of the hazardous substance. The defendant argues that it is uncontroverted that it was Sarnelli's "housekeeping" to have plead the defense, but when it comes as no surprise to the plaintiffs, a technical error will not be fatal.

In the instant case, the defendant's argument from the beginning has been that the release was Sarnelli's fault and not U.E.'s. This defense comes as no surprise to the plaintiffs, and therefore, the Court will allow it to stand. The defendant is put on notice that this is the exception to the rule in this Court and faulty pleading will not always be tolerated.

Based upon the foregoing analysis the Court hereby DENIES the plaintiffs' motion for summary judgment (Document No. 74).

DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT

In defendant's second motion for partial summary judgment, dismissal or abstention (Document No. 97), the defendant moves this Court to grant summary judgment in its favor as to Count V of plaintiffs' Third Amended Complaint, or, in the alternative, to dismiss or abstain from exercising jurisdiction over Count V. The issues presented by this motion are:

(1) Which law is controlling concerning the underground storage tanks ("USTs"), the federal Resource, Conservation, and Recovery Act ("RCRA"), or the Illinois Underground Storage Tank laws?

(2) Because the Office of the Illinois State Fire Marshal ("OSFM") has instituted enforcement proceedings against plaintiffs concerning the underground storage tanks, *must* this Court defer to that agency's jurisdiction?

(3) Because the OSFM has instituted formal proceedings against plaintiffs concerning the underground storage tanks, *should* the Court defer to that agency's jurisdiction? and

(4) Who is the "owner" of the USTs for the purposes of the controlling statute?

BACKGROUND

On May 1, 1990, the plaintiffs first discovered three abandoned underground storage tanks at the Sauget site. Two of those tanks were empty and one contained about six inches of material in the bottom (Johnson Depo. Ex. No. 3). Test results from the tank containing the material proved inconclusive although some type of solvent was suspected (Johnson Depo., pg. 114–121). On December 28, 1992, the plaintiffs learned of two other USTs left on the site by U.E., which contained enough material to obtain a sample. This sample contained petroleum-based material. Once the plaintiffs realized that the tanks contained petroleum products and therefore were not covered by CERCLA, the plaintiffs began proceedings to institute suit under RCRA.

In 1984, Congress passed amendments to RCRA, part of which established a federal program for regulation of USTs. 52 Fed. Reg. 12853 (April 17, 1987). The federal Environmental Protection Agency ("EPA") enforces the RCRA UST law. 42 U.S.C. § 6991e. RCRA allows states to implement and enforce the federal UST law as long as the state's laws and regulations are no less stringent than the federal requirements and as long as the EPA has given approval for the program. 42 U.S.C. § 6991c. Illinois has such a state provision, 415 ILCS 5/22.12 (1993), however, Illinois' program has never received federal approval.

Currently, OSFM is pursuing a civil enforcement proceeding against one of the plaintiffs' entities, Cahokia Marine Service, for violations of the Gasoline Storage Act, Illinois' UST law. The plaintiffs have repeatedly attempted to persuade various regulatory agencies to pursue enforcement proceedings against Union Electric concerning the underground tanks. *See* Linda Tape Letter, dated Jan. 4, 1993, Ex. 2 of Document No. 100. However, the IEPA, EPA and OSFM have declined to pursue any enforcement actions against U.E.

ISSUES

[20] The defendants argue that the OSFM has exclusive jurisdiction over the regulation of USTs in Illinois and therefore,

this Court should defer to their authority. The defendant appears to argue that because Congress expressly delegated the administration of RCRA's UST program to the states, once a state establishes a UST program it automatically becomes the controlling law in that state. This is an incorrect assumption. In order for a state's UST program to have primary enforcement responsibility in that state, the program must be found to be no less stringent than the federal program and the program must gain federal approval. There is no evidence before the Court that Illinois' UST program has ever received federal approval (*See* Plaintiffs' response to Motion pg. 4), or that federal approval has ever been requested.

Accordingly, Illinois' UST program acts independently from federal law. Therefore, the question becomes, since the EPA has not given approval to Illinois' UST program, does the federal law and its regulations pre-empt the state law.

[21] The plaintiff cites the case of *Gade v. National Solid Wastes Management Assoc.*, — U.S. —, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) for the proposition that the federal law should pre-empt the state law. In that case the Supreme Court set forth the three possible types of pre-emption: (1) express preemption, (2) implied- field pre-emption and (3) implied- conflict pre-emption. The Court in *Gade* found that a "nonapproved state regulation of occupational safety and health issues for which a federal standard was in effect is impliedly pre-empted as in conflict with the full purposes and objectives of the OSH Act." *Id.* at —, 112 S.Ct. at 2383. The plaintiff asserts that this same rationale should apply in the case at bar; since the state program is not federally approved, it is in conflict with the federal statute. This Court agrees. In *Gade*, the Court added, "The design of the statute persuades us that Congress intended to subject employers and employees to only one set of regulations, be it federal or state, and that the only way a State may regulate an OSHA regulated occupational safety and health issue is pursuant to an approved state plan that displaces the federal standards." *Id.* This Court finds that the design of this statute also implies that Congress intended owners of USTs to only be subjected to one set of regulations. This is evidenced by the requirement of federal approval. Accordingly, the Court finds that Illinois USTs program is pre-empted by federal law.

Based upon this determination, the Court also concludes that it is not required for this Court to defer to OSFM's jurisdiction. However, the next question becomes *should* the Court defer to OSFM's jurisdiction and stay the proceedings in this case until the plaintiffs have completed their appeal of the agency's decision.

[22-24] The defendants argue that the doctrine of primary jurisdiction should apply in this case. The doctrine of "primary jurisdiction" was designed to promote proper relationships between the courts and the administrative agencies charged with particular regulatory duties. *United States v. Western Pacific R.R.*, 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956). Courts defer to an agency's primary jurisdiction where there is a need for the agency's expertise and special knowledge in complex areas not within the conventional experience of judges. *Far East Conference v. United States*, 342 U.S. 570, 574-5, 72 S.Ct. 492, 494, 96 L.Ed. 576 (1952). In the instant case, the agency that the defendant wishes this Court to defer to is OSFM, an agency that deals with Illinois law. This Court has already made the determination that for the purposes of this suit, federal UST law applies. Therefore, the agency's decision would be of little guidance in the ultimate resolution of this matter. Also, the defendant is not a party to the OSFM matter and therefore, the agency's decision would in no way direct this Court in the matter that is currently before it.

Accordingly, this Court DENIES the defendant's request for dismissal or for a stay pending the outcome of the OSFM proceedings.

Therefore, the sole remaining issue before the Court is, under the federal UST regulations, who was the "owner" of the USTs on November 8, 1984, when the federal regulations went into effect.

The term "owner" means—

(A) in the case of an underground storage tank in use before November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances, and

(B) in the case of any underground storage tank in use before November 8, 1984, but no longer in use on November 8, 1984, any person who owned such tank immediately before the discontinuation of its use.

42 U.S.C. § 6991(3). The debate in this case concerns what Congress intended the words "in use" to mean in this context.

The defendant argues that the plaintiffs are the "owners" of this tank based upon a document from the EPA entitled, *Revisions and Additions to the Underground Storage Tank (UST) Notification Definitions.* This document states:

III. Under Subtitle I *non-operational storage tank* is defined as any underground storage tank in which a regulated substance will not be deposited or from which a regulated substance will not be dispensed after November 8, 1984. We propose that these non-operational tanks be divided into 3 groups:

1. Abandoned tanks (some regulated substances left in UST)

2. Inactive tanks (regulated substances in UST could be used later)

3. Taken out of operation (closed according to acceptable industry practices *or* emptied and properly cleaned)

The statue further states that "a tank taken out of operation on or before January 1, 1974, shall not be required to notify . . .". This refers to tanks defined by # 3 above only. Owners of abandoned and inactive non-operational tanks should notify. Note that "non-operational" is not equivalent to "taken out of operation."

Ex. 3, Document No. 100. Based upon the facts presented to this Court, the Court finds that the USTs in question are abandoned. U.E. left these tanks with regulated substances in them, and since U.E. did not inform the plaintiffs that the tanks were even on the property, it is virtually impossible to think that the substances could be used later. However, the determination that these tanks were abandoned does not answer the question of who was the owner for notification purposes.

On the next page of the above cited document, the EPA provides a chart for the purpose of calculating when notification of the presence of an UST must occur. Looking at the chart, since the tanks in question here hold and did hold a regulated substance, were in the ground as of the date notification was due and were not "taken out of operation" notification is required. The chart continues:

II. If the tank is subject to the notification requirements (I above), who must notify? Did the tank hold regulated substances on November 8, 1984?

Yes-*current owner* (i.e., owner of tank on date notification is due) must notify.

No-*former owner* (I.E., owner of tank on date regulated substances removed from tank) must notify.

The defendant argues that from this chart it is clear that the plaintiffs are the party responsible for notification. The plaintiffs have owned this property since 1979 and therefore it is clear that they owned the property as of November 8, 1984.

The plaintiffs argue that the words "in use" clearly mean that the tanks have a purpose for their existence. The plaintiffs assert that the defendant wants this Court to ignore the clear meaning of the words and look at an EPA directive to determine the words meaning. The plaintiffs argue that "plain meaning of legislation should be conclusive except in those 'rare cases' [in which] the literal application will not produce a result demonstrably at odds with the intention of [the] drafters." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989).

The plaintiffs assert that placing the burden of U.E. best serves the purposes of the statute which is to regulate USTs in order to protect the environment. "To read the statute to make Plaintiffs the owner would disserve the purposes of the UST law. Current owners of property who have no knowledge of the existence of tanks, could go for years

with tanks under their property causing extensive environmental damage. Further, such owners would be potentially subject to huge penalties for a situation they were totally unaware of." **Plaintiffs' Response, pg. 6.**

The plaintiff cites 50 Fed.Reg. 46602 (November 8, 1985), where the EPA has stated its interpretation of the ownership definition in the preamble to the RCRA notification requirements:

> With regard to a tank no longer in use on November 8, 1984, for which notification must be provided by the owner who discontinued its use, EPA believes that such owner should notify if the owner knows or has reason to believe the tank was permanently taken out of use for storing regulated substances. Indications that a tank is permanently taken out of use are: (a) if it is filed with inert solid or otherwise rendered unusable, or (b) if there is reason to believe that it will not be used in the future (e.g., the owner abandoned the tank, intakes and vents are paved over, access piping is disconnected or removed, or the tank was sold to a person who had no use for the tank such as a residential real estate developer).

The plaintiff asserts that by this statement the EPA clearly rejected a presumption of ownership by the person in direct control of real estate properties and facilities.

[25] Based upon the foregoing the Court finds that under the federal regulations, U.E. is the owner of these USTs. In the preamble to RCRA it appears clear that the EPA was trying to place the burden of notification on the proper party. The Court has determined that these tanks are abandoned and therefore there is reason to believe that these tanks will not be used in the future. The main argument in favor of U.E. being the responsible party is that the plaintiffs were not given any notification by the defendants that these tanks were on the property at the time of purchase. The plaintiffs did not know about the tanks and therefore, it is impossible for them to notify the EPA of their existence. The defendant wants this Court to interpret "in use" passively to mean that a tank merely holding a regulated substance is "in use.". Using a tank as a holding facility may very well be fit the definition of "in use." However, this Court finds that part of the definition of "in use" is that whatever use is being made of the tanks must be a conscious use. Here the defendant wants this Court to impose upon the plaintiffs a definition of "in use" that would also encompass unconscious acts. This Court refuses to do so.

Accordingly, the Court **DENIES** the defendant's motion for summary judgment.

CONCLUSION

To summarize, the Court **GRANTED IN PART AND DENIED IN PART** the defendant's first motion for partial summary judgment (Document No. 69). Summary judgment was granted in favor of the defendant and against the plaintiffs on the negligence and willful and wanton counts. The plaintiffs' motion for partial summary judgment (Document No. 74) is **DENIED.** And the defendant's second motion for partial summary judgment (Document No. 97) is **DENIED.**

IT IS SO ORDERED.

Edward C. CELLA, II, Plaintiff,

v.

UNITED STATES of America, Defendant.

No. F 89-30.

United States District Court, N.D. Indiana, Fort Wayne Division.

Nov. 5, 1991.

Order Granting in Part and Denying in Part Motion to Amend Judgment Feb. 12, 1992.

Seaman brought suit against United States to recover damages for injuries sus-

In re Robert Burns JENSEN; Rosemary Tooker Jensen, Debtors.

CALIFORNIA DEPARTMENT OF HEALTH SERVICES, Appellant,

v.

Robert Burns JENSEN; Rosemary Tooker Jensen, Appellees.

No. 91-15879.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 14, 1993.

Decided June 15, 1993.

Chapter 7 debtors brought adversary proceeding to determine whether state's claim for hazardous waste cleanup costs was discharged. The United States Bankruptcy Court for the Eastern District of California, Loren S. Dahl, Chief Judge, 114 B.R. 700, held for state, and appeal was taken. The Bankruptcy Appellate Panel, Ashland, J., 127 B.R. 27, reversed, and appeal was taken. The Court of Appeals held that state had sufficient, prepetition knowledge of debtors' potential liability to give rise to prepetition, contingent "claim" for cleanup costs, and, thus, claim had been discharged in bankruptcy.

Bankruptcy Appellate Panel affirmed.

1. Bankruptcy ⇐3782

Bankruptcy Appellate Panel's decision is reviewed de novo.

2. Bankruptcy ⇐3782, 3786

Bankruptcy court's conclusions of law are reviewed de novo, and its findings of fact are reviewed for clear error.

3. Health and Environment ⇐25.5(5.5)

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), and similar state laws, like California's Carpenter-Presley-Tanner Hazardous Substance Account Act, seek to protect public health and environment by facilitating cleanup of environmental contamination and imposing costs on parties responsible for the pollution. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101–405, as amended, 42 U.S.C.A. §§ 9601–9675; West's Ann.Cal. Health & Safety Code §§ 25300–25395.

4. Bankruptcy ⇐2363.1

Bankruptcy Reform Act of 1978 is designed to give debtor a fresh start by discharging as many of its debts as possible.

5. Bankruptcy ⇐2825, 2828.1

Claim for contribution for environmental cleanup does not arise only when there is enforceable right to payment; a "claim" is designed to ensure that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. Bankr.Code, 11 U.S.C.A. § 101(5)(A).

See publication Words and Phrases for other judicial constructions and definitions.

6. Bankruptcy ⇐3345

Letter from state inspector demonstrated that California Department of Health Services had sufficient prepetition knowledge of debtors' potential liability to give rise to prepetition, contingent "claim" for cleanup costs associated with hazardous waste stored at Chapter 7 debtor's lumberyard, and, thus, claim was discharged in debtor's bankruptcy, even though debtors were not notified until case had been closed that the state considered them liable for cleanup costs. Bankr. Code, 11 U.S.C.A. § 101(5)(A).

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Brian Chally, Senior Deputy Atty. Gen., for amicus curiae State of Nev.

Tom Udall, Atty. Gen., for amicus curiae State of N.M.

Brian J. Zwit, Asst. Atty. Gen., for amicus curiae State of Tex.

Appeal from the United States Bankruptcy Appellate Panel of the Ninth Circuit.

Before ALDISERT,* GOODWIN, and FLETCHER, Circuit Judges.

PER CURIAM:

The California Department of Health Services ("California DHS") appeals the decision of the Bankruptcy Appellate Panel that its claim against Robert Burns Jensen and Rosemary Tooker Jensen for cleanup of hazardous waste at the Jensen's former business property was discharged in the couple's bankruptcy. We have jurisdiction over California DHS's timely appeal pursuant to 28 U.S.C. § 158(d) (1988). We affirm.

I. Facts

A decade ago, the Jensens owned a closely-held corporation called the Jensen Lumber Co. ("JLC") and briefly operated its lumber business.[1] On December 2, 1983, JLC filed a voluntary Chapter 11 bankruptcy petition; the company had been in business only since May 1983.

Several weeks after the petition was filed, on January 25, 1984, an inspector from the California Regional Water Quality Control Board ("California Water Board") visited the inactive JLC site and noticed a large, cinder-block tank. The tank contained about 5,000 gallons of a lumber fungicide. JLC had used the "dip tank" and fungicide solution to treat the lumber it processed. The solution contained toxic chlorinated phenols (including pentachlorophenal, or "PCP").

By letter dated February 2, 1984, the California Water Board inspector expressed his concern to Robert Jensen that any release of the solution "through accident or vandalism.... would probably cause a major fish kill in the South Fork Trinity River and could possibly affect the health of downstream water users."[2] ER at 27. The inspector requested prompt action to prevent such a catastrophe, and advised Robert Jensen that he should either find another operating lumber mill that could use the fungicide, or contact an appropriate hazardous waste removal company.

The Jensens' attorney at the time responded by letter dated February 10, 1984. He advised the California Water Board that JLC would "almost certain[ly]" go completely out of business and that its bankruptcy case likely would be converted to a Chapter 7 proceeding. He also informed the California Water Board that JLC "has no funds available to dispose of the lumber fungicide." ER at 28. On February 13, 1984, the Jensens filed a Chapter 7 personal bankruptcy petition. On March 20, 1984, as predicted, JLC converted its pending corporate Chapter 11 proceedings to a Chapter 7 liquidation.

The California Water Board brought the California DHS in to assist in removing the fungicide on March 23, 1984. On May 18, 1984, a California DHS waste management specialist supervised the removal of the solu-

* Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

1. The JLC mill was located outside of Hyampom, California, a small town situated roughly halfway between Eureka and Redding, California, and almost directly due south of the town of Burnt Ranch, California.

2. PCP is "highly toxic" and can cause liver and kidney damage, adverse changes in respiratory, circulatory, and renal functions, edema of the brain and lungs, and inflammation of the gastric mucosa. ER at 41. The presence of PCP and other toxins at the abandoned JLC site was particularly serious because Hyampom's 300 residents, residing within a three-mile radius of the mill, utilized well water drawn from a main aquifer as their primary source of drinking water. Contamination of this aquifer would be a significant problem. *Id.*

tion from the six foot by six foot by twenty foot dip tank. The California DHS specialist noticed spillage inside the building housing the tank, and evidence of leakage on the river side of the building. He took soil samples, which revealed varying concentrations of PCP contamination; the worst contamination seemed to be located, not surprisingly, in and around the dip tank. Initial estimates of the volume of fungicide in the tank had been about 3,000 gallons. In fact (as suggested above), about 5,000 gallons were pumped into the waste removal tanker, filling it to capacity.[3]

The Jensens' personal bankruptcy case was closed on February 20, 1985. No assets were distributed to creditors. The JLC corporate bankruptcy proceedings closed March 18, 1987. On March 30, 1987, California DHS notified Robert Jensen that it considered him a responsible party liable for the cleanup of the hazardous waste at the JLC site. Rosemary Jensen was later named a potentially responsible party.

Eventually, having been unable to persuade the Jensens or other involved parties to undertake independently the cleanup operation, California DHS developed its own remedial action plan. California DHS has spent over $900,000 at the JLC site (including areas other than the dip tank). The Jensens, doing business as JLC, have been allocated ten percent financial responsibility for the cleanup.

On December 5, 1988, the Jensens' personal bankruptcy proceedings were reopened to permit them to list California DHS and the other parties to the JLC site cleanup as creditors. Their adversary proceeding complaint, dated April 24, 1989, sought a determination that their pro rata share of the cleanup expenses had been "discharged by the granting of the discharge to the debtors herein on July 23, 1984." ER at 7–8.

Ruling on cross-motions for summary judgment, the bankruptcy court determined that California DHS's cleanup recovery claim "arose postpetition and is not subject to discharge." *In re Jensen*, 114 B.R. 700, 707 (Bankr.E.D.Cal.1990). The BAP reversed, finding that "[b]ecause ... claims in bankruptcy arise based upon the debtor's conduct, ... [California] DHS's claim arose in this case prepetition, and was therefore discharged in the Jensens' bankruptcy." *In re Jensen*, 127 B.R. 27, 33 (Bankr. 9th Cir.1991). California DHS filed its notice of appeal from that decision on June 3, 1991.

II. Analysis

[1, 2] The BAP's decision is reviewed de novo. *In re Dewalt*, 961 F.2d 848, 850 (9th Cir.1992). The bankruptcy court's conclusions of law are reviewed de novo, and its findings of fact are reviewed for clear error. *Id.*

[3] The intersection of environmental cleanup laws and federal bankruptcy statutes is somewhat messy. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. §§ 9601–9675 (1988 & Supp.1993) ("CERCLA"), and similar state laws, like California's Carpenter–Presley–Tanner Hazardous Substance Account Act, Cal.Health & Safety Code §§ 25300–25395 (West 1992) ("HSA"),[4] seek "to protect public health and the environment by facilitating the cleanup of environmental contamination and imposing costs on the parties responsible for the pollution." Kevin J. Saville, Note, *Discharging CERCLA Liability in Bankruptcy: When Does a Claim Arise?*, 76 Minn.L.Rev. 327, 327 (1991)

3. As a result, "there was no room [in the removal tanker] for any [dip] tank rinseate." ER at 155. The California DHS specialist posted hazardous waste signs at the building entrances. Despite the warnings, a federal Environmental Protection Agency ("EPA") inspection on April 4, 1985 revealed that the free-standing portions of the cinder-block dip tank had been disassembled and set outside the building; "the stained back and left side of the tank remained as part of the building." ER at 39. Incredibly, the EPA officials were told by a man at the site that the dip tank building "would be leased to him for use as an auto body shop." *Id.*

4. We adopt the bankruptcy court's apt observation that "general references to CERCLA cases" are acceptable even in the context of litigation dealing primarily with HSA "in light of the strong similarity and interdependence between the two" statutes. *In re Jensen*, 114 B.R. at 703 n. 4.

[hereinafter *Discharging CERCLA Liability in Bankruptcy*].

[4] By contrast, the Bankruptcy Reform Act of 1978, 11 U.S.C.A. §§ 101–1330 (1988 and Supp.1993), is "designed to give a debtor a 'fresh start' by discharging as many of its 'debts' as possible." Arlene Elgart Mirsky et al., *The Interface Between Bankruptcy and Environmental Laws*, 46 Bus.Law. 626, 626 (1991) [hereinafter *The Interface Between Bankruptcy and Environmental Law*]. Consistent with this policy, a "claim" is defined at 11 U.S.C.A. § 101(5) in these broad terms:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C.A. § 101(5).

Conflict and confusion are almost inevitable. *See In re Chicago, M., St. P. & P.R.R.*, 974 F.2d 775, 777 (7th Cir.1992). For instance,

> [i]f a problem exists but has not been found or if a cleanup occurs at an identified site before liability is determined, can one of the potentially responsible parties ("PRPs") get a complete discharge in bankruptcy? [And h]ow can a debtor get a fresh start if it is potentially subject to environmental liability, a large portion of which may be contingent . . .?

The Interface Between Bankruptcy and Environmental Laws, 46 Bus.Law. at 627.

Notwithstanding what might be perceived to be diametrically opposed philosophies, the Supreme Court has indicated more than once that, if possible, these two conflicting objectives should be reconciled. *Erman v. Lox Equip. Co.*, 142 B.R. 905, 907 (N.D.Cal.1992) (citing, *inter alia*, *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986); *Ohio v. Kovacs*, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985)); *see also In re Nat'l Gypsum Co.*, 139 B.R. 397, 404 (N.D.Tex.1992) ("it is not a question of which statute should be accorded primacy over the other, but rather what interaction between the two statutes serves most faithfully the policy objectives embodied in the two separate enactments of Congress").

Courts considering when a claim for environmental response costs arose have employed somewhat varying approaches to the question. *See In re Jensen*, 127 B.R. at 30–33. Several courts, including the bankruptcy court below, have rejected the argument that a CERCLA claim arises upon the release or threatened release of hazardous waste, holding instead that each element of a CERCLA claim must be established, including the incurrence of response costs, before a dischargeable claim arises. *United States v. Union Scrap & Metal*, 123 B.R. 831, 838 (D.Minn.1990) (citing *In re Jensen*, 114 B.R. at 706); *cf. In re M. Frenville Co.*, 744 F.2d 332 (3d Cir.1984) (defendant accounting firm in damages action filed by banks had "an unmatured, unliquidated, disputed claim" against debtor for indemnity and contribution when banks filed their action), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 911, 83 L.Ed.2d 925 (1985).

The BAP rejected this analysis as inconsistent with the broad statutory definition of a "claim" and with "the overriding goal of the Bankruptcy Code to provide a 'fresh start' for the debtor." *In re Jensen*, 127 B.R. at 31 (quoting *Grogan v. Garner*, 498 U.S. 279, 286–87, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991)). Indeed, neither *Union Scrap* nor *Frenville* has had a substantial impact. The Minnesota district court, in an opinion subsequent to *Union Scrap*, disregarded the "response costs" rule and focused instead on when the party asserting the CERCLA claim had notice of the claim:

> When the debtor has not disclosed its potential [CERCLA] liabilities in long-since closed bankruptcy proceedings, and the governmental agency has not had actual knowledge of the potential claim in sufficient time to file a claim in those proceed-

ings, the potential [CERCLA] claim is not discharged.

Sylvester Bros. Dev. Co. v. Burlington N.R.R., 133 B.R. 648, 653 (D.Minn.1991).

In a case following its decision in *Frenville*, the Third Circuit considered whether a contingent claim for contribution under CERCLA could arise before CERCLA was enacted. The court held, "[I]t was not until the passage of CERCLA that a legal relationship was created between the [parties] relevant to the petitioners' potential causes of action such that an interest could flow." *In re Penn Cent. Transp. Co.*, 944 F.2d 164, 168 (3d Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992). The court did not cite *Frenville* but instead relied on *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.) (claims of plaintiffs asserting tort causes of action under Federal Employers' Liability Act did not arise until plaintiffs suffered identifiable, compensable injuries), *cert. denied*, 474 U.S. 864, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985).

The Seventh Circuit has also considered this issue. In *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 974 F.2d 775, the state of Washington took soil samples and conducted tests concerning possible contamination at a railyard formerly owned by the debtor in bankruptcy. Shortly before the consummation date, the test results were obtained, indicating that contamination had taken place. The state did not file a proof of claim before the relevant bar date. The court held:

> when a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which this potential claimant knows will lead to CERCLA response costs, and when this potential claimant has, in fact, conducted tests with regard to this contamination problem, then this potential claimant has, at least, a contingent CERCLA claim for purposes of Section 77.

Id. at 786.

A different approach—the one utilized by the BAP in reversing the bankruptcy court's decision in this case—counsels that the bankruptcy claim arises at the time of the debtor's conduct relating to the contamination. *In re Jensen*, 127 B.R. at 32–33. In other words, response costs expended by a California DHS or EPA are dischargeable where they result from pre-petition releases or threatened releases of hazardous substances. *In re Chateaugay Corp.*, 944 F.2d 997, 1005 (2d Cir.1991); *In re Jensen*, 127 B.R. at 33 ("a claim arises for purposes of discharge upon the actual or threatened release of hazardous waste by the debtor").

Another method for addressing the environmental/bankruptcy issue might be called the "relationship" test. *See In re Edge*, 60 B.R. 690 (Bankr.M.D.Tenn.1986). This approach establishes the date of a bankruptcy claim "at the earliest point in the relationship between the debtor and the creditor." *In re Jensen*, 127 B.R. at 31. For example, although a debtor dentist's pre-petition negligence may escape detection until post-petition, a bankruptcy claim arises at the point of the dentist's negligent act. *Id.* at 31–32 (discussing *In re Edge*). A post-petition suit against the debtor dentist was prohibited by 11 U.S.C. § 362's automatic stay. *In re Edge*, 60 B.R. at 705.

[5] Not all of these analyses give adequate consideration to the policy goals of the environmental laws and the bankruptcy code. To hold that a claim for contribution arises only when there is an enforceable right to payment appears to ignore the breadth of the statutory definition of "claim." In relevant part, a claim is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C.A. § 101(5)(A). This "broadest possible definition" of "claim" is designed to ensure that "all legal obligations of the debtor, *no matter how remote or contingent*, will be able to be dealt with in the bankruptcy case." H.R.Rep. No. 595, 95th Cong., 2d Sess. 1, 309 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266 (emphasis added); S.Rep. No. 598, 95th

Cong., 2d Sess. 1, 22, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5808 (same).[5]

The breadth of the definition of "claim" is critical in effectuating the bankruptcy code's policy of giving the debtor a "fresh start." *The Interface Between Bankruptcy and Environmental Laws*, 46 Bus.Law. at 650. *Frenville*'s "right of payment" theory is "widely criticized" outside the Third Circuit, *id.* at 652, at least in part because it would appear to excise "contingent" and "unmatured" claims from § 101(5)(A)'s list.

The debtor's conduct approach adopted by the BAP in this case is not immune from criticism, either. One commentator has noted that "[d]espite Congress's repeal of the 'provability' requirement and its broad definition of 'claim,' nothing in the legislative history or the Code suggests that Congress intended to discharge a creditor's rights before the creditor knew or should have known that its rights existed." *Discharging CERCLA Liability in Bankruptcy*, 76 Minn.L.Rev. at 348.

Moreover, "discharging liability solely because a release of hazardous substances occurred pre-petition may conflict with CERCLA's goal of cleaning up the environment quickly." *Id.* at 350. This drawback is, in a sense, the flipside of the "right to payment" approach, which ignores important bankruptcy concepts and objectives. Few would doubt that courts should not encourage the frustration of environmental cleanup efforts, just as courts should not override congressional attempts to legislate bankruptcy procedures and goals.

The "relationship" approach, when defined as broadly as in *In re Chateaugay*, "undermine[s] the rationale for considering whether or not a relationship exists," namely "that a creditor with a relationship may anticipate its potential claim." *Id.* at 353. "When courts fail to limit the scope of the relationship to situations where some pre[-]petition interaction between the PRP and the EPA existed, this expansive relationship approach takes on the characteristics of and thus suffers from the same infirmities as the 'underlying acts' approach." *Id.*

The sometimes competing policy goals of environmental law and the bankruptcy code were carefully balanced by Judge Barefoot Sanders in *In re National Gypsum*, 139 B.R. at 409. What might be called the "fair contemplation" test provides that "all future response and natural resource damages cost based on pre-petition conduct that can be fairly contemplated by the parties at the time of [d]ebtors' bankruptcy are claims under the [Bankruptcy] Code." *Id.* This approach stems from the belief that

> [t]he only meaningful distinction that can be made regarding CERCLA claims in bankruptcy is one that distinguishes between costs associated with pre-petition conduct resulting in a release or threat of release that could have been "fairly" contemplated by the parties; and those that could not have been "fairly" contemplated by the parties.

Id. at 407–08.

In re National Gypsum spells out certain indicia of fair contemplation ("knowledge by the parties of a site in which a PRP may be liable, NPL ['National Priorities List'] listing, notification by EPA of PRP liability, commencement of investigation and cleanup activities, and incurrence of response costs," *id.* at 408), and emphasizes that it is "not meant to encourage or permit dilatory tactics on the part of EPA or any other relevant government agency." *Id.* The Seventh Circuit in *In re Chicago, Milwaukee* follows a kindred analysis. What Judge Sanders described as "fairly contemplated by the parties," the Seventh Circuit described as the contemplation of a potential CERCLA claimant. According to the Seventh Circuit, when a bankruptcy

5. The authors of one recent article are direct in their rejection of a "right to payment"-type approach:

> The determination of when a claim arises for purposes of bankruptcy law should be a matter of federal bankruptcy law and should not be governed by the particular state or nonCode federal law giving rise to the claim. The reason for this is that the Code definition of "claim" expressly includes rights to payment or equitable relief that are unmatured or unliquidated. Most state or nonCode federal statutes are only concerned with claims that have matured or been liquidated.

The Interface Between Bankruptcy and Environmental Laws, 46 Bus.Law. at 651 (footnotes omitted).

debtor can be tied to a known release of a dangerous substance and when a potential CERCLA claimant has conducted tests revealing a contamination problem, a contingent CERCLA claim arises.

In re Chateaugay "relationship" approach adopts "so broad a definition of claim so as to encompass costs that could not 'fairly' have been contemplated by the EPA or the debtor pre-petition." *Id.* at 407. In rejecting that approach, the court in *In re National Gypsum* remarked that

> conduct giving rise to release or threatened release of hazardous substances pre-petition should be the relevant inquiry in determining the existence of a claim in bankruptcy, [but] this Court is not willing to favor the Code's objective of a "fresh start" over CERCLA's objective of environmental cleanup to the extent exhibited by *Chateaugay*.... [T]here exists no distinction between debtor's conduct and the release or threatened release resulting from this conduct.

Id. (footnotes omitted).

[6] Here, the California Water Board and California DHS are agencies of the same state, involved generally in many of the same capacities. An inspector from the California Water Board visited the inactive lumberyard on January 25, 1984, and observed the fungicide dip tank. The Board notified Robert Jensen of the problem by letter dated February 2, 1984. The letter demonstrates that the Board knew of the serious environmental hazard that existed at the site:

> If this cinder block tank were to be broken through accident or vandalism, the contents of the tank would reach the South Fork Trinity River via a small stream which runs behind the building. The volume of fungicide involved would probably cause a major fish kill in the South Fork Trinity River and could possibly affect the health of downstream water users.

ER at 27. We will impute the California Water Board's knowledge to California DHS. We conclude that the state had sufficient knowledge of the Jensens' potential liability to give rise to a contingent claim for cleanup costs before the Jensens filed their personal bankruptcy petition on February 13, 1984. The claim filed by California DHS against the Jensens therefore was discharged in the Jensens' bankruptcy.

AFFIRMED.

UNITED STATES of America, Plaintiff–Appellee,

v.

Roy L. BARTON, Defendant–Appellant.

No. 92–30304.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 7, 1993.

Decided June 15, 1993.

Defendant was convicted before the United States District Court for the Eastern District of Washington, Fred L. Van Sickle, J., of manufacturing marijuana, and he appealed. The Court of Appeals, Alarcon, Circuit Judge, held that: (1) government's negligent destruction of marijuana plants seized from defendant's residence did not violate due process, where there was no evidence that officers acted in bad faith in placing plants in unventilated plastic bags, and (2) district court did not err in including male marijuana plants in calculating defendant's offense level under the Sentencing Guidelines.

Affirmed.

1. Criminal Law ⇐700(9)

To protect right of privacy, due process principle announced in *Brady* and its progeny concerning destruction of exculpatory or potentially exculpatory evidence must be applied to suppression hearing involving challenge to truthfulness of allegations in affida-

sion from the lien avoidance power of § 522(f).

Therefore, this court is of the opinion that *Owen v. Owen, supra*, effectively supersedes the earlier line of authorities from the Fifth Circuit Court of Appeals. Subject to the limiting conditions set forth earlier in this opinion, the motions filed by the debtors and the Chapter 13 trustee to avoid the nonpossessory, nonpurchase-money security interests of Tower Loan are hereby sustained.

Separate orders will be entered consistent with this Opinion.

In re NATIONAL GYPSUM COMPANY, a Delaware Corporation, Aancor Holdings, Inc., a Delaware Corporation.

Civ. A. No. 3-91-1653-H. Bankruptcy Nos. BK390-37214-SAF-11, BK390-37213-SAF-11.

United States District Court, N.D. Texas, Dallas Division.

Feb. 12, 1992.

Adversary proceeding was brought for determination of dischargeability, as contingent unliquidated claims, of debtors' potential liability for future CERCLA response costs and natural resource damage costs resulting from debtors' prepetition activity. The District Court, Sanders, Chief Judge, held that: (1) debtors' potential liability for such costs gave rise to dischargeable "claims" to the extent that such claims could fairly be contemplated by parties at time of commence of case; (2) federal government was entitled to extension of claims bar date in order to permit addition of claim for contingent unliquidated response costs to its timely filed proof of claim; and (3) response costs incurred postpetition as result of debtors' prepetition activity were entitled to administrative priority, to extent such costs were necessitated by conditions that posed imminent and identifiable harm to environment and public health.

So ordered.

1. Bankruptcy ⇐2825

Determination of whether claim arises in bankruptcy requires analysis of interest created by nonbankruptcy substantive law.

2. Bankruptcy ⇐2825

Creditor has "claim" in bankruptcy proceeding only if, prior to filing of bankruptcy petition, relationship between creditor and debtor contained all of the elements necessary to give rise to legal obligation under relevant nonbankruptcy law.

3. Bankruptcy ⇐2021

Bankruptcy does not provide forum for creation of new rights, but serves only as forum for recognition of rights already acquired.

4. Bankruptcy ⇐2825

Creditor need not have cause of action that is ripe for adjudication outside of bankruptcy in order for it to have prepetition claim for purposes of Bankruptcy Code.

5. Bankruptcy ⇐2821

While nonbankruptcy law governs existence of claim under Bankruptcy Code, it is not dispositive of time at which claim arises.

6. Bankruptcy ⇐3345

Debtors' potential liability for future CERCLA response costs and natural resource damage costs as result of their prepetition conduct gave rise to "claims," which debtors could discharge in bankruptcy proceeding, to extent such claims could fairly be contemplated by parties as of commencement of bankruptcy case.

7. Bankruptcy ⇐3345

Factors to be considered by bankruptcy court, in deciding whether debtor's potential liability for future CERCLA re-

sponse costs give rise to "claim" which may be discharged in bankruptcy proceeding, include knowledge by parties of site for which potentially responsible party (PRP) may be liable, listing of site on National Priorities List, notification by Environmental Protection Agency of PRP liability, commencement of investigation and cleanup activities, and incurrence of response costs.

8. Bankruptcy ⇐2901

Federal government did not have to have full information as to debtors' existing or potential Superfund liabilities under CERCLA in order to be obligated to include such unliquidated contingent liabilities in proof of claim filed in debtors' bankruptcy proceeding.

9. Bankruptcy ⇐3345

Bankruptcy statute providing that federal government shall be bound, to same extent as other parties, by determination of issue under specific bankruptcy provisions, waived federal government's sovereign immunity with respect to determination of dischargeability of debtors' obligations for CERCLA response costs and natural resource damage costs. Bankr.Code, 11 U.S.C.A. § 106(c).

10. Bankruptcy ⇐2060

Bankruptcy dischargeability proceeding brought by parties potentially responsible for CERCLA cleanup costs was one which interfered with "normal CERCLA enforcement proceedings," within meaning of statute prohibiting any federal court from taking jurisdiction over such an action. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 113(h), as amended, 42 U.S.C.A. § 9613(h).

11. Bankruptcy ⇐2060

Statute prohibiting federal courts from accepting jurisdiction over action which interferes with "normal CERCLA enforcement proceedings" did not serve as jurisdictional bar to adversary proceeding brought by debtors for determination of dischargeability of obligation for CERCLA response costs, where federal government had engaged in enforcement action in bankruptcy proceeding by filing proof of claim. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 113(h), as amended, 42 U.S.C.A. § 9613(h).

12. Bankruptcy ⇐2892

Any claim for CERCLA response costs not asserted in federal government's proof of claim was barred, to extent such claim was within fair contemplation of parties at time of commencement of case. Fed.Rules Bankr.Proc.Rule 3003(c)(2), 11 U.S.C.A.

13. Bankruptcy ⇐2900(1)

Excusable neglect in failing to timely file proof of claim, such as may permit bankruptcy court to extend claims bar date, is flexible concept, but one which should be invoked only in unique or extraordinary circumstances. Fed.Rules Bankr.Proc.Rule 9006(b), 11 U.S.C.A.

14. Bankruptcy ⇐2900(1)

"Extraordinary circumstances" existed such as to permit bankruptcy court to allow federal government extension of time within which to file proof of claim for contingent CERCLA response costs, based on novel legal issues regarding when such claims arise. Fed.Rules Bankr.Proc.Rule 9006(b), 11 U.S.C.A.

15. Bankruptcy ⇐2874

Federal government's claim for CERCLA response costs incurred postpetition as result of debtors' prepetition activities was entitled to administrative priority, to extent such costs were necessitated by conditions that posed imminent and identifiable harm to environment and public health. Bankr. Code, 11 U.S.C.A. § 503(b)(1)(A).

16. Health and Environment ⇐25.5(5.5)

To avoid joint and several liability as potentially responsible parties for CERCLA response costs, debtors had to establish that environmental injury was in fact capable of divisibility, and that reasonable basis existed for such apportionment.

17. Health and Environment ⇐25.15(1)

Question of divisibility of environmental injury, for purpose of deciding whether potentially responsible parties should bear

joint and several liability for injury, is one of fact to be determined by presentation of evidence.

18. Bankruptcy ⇐2103

Bankruptcy case would be referred back to bankruptcy court, once district court's order disposed of material nonbankruptcy matters which had prompted withdrawal of reference. 28 U.S.C.A. § 157(a).

Marvin Collins, U.S. Atty., Rebecca Gregory, Asst. U.S. Atty., Dallas, Tex., David L. Dain, U.S. Dept. of Justice, Environment & Natural Resources Div., John Wheeler, Enforcement LE–134S, U.S. E.P.A., Anna Wolgast, Jeffery K. Gordon, Peter E. Jaffe, U.S. Dept. of Justice, Washington, D.C., for E.P.A., plaintiff.

David L. Dain, U.S. Dept. of Justice, Enviroment & Natural Resources Div., Carolyn Dibona, Office of the Sol., Dept. of the Interior, Washington, D.C., for U.S. Dept. of Interior, plaintiff.

Boe W. Martin, Keith W. Harvey, Johnson & Gibbs, Dallas, Tex., James W. Moorman, David F. Williams, Cadwalader Wickersham & Taft, Washington, D.C., Rebeca O. Beasley, National Gypsum Co., Dallas, Tex., for National Gypsum Co., defendant.

Barbara J. Houser, Leonard M. Parkins, Anne Marie Ferazzi, Sheinfeld Maley & Kay, Dallas, Tex., for Official Committee of Asbestos Claimants of Nat. Gypsum, movant.

MEMORANDUM OPINION AND ORDER

SANDERS, Chief Judge.

There are before the Court two sets of motions that will be considered jointly. The first set of motions consists of:

1. United States' Motion for Legal Determination of Issues Raised in the Debtors' Objection, Motions and/or Counterclaims, filed October 28, 1991 ("U.S. Motion");
2. Debtors' Brief in Response to the United States' Motion for Legal Determination of Issues and Supporting Brief, filed November 29, 1991 ("Debtors' Response");
3. Statutory Bond and Trade Creditors' Committee Memorandum in Support of Debtors' Objections, Motions and/or Counterclaims, filed November 27, 1991 ("Committee Memorandum"); and
4. United States' Reply to Debtors' and Committee's Response to United States' Motion for Determination of Legal Issues, filed December 18, 1991 ("U.S. Reply").

The second set of motions consists of:

1. Debtors' Motion for Summary Judgment Concerning Discharge of any Environmental Liability for Sites Not Listed in the Government's Proof of Claim and supporting Memorandum, filed October 25, 1991 ("Debtors' Motion");
2. United States' Motion for Partial Dismissal of the Amended Counterclaim of Debtors and supporting Memorandum, and Memorandum Brief in Response to Debtors' Motion for Summary Judgment, filed November 12, 1991 ("U.S. Response");
3. Debtors' Memorandum in Opposition to Motion of the United States for Partial Dismissal of Debtors' Amended Counterclaim and in Reply to the United States' Memorandum in Response to Debtors' Motion for Summary Judgment, filed November 29, 1991 ("Debtors' Reply"); and
4. Reply of the United States in Further Support of its Motion for Partial Dismissal of Amended Complaint, filed December 17, 1991 ("U.S. Reply II").

I. *Factual Summary*

National Gypsum Co. ("Gypsum"), along with its parent corporation, Aancor Holding Inc., (collectively "Debtors"), filed a voluntary petition for bankruptcy on October 28, 1990 under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* ("Code"). Since the petition date, Debtors have operated their businesses as debtors in possession pursuant to Sections 1107 and 1108 of the Code.

On May 29, 1991 the United States filed its Proof of Claim ("Proof of Claim") on behalf of the Environmental Protection

Agency ("EPA") and the Department of Interior ("DOI"). Pursuant to CERCLA,[1] the United States' Proof of Claim lists seven sites nationwide at which it alleges the Debtors generated or disposed of hazardous substances ("Listed Sites"). In addition, the United States reserves its right to assert that the Debtors are liable under CERCLA with respect to at least thirteen unlisted sites based on pre-petition conduct ("Unlisted Sites"). For a detailed discussion of the Proof of Claim, and United States' Listed and Unlisted Sites, refer to Section III, *infra*.

On August 2, 1991 the Debtors filed with the bankruptcy court an Objection to the Proof of Claim, a Motion to Estimate the United States' Claim and a Motion to Classify the United States' Claim. Debtors' motions raised a number of significant legal issues regarding the intersection of the Code and CERCLA.

On August 16, 1991 the United States filed a Motion for Withdrawal of Reference. On September 13, 1991 this Court granted the United States' Motion, withdrawing from bankruptcy court all matters pertaining to the Proof of Claim, and all Debtors' responses to such claim. *See* September 13, 1991 Memorandum Opinion and Order. 134 B.R. 188. The Court found that disposition of the Proof of Claim implicated the category of cases that requires substantial and material consideration of non-bankruptcy federal statutes, and warrants mandatory withdrawal of reference pursuant to 28 U.S.C. § 157(d). *See id.*

Once reference was withdrawn, the United States and the Debtors agreed on a schedule for the briefing of significant and controlling legal issues raised by the Proof of Claim, and more specifically, by the interaction of the Code and CERCLA. These legal issues are embodied in the two sets of motions before the Court: The United States' Motion for Legal Determination of Issues Raised in the Debtors' Objection, Motions and/or Counterclaims, and the Debtors' Motion for Summary Judgment Concerning Discharge of any Environmental Liability for Sites not Listed in the United States' Proof of Claim.

Beyond setting a schedule for the briefing of the two sets of motions, the parties were unable to agree on a stipulated schedule for discovery and trial. As a result, on October 15 and 18, 1991 the United States and the Debtors filed, respectively, two separate proposed scheduling orders. The proposed scheduling orders placed before the Court for determination the order in which estimation and determination of liability of the United States claims' should be addressed.

On November 12, 1991 the Court granted Debtors' request for bifurcation of the proceedings into an estimation phase which precedes the liability phase; however, estimation of the Proof of Claim would occur no earlier than the disposition of the two sets of scheduled motions. *See* November 12, 1991 Memorandum Opinion and Order. The Court found that in view of the Court's mandatory withdrawal of reference, and in order to facilitate the administration of the bankruptcy proceedings, there existed no reason to depart in a case involving CERCLA from the well-established bankruptcy practice and policy favoring estimation of unliquidated claims prior to determination of liability. *See id.* At that time, the Court found that a potentially large portion of the United States' Proof of Claim was unliquidated. *See id.* at 5. The Court has not yet adopted a trial and discovery schedule.

II. *Parties' Contentions*

The two sets of pleading raise the following controlling questions of law:

1. Whether future response costs and future natural resource damage costs at the Listed Sites are "claims" within the meaning of the Bankruptcy Code, subject to discharge;

2. Whether Debtors' environmental liabilities for the Unlisted Sites arising from pre-petition conduct are "claims"

1. CERCLA refers to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601–9675 (1989).

within the meaning of the Bankruptcy Code, subject to discharge;

3. Whether response costs incurred in connection with property presently owned by Debtors are entitled to administrative expense priority; and

4. Whether Debtors are jointly and severally liable for claims at the Listed sites.

The United States argues that future response costs and future natural resource damage costs at the Listed Sites are not claims subject to discharge; Debtors' liabilities at Unlisted Sites are not dischargeable claims; response costs incurred post bankruptcy at property owned by Debtors are entitled to administrative priority; and liability of Debtors for CERCLA claims is joint and several. The United States, however, contests the Court's jurisdiction to address Debtors' liability at the Unlisted Sites.

The Debtors argue, in contrast, that Debtors' potential liability for any future response costs or future natural resource damages at the Listed Sites constitute pre-petition claims subject to discharge; Debtors' environmental liabilities for the Unlisted Sites arising from pre-petition conduct are claims; response costs incurred post bankruptcy at property owned by the Debtors are general unsecured claims; and the Proof of Claim should be fixed at an amount reflecting Debtors' equitable share of liability. In addition, Debtors maintain that the Court has subject matter jurisdiction to address Debtors' liability at the Unlisted Sites.

III. *Proof of Claim: Listed/Unlisted Sites*

Upon filing for bankruptcy, the Debtors alerted the United States that they may be liable for recovery of cleanup costs at a number of Superfund sites. After preliminary investigation of the Debtors' potential responsibility for hazardous waste clean up, the United States, needing more time to complete its investigations, requested an extension in the bar date set by the bankruptcy court [2]. The Debtors and the United States identified over twenty sites at which there existed a potential for liability on the part of the Debtors.

By the extended bar date, May 29, 1991, the United States determined to file its Proof of Claim for Debtors' pre-petition conduct at only seven Superfund sites ("Listed Sites"). The United States, however, reserves its right to assert that the Debtors are liable under CERCLA with respect to at least thirteen unlisted sites based on pre-petition conduct ("Unlisted Sites").

A. Listed Sites[3]:

The United States Proof of Claim lists seven sites, all of which are on EPA's "National Priorities List [4]" ("NPL") of sites targeted for Superfund response. The Proof of Claim involves Debtors' liability on primarily three grounds: past response costs [5], future response costs [6] and natural

2. The bar date issued by the bankruptcy court initially required all creditors with pre-petition claims to file proof of claims by March 18, 1991. However, in response to the United States Motion for extension of time, the bankruptcy court granted the United States an additional 60 days to file its claim. Debtors, themselves, then filed an emergency motion, apparently at the request of the government, seeking to extend the bar date for an additional nine days, or until May 29, 1991, which was granted.

3. Although derived primarily from Debtors' pleadings, this section involves facts the Court understands to be undisputed; the United States has not challenged any of these factual presentations. However, since the purpose of the pleadings relating to the Listed Sites is solely determination of legal questions, the Court's reference to these facts should not be construed as binding determinations.

4. The NPL is intended to prioritize releases or threatened releases throughout the United States for the purpose of taking remedial action. *See* 42 U.S.C. § 9605(a)(8)(A). The criteria for establishing priorities is set by statute and takes into account the population at risk, the hazard potential of the substances, potential of contaminating drinking water supplies and ambient air, and potential for destruction of ecosystems, among a number of other factors. *See id.* As a matter of law, the NPL listing requires a preliminary finding by the EPA that a site poses a release or threat of release of a hazardous substance. *See id.* §§ 9605(a)(8)(A) & (B); *see also id.* § 9604(a)(1).

5. Section 104 of CERCLA authorizes the EPA to take "any ... response measure consistent with the national contingency plan which [EPA] deems necessary to protect the public health or

resource damages [7]. *See* 42 U.S.C. §§ 9607(a)(1), (2) and (3).

With respect to each of the seven Listed Sites [8], the United States has alleged that the Debtors arranged for the disposal of hazardous substances pre-petition; that a release or threat of release of a hazardous substance occurred or existed pre-petition; and that EPA first incurred response costs for each of these sites pre-petition. *See* Debtors' Appendix A, attached to Debtors' Response [9].

Some form of governmental action has been taken at each of the seven Listed Sites. Such action has taken the following varied forms, appearing often in combination, at any individual site: listing sites on NPL [10], notifying Debtors of their status as potentially responsible parties ("PRP"), Remedial Investigation and Feasibility Study [11], issuance of a Record of Decision [12], issuance of Administrative Consent Order [13], and incurrance of response costs [14]. *See id.*

welfare or the environment" whenever "any hazardous substance is released or there is a substantial threat of such a release into the environment...." 42 U.S.C. § 9604(a). EPA selects an appropriate remedy and can either order the potentially responsible party to take the remedial action under Section 106(a), *see id.* § 9606(a); or take the remedial action itself, using so-called Superfund money, and seek reimbursement for such response costs under section 107(a), *see id.* § 9607(a). Response Costs include investigative, remedial, removal and governmental oversight costs under CERCLA. *See id.* § 9601(25).

6. The United States maintains that future response costs and future natural resource damages are not "claims" under the Code, and for this reason should not be included in the Proof of Claim for the purpose of dischargeability. However, the United States has contingently included future costs and damages for unliquidated damages in its Proof of Claim in case this Court finds such future costs to be "claims" subject to the bankruptcy bar date.

7. CERCLA provides that, in addition to cost recovery for response and cleanup actions, natural resource trustees may recover damages for injury to, destruction of, or loss of natural resources resulting from the discharge of oils or the release of hazardous substances, including the reasonable costs of assessing such injury, plus any prejudgment interest. *See* 42 U.S.C. § 9607(a)(4)(C).

8. The 7 Listed Sites consist of the Asbestos Dump Sites (Millington, New Jersey), the Salford Quarry facility (Montgomery County, Pennsylvania), the City Industries Site (Orlando, Florida), Yellow Water Road (Jacksonville, Florida), the Coakley Landfill (North Hampton, New Hampshire), H.O.D. Landfill (Antioch, Illinois), and Yeoman Creek Landfill (Waukegan, Illinois).

   Response costs are alleged as to all seven Sites. Natural Resource damages are alleged only as to the Salford Quarry, the H.O.D. Landfill, the Yeoman Creek Landfill, and the Asbestos Dump Sites.

9. Debtors' Appendix A, attached to its response to the U.S. Motion, presents in tabular form, information for each of the seven Listed Sites concerning Debtors' alleged disposal, the alleged release or threat of release, and alleged incurrence of response costs.

10. *See supra* note 4.

11. Once a site has been placed on the National Priorities List (following a preliminary assessment and public notice and comment), a Remedial Investigation and Feasibility Study is conducted "to determine the nature and extent of the threat presented by the release and to evaluate proposed remedies." 40 C.F.R. § 300.68(d); 42 U.S.C. § 9604(a).

12. After completion of the Remedial Investigation and Feasibility Study, EPA selects an appropriate remedy from among the range of alternatives considered for the site. *See* 40 C.F.R. 300.68(a)–(j). The remedial decision is based upon the administrative record developed during the Investigation and Study, and must satisfy the statutory cleanup standards, which include all "applicable" and "relevant and appropriate" federal state and local laws. *See* 42 U.S.C. § 9621(d). CERCLA requires EPA to publish notice of any proposed remedial plan and afford an opportunity for public comment before adopting the plan. *See id.* § 9617. EPA embodies its final remedy selection in a Record of Decision. *See* 40 C.F.R. § 300.68.

13. After EPA issues a Record of Decision, it can solicit or compel potentially responsible parties to perform the removal or remedial action. Section 106(a) of CERCLA authorizes EPA to issue an Administrative Order directing responsible parties to perform the EPA-selected remedy. *See* 42 U.S.C. § 9606. Additionally, CERCLA authorizes the Attorney General to seek judicial relief to compel responsible parties to perform the remedy. *See id.*

14. EPA may choose to implement a remedy for a site itself, using Superfund money. Section 107(a) of CERCLA authorizes EPA to seek reimbursement of Superfund money spent for the cleanups. *See* 42 U.S.C. § 9607(a). A cost re-

B. Unlisted Sites[15]:

There are at least thirteen sites [16] not listed in the Proof of Claim at which the United States has asserted that the Debtors are liable under CERCLA. With respect to each of these Unlisted Sites, the United States has alleged that the Debtors arranged for the disposal of hazardous substances pre-petition; that a release or threat of release of a hazardous substance occurred or existed pre-petition; and that EPA first incurred response costs for each of these sites pre-petition. *See* Debtors' Appendix A, attached to Debtors' Motion [17].

However, in addition to the thirteen Unlisted Sites, the EPA has knowledge of numerous other sites to which it believes the Debtors are linked through its CERCLIS computer database. EPA's CERCLIS computer database lists the sites under investigation for purposes of the Superfund program, identifying those sites with which the Debtors, their present or prior affiliated companies, are related. *See* Debtors' Appendix B, attached to Debtors' Motion [18].

The United States refers to a lack of full information and its prosecutorial discretion as reasons for the non-inclusion of at least thirteen other sites in its Proof of Claim:

> Because of the large number of sites listed on the National Priorities List, the list of the nation's most pressing hazardous sites, and because of EPA's priority of devoting resources to the cleanup of hazardous waste at those sites, even after being afforded this extra time, the United States was not able to obtain *full* information as to the Debtors' existing or potential Superfund liabilities. Therefore, *because of a lack of information, or for other reasons within the prosecutorial discretion of the United States,* the United States determined to make a claim for the Debtors' involvement at only seven Superfund sites.

U.S. Response at 3 (emphasis added).

IV. *Analysis*

The questions of law outlined in Section II, *supra,* will be considered seriatim.

1. Future Response and Damage Costs:

The legal issue presented to the Court is whether future response costs and future natural resource damage costs at the Listed Sites are "claims" within the meaning of the Code, and subject to discharge.

The United States maintains that future response and damage costs based on pre-petition conduct do not give rise to a bankruptcy claim subject to discharge, and that only those costs already incurred prior to reorganization are dischargeable claims. In support of its position, the United States argues that under the Code, the time at which a claim arises is determined by reference to substantive non-bankruptcy law, and that CERCLA does not give rise to

covery action lies only after EPA has incurred response costs. *See id.*

15. As the preceding Section on Listed Sites, this section is similarly derived in large part from Debtors' pleadings, and the United States has not disputed the factual representations made by Debtors. However, since the issue regarding Debtors' liability at Unlisted Sites arises from Debtors' Motion for Summary Judgment, *see* Section IV–(2), *infra,* the factual representations adopted by the Court in this section are undisputed and binding.

16. The thirteen Unlisted Sites consist of: the Bay Drum Site (Tampa, Florida), Florence Land Recontouring Landfill (Florence Township, New Jersey), Wide Beach Development (Brant, New York), Sixty–Second Street Dump (Tampa, Florida), the Gold Coast Oil Site (Miami, Florida), Kin-Buc Landfill (Edison, New Jersey), McKin Co. (Gray, Maine), Liquid Disposal Inc. (Utica, Michigan), SED Inc. (Greensboro, North Carolina), Cannons Engineering Corp. (Bridgewater, Massachusetts), Operating Industries, Inc. Landfill (Monterey Park, California), Taylor Road Landfill (Hillsborough County, Florida), and Sand Springs Petrochemical Complex (Sand Springs, Oklahoma).

17. Debtors' Appendix A, attached to Debtors' Motion, presents in tabular form information for each of the thirteen known Unlisted Sites concerning National Gypsum's alleged disposal, the alleged release or threat of release, and the alleged incurrence of response costs. Debtors have provided documentation supporting the information summarized in the table.

18. Appendix B, attached to Debtors' Motion, is a print-out of a CERCLIS search conducted for Debtors.

liability or to a cognizable legal claim until costs have been expended or remedial measures adopted to address environmental hazards.

In contrast, the Debtors maintain that future response and damage costs based on pre-petition conduct are pre-petition claims subject to discharge under the Code. The Debtors claim that although the existence of a claim under the Code is determined by reference to the substantive non-bankruptcy law, the timing of a claim is not; and that courts must look to the earliest possible date upon which a claim may arise, so as to maximize the scope of a discharge. Debtors propose that the following three triggering events determine the time at which a CERCLA claim arises under the Code: (1) pre-petition conduct by the Debtors at a site; (2) pre-petition release or a threatened release of hazardous substances occurs at a site; or (3) pre-petition incurrence of the first response costs at a site by the United States.

Congress enacted CERCLA in response to the vast threats to public health and safety presented by unsafe disposal of toxic chemicals and hazardous substances. *See Voluntary Purchasing Groups v. Reilly*, 889 F.2d 1380 (5th Cir.1989). The provisions of CERCLA serve two goals,

> First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of a national magnitude and resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.

United States v. Reilly Tar & Chemical Corp., 546 F.Supp. 1100, 1112 (D.Minn. 1982). *See also Walls v. Waste Resource Corp.*, 823 F.2d 977, 980–81 (6th Cir.1987).

Once a potentially responsible party is in bankruptcy, the provisions of CERCLA cannot stand as the sole relevant statutory guide, and must be reconciled with the provisions of the Code. Contrary to the practical impact of the party's respective arguments, it is not a question of which statute should be accorded primacy over the other, but rather what interaction between the two statutes serves most faithfully the policy objectives embodied in the two separate enactments of Congress. In order to best serve the goals of CERCLA in the context of bankruptcy, the Court must recognize the circumstances particular to bankruptcy proceedings and the provisions of the Code that by necessity affect the PRP's ability to partake in environmental costs and remedies, as well as its ability to reorganize.

As previous courts have recognized, CERCLA and the Code are in tension in significant respects.

> The conflict begins at a basic level, since the goal of CERCLA—cleaning up toxic waste sites promptly and holding liable those responsible for the pollution—is at odds with the premise of bankruptcy, which is to allow debtors a fresh start by freeing them of liability. The two statutes also differ in their timing. To foster rapid cleanup, Congress embraced a policy of delaying litigation about cleanup costs until after the cleanup. Thus, under CERCLA, liability is not assessed until after the EPA has investigated a site, decided what remedial measures are necessary, and determined which potentially responsible persons will bear the costs.

In re Combustion Equipment Associates, Inc., 838 F.2d 35, 37 (2d Cir.1988).

Under the provisions of CERCLA, EPA has the authority to investigate hazardous sites, select a remedy and either seek affirmative relief (through an administrative order or injunction) to force a cleanup, or perform a cleanup using money from the Superfund and subsequently recover costs associated with the cleanup. *See* 42 U.S.C. §§ 9604, 9606, 9607, 9611. In fact, PRP liability is not assessed until after the EPA has investigated a site and adopted remedial measures under Section 113(h) of CERCLA. *See id.* § 9613(h); *see also In re Combustion*, 838 F.2d at 37 (CERCLA precludes pre-enforcement judicial review so as to allow for cleanup before litigation.).

Under the provisions of the Code, on the other hand, all pre-petition claims are generally subject to discharge. *See* 11 U.S.C. § 727(b). Section 101(4) of the Code defines a claim, in relevant part, as a:

> right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

11 U.S.C. 101(4)(A).

Furthermore, the Code requires estimation of all contingent or unliquidated claims which "unduly delay the administration of the case.[19]" 11 U.S.C. 502(c)(1).

The legislative history of the Code reflects Congress' intent that the term "claim" be given broad interpretation so that "all legal obligations of the debtor, no matter how remote or contingent will be able to be dealt with in the bankruptcy case." H.R.Rep. No. 595, 95th Cong., 1st Sess. 309, *reprinted in* 1978 U.S.Code Cong. & Admin.News 5787, 5963, 6266. The courts accordingly have given a broad and expansive reading to the term "claim". *See Ohio v. Kovacs*, 469 U.S. 274, 279, 105 S.Ct. 705, 707, 83 L.Ed.2d 649 (1985).

[1–3] Determination of whether a claim arises in bankruptcy requires an analysis of interests created by non-bankruptcy substantive law. *See In re Remington Rand Corp.*, 836 F.2d 825, 830 (3d Cir.1988); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 941 (3d Cir.), *cert. denied* 474 U.S. 864, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985). A claim exists only if before filing of the bankruptcy petition, the relationship between the debtor and the creditor contained all the elements necessary to give rise to a legal obligation—"a right to payment"—under the relevant non-bankruptcy law. *See United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 835 (D.Minn. 1990); *In re UNR Industries, Inc.*, 29 B.R. 741, 745–46 n. 4 (N.D.Ill.1983). Bankruptcy does not provide a forum for the creation of new rights, but "serves only as a forum for the recognition of rights already acquired." *In re Credit Industrial Corp.*, 366 F.2d 402, 407 (2d Cir.1966).

[4, 5] However, the creditor need not have a cause of action that is ripe for suit outside of bankruptcy in order for it to have a pre-petition claim for purposes of the Code. *See In re Remington Rand Corp.*, 836 F.2d 825, 826–27 (3d Cir.1988)[20]. The Code encompasses within the term "claim" all "contingent" "unliquidated" and "unmatured" rights to payment. *See* 11 U.S.C. § 101(4). The Code's power to estimate contingent claims similarly extends to otherwise unripe causes of action. *See In re Combustion*, 838 F.2d at 40. While non-bankruptcy law governs the *existence* of a claim under the Code, it is not dispositive of the *time* at which a claim arises under the Code. It is immaterial for the purpose of bankruptcy, whether EPA's claims against the Debtors are ripe for adjudication under CERCLA, as long as all the elements that can give rise to liability under CERCLA have occurred pre-petition.

[6] In reading together the statutory frameworks of CERCLA and the Code, the landmark case of *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir.1991), used the bankruptcy concept of contingent claims to bring future CERCLA response and dam-

19. Estimation can serve several purposes. Estimation of unliquidated and contingent claims "is essential prior to the hearing on confirmation of a plan, in order for the court to evaluate the feasibility of the plan without delaying the confirmation process." *In re MacDonald*, 128 B.R. 161, 164 (W.D.Tex.1991). It also serves the fundamental Code policy of treating similarly situated creditors equally, *see Matter of Brints Cotton Marketing, Inc.*, 737 F.2d 1338, 1342 (5th Cir.1984), and ensuring that Debtors receive a "fresh start" "without the threat of lingering claims 'riding through' the bankruptcy," *In re Baldwin-United Corp.*, 55 B.R. 885, 898 (Bankr. S.D.Ohio 1985).

20. The United States relies on the Third Circuit case of *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985), for its argument that a bankruptcy claim does not exist until a suit is ripe under the substantive law. The Third Circuit itself later retreated from this position in *In re Remington, supra*, and other courts have widely criticized the *Schweitzer* reasoning, *see, e.g., In re Jansen*, 127 B.R. 27, 30–31 (9th Cir. BAP 1991); *In re Edge*, 60 B.R. 690, 704 (Bankr.M.D.Tenn.1986).

age costs within the ambit of present discharge proceedings under the Code.

> The relationship between environmental regulating agencies and those subject to regulation provides sufficient "contemplation" of contingencies to bring *most* ultimately maturing payment obligations based on pre-petition conduct within the definition of "claims".

Id. at 1005 (emphasis added). Based on this regulatory relationship, the court in *Chateaugay* found that,

> nothing prevents the speedy and rough estimation of CERCLA claims for purposes of determining EPA's voice in the Chapter 11 proceedings, with ultimate liquidation of the claims to await the outcome of normal CERCLA enforcement proceedings in which EPA will be entitled to collect its allowable share (full or pro rata, depending on the reorganization plan) of incurred response costs.

Id. at 1006.

A "speedy and rough estimation" of the claims for the purposes of bankruptcy is not meant to interfere with the "normal CERCLA enforcement proceedings," and in fact, "final liquidation of the claims" must await such proceedings. *Id.* Estimation serves solely to determine the status to be accorded potential CERCLA claims in bankruptcy in order to facilitate "administration of the case," 11 U.S.C. 502(c)(1); and does not entail the type of litigation precluded by 42 U.S.C. § 9613(h) [21]. Accordingly, the court in *Chateaugay* found CERCLA's prohibition of pre-enforcement review inapplicable. *See Chateaugay*, 944 F.2d at 1006.

The court in *Chateaugay* focused on conduct resulting in release or threatened release of hazardous substances as the relevant point in time for determining whether a claim has arisen for the purposes of bankruptcy. An obligation to pay the EPA for response costs is a dischargeable claim whenever based upon a pre-petition conduct resulting in release or threatened release of hazardous substances. *See id.* at 1005.

In so finding, the court in *Chateaugay* refused to recognize as claims, response costs based simply on debtor's pre-petition conduct, as opposed to conduct resulting in release or threatened release of hazardous substances pre-petition. *See id.* at 1000, 1005. As a result of this distinction, the court found that the placing of hazardous substances in sealed containers pre-petition, followed by release of the substances into the environment years after confirmation, is not a claim. *See id.*

In determining what treatment to accord future CERCLA costs, the court in *Chateaugay* drew on the treatment of contract cases in bankruptcy, while recognizing that,

> Though there does not yet exist between EPA and [debtor] the degree of relationship between claimant and debtor typical of an existing though unmatured contract claim, the relationship is far closer than that existing between future tort claimants totally unaware of injury and a tort-feasor. EPA is acutely aware of LTV and vice versa.

Id. at 1005. The court finally noted that,

> [i]n the context of contract claims, the Code's inclusion of "unmatured" and "contingent" claims is usually said to refer to obligations that will become due upon the happening of a future event that was *"within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created."*

Id. at 1004 (citing *In re All Media Properties Inc.*, 5 B.R. 126, 133 (Bankr.S.D.Tex. 1980), *aff'd mem.*, 646 F.2d 193 (5th Cir. 1981)) (emphasis added).

In the final analysis, however, the court in *Chateaugay* appears to part from the

21. Estimation, as the United States claims, "would necessarily embroil the parties and the bankruptcy court in disputes over the wisdom and scope of possible remedies before EPA had fully investigated the concerned sites." U.S. Motion at 39. However, the presentation of evidence and testimony for purposes of reaching an estimate is not tantamount to the litigation precluded by 42 U.S.C. § 9613(h). Section 113(h) was intended to prevent the delay in cleanup activity that would result from a preliminary determination of liability through litigation. *See In re Combustion*, 838 F.2d at 37.

contractual standard it earlier had aligned itself with by adopting so broad a definition of claim so as to encompass costs that could not "fairly [22]" have been contemplated by the EPA or the debtor pre-petition.

> True, EPA does not yet know the full extent of the hazardous waste removal costs that it may one day incur and seek to impose upon LTV, and *it does not yet even know the location of all the sites at which such wastes may yet be found.* But the location of these sites, the determination of their coverage by CERCLA, and the incurring of response costs by EPA are all steps *that may fairly be viewed,* in the regulatory context, as rendering EPA's claim "contingent," rather than as placing it outside the Code's definition of "claim."

Id. at 1005 (emphasis added).

The *Chateaugay* ruling covers releases that have occurred pre-petition, even though they have not been discovered by EPA or anyone else. *See id.* at 1000. The powers and knowledge of a regulatory agency are presumed to "fairly" allow for "sufficient contemplation of [such] contingencies." *Id.* at 1005.

While similarly of the view that conduct giving rise to release or threatened release of hazardous substances pre-petition should be the relevant inquiry in determining the existence of a claim in bankruptcy [23], this Court is not willing to favor the Code's objective of a "fresh start" over CERCLA's objective of environmental cleanup to the extent exhibited by *Chateaugay* [24]. Despite the distinction drawn in *Chateaugay, see supra* page 406, under the terms of CERCLA, there exists no meaningful distinction between debtor's conduct and the release or threatened release resulting from this conduct [25]. The only meaningful distinction that can be made regarding CERCLA claims in bankruptcy is one that distinguishes between costs associated with pre-petition conduct resulting in a release or threat of release that could have been "fairly" [26] contem-

22. The court in *Chateaugay* uses the term "fairly" on numerous occasions, *see, e.g., Chateaugay,* 944 F.2d at 1005, and specifically in affirmation of the lower court's recognition that "before a contingent claim can be discharged, it must result from pre-petition conduct *fairly* giving rise to that contingent claim." *In re Chateaugay Corp.,* 112 B.R. 513, 521 (S.D.N.Y.1990) (emphasis added). This Court, finding the use of the term "fairly" both significant and apt, adopts the same language.

23. As the United States points out, under CERCLA itself, the release or threat of release serves as a predicate for EPA to exercise its response authority. *See* 42 U.S.C. §§ 9604, 9606.

24. Both the United States and the Debtors read *Chateaugay* so as to discharge all costs relating to pre-petition conduct resulting in a release or threat of release, *regardless* of whether these costs are fairly within the contemplation of the parties pre-petition.

Upon careful reading of *Chateaugay,* this Court is unable to determine whether the parties' proposed reading is accurate due to conflicting indications in the opinion itself. The use of the word "fairly" in *Chateaugay* has already been alluded to. *See supra* note 22. Also, due to a regulatory agencies' ability to contemplate future claims, the court in *Chateaugay* found that "most"—but not all—ultimately maturing payment obligations fall within the definition of claims. *See supra* page 17 (quoting *Chateaugay,* 944 F.2d at 1005).

Furthermore, it is not clear to the Court why the placing of hazardous substances in sealed containers pre-petition, followed by release of the substances into the environment years after confirmation, is not a claim; while the release of substances at locations unknown to the parties pre-petition is a claim. It appears that *Chateaugay* was motivated by notions of fairness in excluding the disposal of containers from the definition of claim. *See* 944 F.2d at 1005. However, under CERCLA, "release" includes the dumping or disposing of containers of hazardous substances. *See* 42 U.S.C. § 9601(22). In both situations, similar concerns with fairness arise in that a "release" has occurred pre-petition, while the hazardous results of such release are not known or manifest until some time after confirmation.

25. As regards CERCLA litigation, the Fifth Circuit has taken the position that disposal of hazardous substance itself constitutes a "release or threat of release." *Amoco Oil Co. v. Borden, Inc.,* 889 F.2d 664, 669 (5th Cir.1989). Section 9601(22) of Title 42 defines "release" as including "dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)."

26. The concept of "fairly" is commensurate with the Code's requirement of adequate notice. *See*

plated by the parties; and those that could not have been "fairly" contemplated by the parties [27].

[7] A number of factors are relevant to whether fair contemplation of future costs based on pre-petition conduct can occur at any particular site by the parties. Such factors include knowledge by the parties of a site in which a PRP may be liable, NPL listing, notification by EPA of PRP liability, commencement of investigation and cleanup activities, and incurrence of response costs [28]. *See supra* notes 11–14. It appears that at least one, and at times all, of these factors have occurred in the seven sites listed by the EPA for future response and natural resource damage costs, permitting "a speedy and rough estimation of CERCLA claims for purposes of determining EPA's voice in the Chapter 11 proceedings with ultimate liquidation of the claims to await the outcome of normal CERCLA enforcement proceedings [29]." *Chateaugay*, 944 F.2d at 1006.

The "fair contemplation" standard, however, is not meant to encourage or permit dilatory tactics on the part of EPA or any other relevant government agency. In criticizing the *Chateaugay* court's emphasis on EPA's "opportunity" to file their environmental claims before confirmation, the EPA argues that this focus belies an inadequacy in the decision in that,

> if a government agency is diligent and files a proof of claim for possible future response costs, it faces the possibility that its claim will be discharged. But if a similarly situated agency does not file a claims [sic], waiting instead to pursue the recovery of costs only after they have been incurred in the ordinary course of its activities, its claims will be preserved.

U.S. Motion at 36.

The existence of a claim in bankruptcy "should not depend on the victim's appraisal of the likely success of post-bankruptcy collection efforts." *In re Edge*, 60 B.R. at 700 n. 8.

There exists no statute of limitations under the terms of CERCLA itself by which EPA must respond to a release or else lose its right to seek relief against PRPs. The only statute of limitations relating to response actions runs from the date the removal action is completed or from the date on-site construction is initiated. *See* 42

11 U.S.C. §§ 521, 523; and Rule 2002 of the Rules and Forms of Practice and Procedure in Bankruptcy.

27. The court in *U.S. v. Union Scrap Iron & Metal*, 123 B.R. 831, 834–37 (D.Minn.1990) similary was sensitive to what was within the fair contemplation of the parties prior to bankruptcy. The court in *Union Scrap* refused to discharge environmental claims arising post-bankruptcy based on pre-petition conduct since at the time of the bankruptcy, the EPA was not aware that the debtor was a PRP at a site not owned by debtor; and the debtor did not acknowledge any relation to the site under investigation in its bankruptcy disclosure statement or plan of reorganization.

It is certain, in any event, that there may exist considerable delay between environmental harm and discovery of such harm. *See, e.g., United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F.Supp. 823 (W.D.Mo.1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir.1986) (chemicals dumped in 1971; site discovered eight years later through anonymous tip); *see also* W. Glaberson, *Love Canal: Suit Centers on Records from 1940's*, N.Y. Times, B1 (Oct. 22, 1990) (chemicals dumped from at least 1940's; site becomes manifest in 1970's).

28. Estimation of CERCLA claims is clearly possible in bankruptcy proceedings. In CERCLA litigation, the government has consistently sought estimation of future response costs based on the response costs already incurred, and the courts have uniformly granted the government's request. *See, e.g., United States v. Hardage*, 733 F.Supp. 1424, 1439 (W.D.Okl.1989); *United States v. A & F Materials Co. Inc.*, 578 F.Supp. 1249, 1259 (S.D.Ill.1984); *United States v. Conservation Chemical Co.*, 619 F.Supp. 162, 211–12 (W.D.Mo.1985). It is precisely this type of estimation of CERCLA claims that would occur in the context of bankruptcy.

29. In allowing for such rough and speedy estimation of CERCLA claims, the Court is mindful of the fact that each hazardous waste site is unique, and that assessment of damages and design of cleanup remedies are time consuming if they are meant to be effective in the long run. *See* 42 U.S.C. §§ 9604, 9606, 9607, 9613(h). However, estimation is not meant to necessarily hasten this process, but to secure the possibility of payment by PRPs in bankruptcy for the costs of environmental damage they might have caused based on what can fairly be contemplated by the parties due to pre-petition conduct.

U.S.C. § 9613(g)(2)(A)–(B). However, Congress has set performance goals for EPA to meet in studying a certain number of hazardous sites each year. *See* 42 U.S.C. § 9616. Congress has further required that the relevant government agency move diligently with remedial investigation and feasibility studies for the purpose of assessing and responding to natural resource damages. *See* 42 U.S.C. 9613(g)(1)(B)(ii).

[8] The time scheme governing EPA under CERCLA by necessity is altered when it comes in contact with the Code. In order for the EPA to preserve its claims in regard to a PRP in bankruptcy, its duties are triggered by the mere discovery of a site linked to the Debtors, and extends to such activity that would allow a rough and speedy estimation of CERCLA claims under the Code. Contrary to the United States' Position, it need not have "*full* information as to Debtors' existing or potential Superfund liabilities," *see supra* page 403, in order to include unliquidated contingent claims in its Proof of Claim subject to estimation.

In sum, all future response and natural resource damages cost based on pre-petition conduct that can be fairly contemplated by the parties at the time of Debtors' bankruptcy are claims under the Code.

2. Costs at Unlisted Sites:

The legal issue presented to the Court is whether Debtors' environmental liabilities for the Unlisted Sites arising from pre-petition conduct are "claims" within the meaning of the Bankruptcy Code, subject to discharge.

The Debtors argue that because all liability at the Unlisted Sites arise from pre-petition conduct they are claims; and since the bar date is past, any claim by the government with respect to Unlisted Sites is barred. The United States argues that claims in relation to Unlisted Sites are not claims subject to discharge because the Debtors have made no showing that a declaration of dischargeability is necessary for confirmation of a plan of reorganization.

In contrast to the other legal issues presented for Court determination, this issue arises from Debtors' Motion for Summary Judgment on their claim for a Declaratory Judgment under 28 U.S.C. § 2201, set forth in their Amended Counterclaim [30]. As a preliminary matter, the United States contests the jurisdiction of this Court to entertain this issue, and moves for dismissal of the Third Claim for relief of Debtors Amended Counterclaim. The United States argues that the Court lacks jurisdiction to entertain Debtors' claim for declaratory judgment on two grounds: (1) the United States has not waived its sovereign immunity as regards the declaration of non-liability prior to any claim being asserted by the United States; and (2) Section 113(h) of CERCLA is a jurisdictional bar to such declaration. The Debtors maintain that jurisdiction exists because the United States has waived its sovereign immunity, and the jurisdictional bar of Section 113(h) is inapplicable.

The United States' arguments are without merit, and this Court has jurisdiction to address the Third Claim in Debtor's Counterclaim.

[9] First, although specific statutory waiver of sovereign immunity is necessary in order to maintain a lawsuit against the United States, *see Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 734, 102 S.Ct. 2118, 2122, 72 L.Ed.2d 520 (1982), Section 106(c) of the Code [31] contains pre-

30. On October 25, 1991 the Debtors amended their Counterclaim with the consent of the United States "in order to provide the Court with an additional procedural vehicle through which this issue could be addressed." Debtors' Reply at 5. The Debtors argue that a declaratory judgment is necessary to insure that they achieve a viable reorganization.

31. Section 106(c) of the Code reads in pertinent part:

> Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity,
> (1) a provision of this title that contains "creditor", "entity" or "governmental unit" applies to governmental units; and
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

Congress included Section 106(c) so as to "comply with the requirement in case law that an

cisely such waiver for issues arising under bankruptcy involving the United States. In fact, Section 106(c) "waives the sovereign immunity of the Federal Government so that the Federal Government is bound by determinations of issues by the bankruptcy court even when it did not appear and subject itself to the jurisdiction of the court." *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96, 103, 109 S.Ct. 2818, 2823, 106 L.Ed.2d 76 (1989). In this case, the United States has clearly appeared before the bankruptcy court.

The Seventh Circuit facing a similar issue found that a debtor may seek a declaration from the bankruptcy court that a debt owed to an agency of the United States is dischargeable:

> [S]ection 106(c) of the Bankruptcy Code waives the sovereign immunity of the United States with respect to questions relating to dischargeability of debts owed to the government.

In re Neavear, 674 F.2d 1201, 1204 (7th Cir.1982).

[10] Second, Section 113(h) [32] of CERCLA does not serve as a jurisdictional bar to declaratory relief in the context of bankruptcy when the United States has engaged in enforcement action by filing a Proof of Claim. In the combined context of CERCLA and the Code, only two cases have addressed the applicability of Section 113(c) to declaratory judgments. The first case left the issue explicitly open, *see In re Combustion Equipment Associates, Inc.*, 838 F.2d 35 (2d Cir.1988); and the second found Section 113(c) inapplicable, *see Chateaugay, supra.*

In *In re Combustion*, the debtor after emerging from reorganization, sought a declaratory judgment that unincurred response costs based on pre-petition releases were claims that had been discharged. The Court in *In re Combustion* found that dispute unripe since the EPA had not yet decided whether to act, if at all, against the plaintiff for environmental damage; and explicitly left open the question whether a declaratory judgment for CERCLA claims would be appropriate *during* a reorganization proceeding. *See* 838 F.2d at 40–41.

In *Chateaugay*, the government argued that Section 113(h)'s ban on pre-enforcement judicial review required that it receive a declaratory judgment upholding its contention that unincurred response costs are not dischargeable claims. In rejecting the government's argument, the court found that in a context where CERCLA claims are being estimated for the purpose of bankruptcy, whilst ultimate liquidation of claims awaits the outcome of normal CERCLA enforcement proceedings,

> prohibition of pre-enforcement review is simply inapplicable. The Court is not being called upon to "review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title."

Chateaugay, 944 F.2d at 1006.

However, the circumstances before this Court are clearly distinguishable from *Chateaugay*. A declaratory judgment relating to claims in sites not listed in the Proof of Claim is different from a declaratory judgment relating to unincurred response costs at listed sites that are subject to estimation in bankruptcy and liquidation in normal CERCLA proceedings. In the circumstances before us, a declaratory judgment for all practical purposes clearly interferes with "normal CERCLA enforcement proceedings" in that it precludes future asser-

express waiver of sovereign immunity is required to be effective." 124 Cong.Rec.H. 11,091 (Sept. 28, 1978).

32. Section 113(h) of CERCLA provides in relevant part,

> *No Federal court shall have jurisdiction* under Federal law other than under section 1332 ... or under state law which is applicable or relevant and appropriate under section 9621 of this title.... *to review any challenges to removal or remedial action* selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following....

42 U.S.C. § 9613(h) (emphasis added).
For a discussion of the exceptions to Section 113(h)'s jurisdictional bar, see *infra* note 35 and accompanying text.

tion of liability by the United States against the Debtors for the Unlisted Sites.

Contrary to the assertion of the Debtors [33], Section 113(h) is applicable in these circumstances. The Fifth Circuit has found that a challenge to liability is tantamount to a challenge to response action under Section 113(h). In *Voluntary Purchasing Groups v. Reilly*, 889 F.2d 1380, 1389–90 (5th Cir.1989), the court found that Section 113(h) barred judicial review of a PRP's complaint seeking declaratory relief that it was not a liable party before the United States had brought a cost-recovery suit.

> If PRPs were allowed to file suits for declaratory judgment prior to cost recovery suits being filed by the EPA, much of the EPA's time and resources could end up being allocated to litigation in this area.
>
> . . . . .
>
> Moreover, the crazy quilt litigation that could result from allowing PRPs to file suits for declaratory judgments of non-liability could force the EPA to confront inconsistent results.

Id. at 1390 (citations omitted).

[11] However, once the United States files a Proof of Claim, the exceptions to the jurisdictional bar of Section 113(h) are activated [34]. The exceptions to the jurisdictional bar of Section 113(h) are various enforcement or cost-recovery measures that can be taken by the United States [35]. In reading the Code and CERCLA together, the filing of a Proof of Claim constitutes such governmental action, and falls under the enumerated exceptions to Section 113(h). Any other reading would allow the United States, by not filing a Proof of Claim, to preserve its claims for all sites for post-bankruptcy proceedings to the detriment of all other creditors whose claims are discharged, and of the Debtors to the extent post-bankruptcy environmental claims impacts their ability to effectively reorganize. In short, any other reading would allow the United States to completely circumvent the objectives underlying the Code [36].

Having ascertained this Court's jurisdiction, the determination of whether Debtors'

33. In regard to the applicability of Section 113(h), the Debtors state,

> This is not, as mischaracterized by the Government, a suit "for a declaration of non-liability under CERCLA." Rather, this is a suit for a declaration that whether or not Debtors have any liability under CERCLA for the Unlisted Sites, the assertion of any such liability is barred and the liability is discharged upon confirmation. This is a question of interpretation involving the Code, not CERCLA.

Debtors' Reply at 9.

Debtors' argument is implausible in that it draws artificial distinctions at the cost of real practical effects, and assumes that the Code should be accorded primacy in a case involving interpretation of both the Code and CERCLA. As stated earlier, arguments based on the primacy of one statute over the other can not be adopted by this Court.

34. The Court is cognizant of the fact that the combined effect of its ruling is that in order to preserve its CERCLA claims against a bankrupt PRP, the United States must file a Proof of Claim; and that in filing such Proof of Claim, the United States subjects itself to declaratory relief, otherwise precluded by Section 113(h), for unlisted sites. However, this is the only reading of CERCLA and the Code that strikes a balance between the objectives served by both statutes.

35. The exceptions to Section 113(h)'s jurisdictional bar consist of actions to recover response costs or damages or for contribution, to enforce an order or recover a penalty for violation of such order, for reimbursement, and to compel a remedial action. *See* 42 U.S.C. § 9613(h)(1)–(5).

36. In addition, the cases relied on by the United States to demonstrate that Section 113(h) is a jurisdictional bar are distinguishable. The United States relies largely on *Voluntary Purchasing, supra*, to demonstrate that Section 113(h) bars declaratory relief in this case. However, in *Voluntary Purchasing*, the Fifth Circuit was faced with a situation where the United States had taken *no* action to secure its claims. The Fifth Circuit was not faced with the unique circumstances surrounding the interaction of the Code and CERCLA, and the filing by the United States of a Proof of Claim for the purpose of securing eventual enforcement of its environmental claims against a PRP in bankruptcy. In fact, the court's decision in *Voluntary Purchasing*, barring declaratory relief, was specifically limited to cases where the United States had not brought a cost recovery suit. 889 F.2d at 1389–90.

environmental liabilities at Unlisted Sites arising from pre-petition conduct are claims follows directly from the analysis in the preceding Section as to when a claim arises. All liability at the Unlisted Sites arising from pre-petition conduct resulting in release or threatened release, fairly within contemplation of the parties, are dischargeable claims [37].

At the thirteen Unlisted Sites, the United States had enough knowledge to fairly base contingent liability on, but chose not to do so. *See supra* page 403. The United States does not challenge the Debtors' presentation that at all of the Unlisted Sites the alleged conduct occurred pre-petition, a release or threat of release existed pre-petition, and the first response costs were incurred pre-petition [38]. *See* Debtors' Motion at 6.

[12] Pursuant to Bankruptcy Rule 3003(c)(2), any claim not asserted in the Proof of Claim is barred. However, the United States reserves its right to seek permission to amend its previously submitted Proof of Claim in relation to the Unlisted Sites. The Debtors object to such amendment on the grounds that the United States knowingly did not include the thirteen other sites in the Proof of Claim, and there exists no ground for excusable neglect. The Debtors further argue that amending the Proof of Claim so as to include the Unlisted Sites at this point in the bankruptcy proceedings would severely prejudice the Debtors.

[13] Under Bankruptcy Rule 9006(b), the Court has discretion to extend the time to file a Proof of Claim after the bar date where the failure to timely file was the result of "excusable neglect." In past consideration of this Rule, this Court has defined excusable neglect as "the failure to timely perform a duty ... due to circumstances which were beyond the reasonable control of the person whose duty it was to perform." *Mackie v. Production Oil Co.*, 100 B.R. 826, 827 & n. 3 (N.D.Tex.1988) (citations omitted). Although excusable neglect is a flexible concept, "[c]ourts require 'unique' and/or 'extraordinary circumstances' to excuse a creditor's failure to file by the bar date." *Id.* at 827 (citations omitted).

[14] The novel nature of the legal issues presently before the Court constitute the "unique" or "extraordinary circumstances" required to excuse a creditor's failure to file by the bar date. *See id.* Extension of the bar date as relates to the United States claims for Unlisted Sites is warranted under these circumstances.

3. Administrative Expense Priority:

[15] The legal issue presented is whether response costs incurred in connection with property presently owned by Debtors are entitled to administrative expense priority [39].

The United States' Proof of Claim seeks reimbursement of expenses incurred at the Salford Quarry Site—aimed at preserving the property—since the filing of the bankruptcy petitions. The United States argues that since this Site is presently owned by the Debtors, such expenses should be treated as priority administrative expenses under the Code.

The Debtors, on the other hand, maintain that the entirety of the United States' claim at the Salford Quarry Site is a general unsecured claim. The Debtors argue that the standard for administrative priority un-

37. The United States argues that claims for the Unlisted Sites are not discharged because Debtors have made no showing that a declaration of dischargeability is necessary. The necessity of the dischargeability is not determinative of when a CERCLA claim arises for bankruptcy purposes. Furthermore, this Court has previously held that the CERCLA claims are potentially so large as to interfere with Debtors' reorganization if not estimated. *See* November 12, 1991 Memorandum Opinion & Order at 5.

38. The party opposing a motion for summary judgment must point out specific facts showing that there is a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Castillo v. Bowles*, 687 F.Supp. 277, 280 (N.D.Tex.1988). In the absence of such showing, the facts will be deemed undisputed.

39. Of all seven Sites, only the Salford Quarry Site is presently owned by the Debtors.

der the Code is not met since the United States has made no showing that the expenses incurred benefit the estate in any way or are necessary to prevent an imminent, identifiable harm. Adopting the position of the United States, the Debtors argue, would give the United States the impermissible power to shift parts of its pre-petition claim from general unsecured to administrative status.

Pursuant to Section 507 of the Code, administrative expenses allowed under Section 503(b) of the Code are entitled to priority. *See* 11 U.S.C. § 507. Section 503(b) includes, in relevant part, "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after commencement of the case." *Id.* at § 503(b)(1)(A). Whether a particular expense is an "actual and necessary cost" is a question of fact to be determined "after notice and a hearing." *Id.* at § 503(b).

In the context of environmental claims, the meaning of "preserving the estate" under Section 503 of the Code has been expanded to encompass protection of the environment and public health. The Supreme Court in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986), enunciated the obligations of a bankruptcy trustee or a debtor-in-possession in ensuring that the environment and public health are not unduly degraded:

> [A]nyone in possession of the site ... must comply with the environmental laws.... Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions.

Id. at 502, 106 S.Ct. at 760 (quoting *Ohio v. Kovacs*, 469 U.S. 274, 285, 105 S.Ct. 705, 711, 83 L.Ed.2d 649 (1985)). The Supreme Court in *Midlantic* further restricted the ability of a trustee or debtor to abandon property where such abandonment would result in "imminent and identifiable harm" to the public health or safety. *Id.* 474 U.S. at 507 n. 9, 106 S.Ct. at 762 n. 9.

In accord with the Supreme Court's recognition of a bankruptcy trustee or debtor's obligations in *Midlantic*, lower courts have allowed the payment of response costs incurred post-petition based on conduct occurring pre-petition, as administrative priority expenses where the costs were necessary to remedy conditions that pose an "imminent and identifiable" threat to the public health or safety. *See Chateaugay*, 944 F.2d at 1009–10; *In re Wall Tube & Metal Products Co.*, 831 F.2d 118, 123–24 (6th Cir.1987); *In re Peerless Plating Co.*, 70 B.R. 943, 946–48 (Bankr.W.D.Mich. 1987); *In re Stevens*, 68 B.R. 774, 783 (Bankr.D.Me.1987); *In re T.P. Long Chemical Inc.*, 45 B.R. 278, 286 (Bankr.N.D.Ohio 1985).

Finally, the Debtors' concern with the possibility that the United States would delay its response costs so as to benefit from administrative status is misplaced. First, a relatively small portion of the United States' Proof of Claim falls under administrative status, because of all the sites at issue only the Salford Quarry is presently owned by the Debtors. Second, before any costs incurred by the United States are accorded administrative status, the notice and hearing requirements of Section 503(b) of Title 11 must be satisfied. Third, the United States is not hereby attempting to fix its entire claim at the Salford Quarry, but rather is acting during administration of the estate to remedy ongoing effects of a release of hazardous substances [10].

In sum, all response costs incurred post-petition as a result of conduct occurring pre-petition in regard to the Salford Quarry are entitled to administrative priority subject to the following specific determination: such costs were necessitated by conditions that posed an imminent and identifiable harm to the environment and public health.

4. Joint and Several Liability:

The legal issue presented is whether Debtors are jointly and severally liable for claims at the Listed sites.

40. Based on these same grounds, the *Chateaugay* court rejected the debtors' similar concern with abuse of the bankruptcy process by the government. *See* 944 F.2d at 1010.

The United States maintains that the Debtors' liability is joint and several under CERCLA for all costs incurred at all of the Listed Sites because the environmental injury is indivisible. The United States argues that equitable apportionment of costs is only appropriate in an adversarial action brought by the Debtors themselves for contribution under CERCLA against other responsible parties.

The Debtors, on the other hand, maintain that the United States' claim should be fixed at an amount reflecting Debtors' equitable share of liability. To provide for joint and several liability, the Debtors argue, would undermine the equitable nature of bankruptcy proceedings to the detriment of other creditors and the Debtors. Furthermore, the Debtors argue that CERCLA itself does not compel joint and several liability where inequitable.

CERCLA does not expressly provide for joint and several liability. Congress expressly left to the courts the determination of what standard of liability to impose under CERCLA, based on a case by case basis [41]. Subsequently, however, in enacting the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Congress endorsed the standard of joint and several liability imposed by the seminal case of *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802 (S.D.Ohio 1983). *See United States v. Monsanto Co.*, 858 F.2d 160, 171 n. 23 (4th Cir.1988) (Citing H.R.Rep. No. 253(I), 99th Cong.2d Sess., 79–80, *reprinted in* 1986 U.S.Code Cong. & Admin.News at 2835, 2861–62).

In determining the scope of liability, the *Chem-Dyne* Court followed the strict approach advocated by the Restatement (Second) of Torts. Under this approach, the burden of proof as to apportionment of harm is on the defendant; absent a showing of divisibility, each defendant is jointly and severally liable for the entire harm. *See Chem-Dyne*, 572 F.Supp. at 808.

Since *Chem-Dyne*, courts uniformly have imposed joint and several liability where the harm has been indivisible. *See, e.g., Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir.1989); *O'Neil v. Picillo*, 883 F.2d 176, 178–79 (1st Cir.1989); *United States v. Monsanto Co.*, 858 F.2d 160, 171–72 (4th Cir.1988). Even courts critical of the inequitable results of joint and several liability have applied this standard to the circumstances before them. *See, e.g., O'Neil* 883 F.2d at 178; *United States v. A & F Materials Co.*, 578 F.Supp. 1249, 1256 (S.D.Ill.1984).

[16, 17] In order to avoid joint and several liability, the Debtors must establish that (1) the environmental injury is in fact capable of divisibility; and (2) a reasonable basis exists for such apportionment. *See Chem-Dyne*, 572 F.Supp. at 811; *United States v. Miami Drum Services, Inc.*, 25 E.R.C. 1469, 1474, 1986 WL 15327 (S.D.Fla. 1986). Divisibility of harm is a question of fact to be determined by presentation of evidence. *See Kelley v. Thomas Solvent Co.*, 714 F.Supp. 1439, 1448 (W.D.Mich. 1989).

As discussed earlier, determination of whether a claim arises in bankruptcy requires an analysis of interests created by non-bankruptcy substantive law. *See supra* page 405. CERCLA as developed by case law provides for a joint and several standard of liability where the harm is indivisible. In enacting SARA, Congress had occasion to examine this case law but instead endorsed this development, and added two provisions to mitigate the possible inequities of joint and several liability. *See O'Neil*, 883 F.2d at 179.

> First, the [SARA] Amendments direct the EPA to offer early settlements to defendants who the Agency believes are responsible for only a small portion of the harm, so called *de minimis* settlements. *See* [CERCLA] § 122(g). Second, the Amendments provide for a statutory cause of action in contribution, co-

41. *See* H.Rep. No. 253(I), 99th Cong.2d Sess. 74, *reprinted* in 1986 U.S.Code Cong. & Admin.News 2835, 2856 ("the explicit mention of joint and several liability was deleted from CERCLA in 1980 to allow courts to establish the scope of liability through a case-by-case application of traditional and evolving principles of common law and pre-existing statutory law.")

difying what most courts had concluded was implicit in the 1980 Act. *See* [CERCLA] § 113(f)(1). Under this section, courts "may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."

Id.

In sum, subject to a finding of divisibility, Debtors' liability at the Listed Sites will be estimated on the basis of joint and several liability.

V. *Renewed Reference to Bankruptcy Court*

[18] On September 13, 1991 the Court withdrew reference from bankruptcy court of all matters pertaining to the United States' Proof of Claim, and all Debtors' responses to such claim. The Court found that disposition of these matters implicated substantial and material consideration of non-bankruptcy federal statutes, and warranted mandatory withdrawal of reference pursuant to 28 U.S.C. § 157(d).

The legal issues addressed in this Order dispose of the material matters at the heart of the intersection between the Code and CERCLA which had prompted the withdrawal of reference. At this time, the Court is of the opinion that this case should be referred to bankruptcy court pursuant to 28 U.S.C. § 157(a). Bankruptcy courts provide the expertise and efficiency intended by Congress in adjudication of core bankruptcy matters. *See In re White Motor Corp.*, 42 B.R. 693, 705 (N.D.Ohio 1984). Withdrawal of reference is no longer warranted where it is a question of "straight forward application of a federal statute to a particular set of facts." *In re Johns-Manville Corp.*, 63 B.R. 600, 602 (S.D.N.Y.1986).

VI. *Conclusion*

The Court has made the following determinations:

1. All future response and natural resource damages costs based on pre-petition conduct, fairly within contemplation of the parties at the time of Debtors' bankruptcy, are claims under the Bankruptcy Code;

2. All liability at any site not listed in the amended United States' Proof of Claim based on pre-petition conduct, fairly within contemplation of the parties at the time of Debtors' bankruptcy, constitutes a claim under the Code;

3. All response costs incurred post-petition at a site presently owned by Debtors as a result of pre-petition conduct are administrative priority expenses where the costs were necessary to remedy conditions posing an imminent and identifiable threat to the public health or safety; and

4. Subject to a finding of divisibility, Debtors' liability at the Listed Sites will be estimated on the basis of joint and several liability.

Having determined the foregoing legal issues, the Court REFERS this case to bankruptcy court for further proceedings in the light of this opinion.

SO ORDERED.

In re Troy D. GRIFFIN, Debtor.

Bankruptcy No. 91-53761-RBK.

United States Bankruptcy Court,
W.D. Texas,
San Antonio Division.

April 8, 1992.

Creditor objected to Chapter 7 debtors' claimed exemption in sailboat. The Bankruptcy Court, Ronald B. King, J., held that sailboat was not included within Texas exemption for athletic sporting equipment.

Objection sustained.

Exemptions ⇐37

Sailboat was not included within Texas exemption for "athletic and sporting equipment," and thus claimed exemption would

CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a). This is a core proceeding in accordance with 28 U.S.C. § 157(b)(2)(B).

2. The debtor's motion to expunge the claims of Great Waters and Poland Spring as untimely filed in accordance with Federal Rule of Bankruptcy Procedure 3003(c)(3) is granted.

SETTLE ORDER on notice in accordance with the foregoing.

TORWICO ELECTRONICS, INC., Plaintiff/Appellee,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY, Defendant/Appellant.

Civ. No. 92-1828 (AET).

United States District Court, D. New Jersey.

Dec. 8, 1992.

Chapter 11 debtor filed adversary proceeding, seeking to preclude New Jersey Department of Environmental Protection and Energy (DEPE) from imposing any liability or enforcing any obligation for environmental cleanup. The Bankruptcy Court, Stephen A. Stripp, J., 131 B.R. 561, entered judgment for debtor, and DEPE appealed. The District Court, Anne E. Thompson, J., held that debtor's cleanup obligation under New Jersey Environmental Cleanup Responsibility Act (ECRA) was not an unsecured "claim" that could be discharged.

Reversed in part and vacated in part.

1. Bankruptcy ⇐2825

Not all prepetition environmental cleanup obligations are equivalent to monetary obligations, and, thus, not all such obligations will constitute "claim" in bankruptcy proceedings.

See publication Words and Phrases for other judicial constructions and definitions.

2. Bankruptcy ⇐2371(1)

Chapter 11 debtor's cleanup obligation under New Jersey Environmental Cleanup Responsibility Act (ECRA) was not unsecured "claim" that could be discharged, and, therefore, bankruptcy court improperly enjoined New Jersey from enforcing ECRA; New Jersey Department of Environmental Protection and Energy (DEPE) had no alternative payment remedy under ECRA and was attempting to remedy both past and ongoing pollution. Bankr.Code, 11 U.S.C.A. § 101(5); N.J.S.A. 13:1K-6 to 13:1K-14.

Rachel Lehr, New Jersey Dept. of Public Safety, Div. of Law, Trenton, NJ, for defendant/appellant.

Timothy P. Neumann, Wood, Broege, Neumann & Fischer, Manasquan, NJ, for plaintiff/appellee.

MEMORANDUM AND ORDER

ANNE E. THOMPSON, District Judge.

This matter is before the Court on an appeal by the State of New Jersey, Department of Environmental Protection and Energy ("DEPE") from the Bankruptcy Court's judgment, filed September 20, 1991, in favor of Torwico Electronics, Inc. ("Torwico"), a manufacturer of electronic transformers. DEPE is appealing a final judgment of the Bankruptcy Court, and this Court has jurisdiction pursuant to 28 U.S.C.A. § 158(a) (West 1992). The Bankruptcy Court's legal conclusions are subject to plenary review, and its factual findings are examined under a clearly erroneous standard. *See* Fed.R.Bankr.P. 8013; *J.P.*

Fyfe, Inc. v. Bradco Supply Corp., 891 F.2d 66, 69 (3d Cir.1989) (citations omitted).

Background

The parties' dispute arises from an illegal seepage pit located on property that Torwico had leased from George Allen Associates ("GAA"). Torwico relocated after the lease ended in September 1985; however, it subsequently entered into an agreement with GAA to share certain costs related to New Jersey's Environmental Cleanup Responsibility Act ("ECRA"). *See* N.J.Stat.Ann. §§ 13:1K–6 to –14 (West 1991). On August 4, 1989, Torwico filed its Chapter 11 bankruptcy petition. In October 1989, the Bankruptcy Court issued an order declaring that January 2, 1990 was the last day on which a party could file a proof of claim or interest. DEPE, however, asserts that it did not receive notice of Torwico's bankruptcy filing.

In November 1989, DEPE inspected Torwico's former site and discovered the seepage pit containing hazardous wastes. The contamination, moreover, had migrated from the pit into off-site ground waters. Torwico denies that it used or even knew of the seepage pit during its operations on the former site. In late March 1990, Torwico filed an adversary proceeding seeking to preclude DEPE from imposing any liability or enforcing any obligation for environmental cleanup. Torwico reasoned that such a liability or obligation would constitute a claim under Chapter 11 of the Bankruptcy Code, and that DEPE was barred from pursuing any claims because of its failure to file a timely proof of claim. In response, DEPE argued that its efforts to ensure that Torwico complies with environmental laws constitute an exercise of the state's police power and would not be dischargeable in bankruptcy.

In early April 1990, DEPE issued an Administrative Order and Notice of Civil Administrative Penalty Assessment to Torwico which required *inter alia* that Torwico develop a closure plan for the seepage pit. In August 1990, DEPE issued a Notice of Violation of ECRA to Torwico and GAA. In November 1990, Torwico filed a motion with the Bankruptcy Court for summary judgment and injunctive relief, and DEPE cross-moved for summary judgment. Following oral argument on January 14, 1991, and supplemental briefing and reargument on April 1, 1991, the Bankruptcy Court issued its opinion and order. *See In re Torwico Elecs., Inc.*, 131 B.R. 561 (Bankr.D.N.J.1991).

The Bankruptcy Court held that the Torwico's cleanup obligation was an unsecured claim. *Id.* at 572; *see also* 11 U.S.C.A. § 101(5) (West Supp.1992). It reasoned that "where a debtor in bankruptcy cannot clean up environmental contamination ... without paying money, the obligation to clean up pursuant to an injunction is a debt which is dischargeable in bankruptcy." 131 B.R. at 569. Following this conclusion, the Bankruptcy Court held that the DEPE's claim was time-barred and that the sections of ECRA which "purport to dictate the treatment of cleanup obligations in bankruptcy" are void under the Supremacy Clause. *Id.* at 573, 576; *see also* N.J.Stat. Ann. § 13:1K–12 (West 1991) ("No obligations imposed by this act shall constitute a lien or claim which may be limited or discharged in a bankruptcy proceeding.").

Discussion

[1] In *Ohio v. Kovacs*, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985), the Supreme Court affirmed the Sixth Circuit's conclusion that the debtor's "cleanup duty had been reduced to a monetary obligation," and constituted a claim under the Bankruptcy Code. *Id.* at 282, 105 S.Ct. at 709. In *Kovacs*, however, the state's attorney conceded in oral argument that the only performance sought from the debtor was the payment of money. *See id.* at 283, 105 S.Ct. at 710. Thus, *Kovacs* does not mandate that all prepetition cleanup obligations are equivalent to monetary obligations. In *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986), the Supreme Court held that a bankruptcy trustee cannot abandon property in contravention of state environmental statutes and regulations.

Id. at 507, 106 S.Ct. at 762. Although *Midlantic* specifically addressed the issue of a bankruptcy trustee's abandonment power, it clarified that: "Congress did not intend for the Bankruptcy Code to preempt all state laws." *Id.* at 505, 106 S.Ct. at 761.

In *Penn Terra Ltd. v. Department of Environmental Resources*, 733 F.2d 267 (3d Cir.1984), the Third Circuit interpreted sections 362(b)(4) & (5) of the Bankruptcy Code,[1] and addressed the issue of whether the actions of the Pennsylvania Department of Environmental Resources ("DER") were an attempt to enforce a money judgment. *Id.* at 272. The *Penn Terra* court concluded that "the suit brought by DER to compel Penn Terra to remedy environmental hazards was properly brought as an equitable action to prevent future harm, and did not constitute an action to enforce a money judgment." *See id.* at 278. Although the bankruptcy stay provisions contain a specific exception for the exercise of police or regulatory power, and the provisions defining bankruptcy claims do not, *Penn Terra* recognizes that requiring a debtor "to rectify harmful environmental hazards" entails the exercise of state regulatory powers. *Id.* at 274.

In *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir.1991), the Second Circuit recognized the difficulty in classifying a debtor's obligation to clean up a toxic waste site that continues to leach hazardous substances into nearby water supplies. *See id.* at 1007. This obligation contains two elements: (1) to stop the on-going pollution, and (2) to cleanup the toxic substances which may have been deposited before the debtor filed for bankruptcy. The *Chateaugay* court concluded that: "[A] cleanup order that accomplishes the dual objectives of removing accumulated wastes and stopping or ameliorating on-going pollution emanating from such wastes is not a dischargeable claim." *Id.* at 1008.

[2] In this case, the DEPE has no alternative payment remedy under ECRA and is attempting to remedy both past and ongoing pollution. In light of the foregoing case law, the Court concludes that Torwico's cleanup obligation under ECRA is not a dischargeable unsecured claim. The Court, therefore, need not reach the issue of whether the DEPE's purported claim would be time-barred. Similarly, since this conclusion eliminates the alleged conflict between ECRA and the Bankruptcy Code, the Supremacy Clause issue does not arise. *See Perez v. Campbell*, 402 U.S. 637, 644, 91 S.Ct. 1704, 1708, 29 L.Ed.2d 233 (1971).

For all these reasons, it is on this 8th day of December 1992;

ORDERED that the Department of Environmental Protection and Energy's appeal of the Bankruptcy Court's decision granting Torwico Electronics, Inc. an injunction prohibiting the State from enforcing certain environmental laws be and hereby is granted, and it is further;

ORDERED that the Bankruptcy Court's ruling that Torwico Electronics, Inc.'s cleanup obligation is an unsecured claim be and hereby is reversed, and that the remainder of the Bankruptcy Court's decision be and hereby is vacated.

DENTAL BENEFIT MANAGEMENT, INC.

v.

Rudolph J. CAPRI, Robert Reeves, and Pioneer Business Forms.

Civ. A. No. 91–6212.

United States District Court, E.D. Pennsylvania.

Aug. 12, 1992.

Purchaser of printing services brought action against seller, seller's owner, and

1. Section 362(b)(4) provides that no bankruptcy stay applies to the "commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C.A. § 362(b)(4) (West 1979). Section 362(b)(5) provides that the stay applies to money judgments even if in furtherance of the state's regulatory power. *See id.* § 362(b)(5).

On behalf of Texaco Inc., this memorandum addresses the Pre-Enforcement Review Panel's designation of responsible parties. We specifically oppose the Calleris' contention that they should avoid all responsibility for environmental remediation of the 15595 Washington Boulevard property (the "Property").

I. PRELIMINARY STATEMENT

The Review Panel should either exclude Texaco from the list of responsible parties entirely or should assign it only secondary responsibility. At least three sets of underground storage tanks have operated at the Property: the First USTs (installed pre-1969), the Second USTs (installed 1969), and the Third USTs (installed 1987). Texaco, however, never used any tanks at the Property. Texaco only acquired the Property in 1983 in a foreclosure sale to protect its security interest. It never owned or operated a service station at the site. Instead, Texaco tried to sell the Property as soon as it acquired it. Under these circumstances, it would be fundamentally unfair to turn to Texaco in the first instance as a convenient deep pocket to pay for contamination caused by others.

Texaco recognizes that the Review Panel may be inclined at this stage to characterize Texaco as a responsible party because it owned the Property after the Calleris' ownership, when a discharge took place. If the Review Panel is so inclined, however, Texaco's attenuated connection with the Property dictates secondary responsibility only.

The Review Panel should designate the Calleris as responsible parties.[1] The Calleris owned and sometimes operated the Property from 1974 through August

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[1] There does not appear to be any dispute that Bertram Kubo and Mehdi Mohammadian are properly named as responsible parties under paragraphs 1 (Mohammadian) and 3 (Mohammadian and Kubo) of 23 CCR section 2720. In light of the significantly increased levels of benzene and TPH as gasoline discovered in 1994 and the two recent notices of violation issued to Mohammadian, it is also reasonable to conclude that both Mohammadian and Kubo are responsible parties under paragraph 4 of section 2720. That

(Footnote continues ...)

1983. During that time, the Second USTs, which are currently believed to be a source of at least some contamination, were in active operation. After the Calleris lost the property in foreclosure in 1983, no one else ever used the Second USTs. Nothing in the Calleris' April 14, 1995, memorandum to the Review Panel (the "Calleris' Memo.") can obscure this fundamental fact. For this reason alone, the Review Panel can and should designate the Calleris as responsible parties. 23 CCR § 2720(¶ 2) (in the case of USTs no longer in use, "responsible party" includes "any person who owned or operated the underground storage tank immediately before the discontinuation of its use").

Further, there is ample evidence from which to conclude that the minor contamination discovered in 1986 dated from before August 1983, the period when the tanks were in use. The Review Panel should therefore designate the Calleris as responsible parties for this reason as well. 23 CCR § 2720 (¶4) ("responsible party" includes 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").

provided the USTs were never used between 1983 and 1986

Accordingly, the Calleris, Kubo, and Mohammadian should remain as responsible parties. As the State Water Resources Control Board ("SWRCB") has held in the past, "Generally speaking, it is appropriate and responsible for a Regional Board to name all parties for which there is reasonable evidence of responsibility, even in cases of disputed responsibility." *Petition of Stinnes-Western Chemical Corporation*, SWRCB Order No. WQ 86-16, 1986 Cal. ENV. LEXIS 18, *16 - *17 (September 18, 1986) (*quoting Petition of Exxon Company*, SWRCB Order No. 85-7, 1985 Cal. ENV. LEXIS 10 (August 22, 1985)).[2] Exclusion of the Calleris from these proceedings now, as the Calleris request, will not facilitate a fair and efficient remediation of the Property. Of all

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is, they are owners and operators of the Third USTs at the time of or following an unauthorized release of hazardous substances from those tanks.

[2] Copies of authorities cited in the memorandum are provided for the Review Panel's convenience.

the potentially responsible parties, the Calleris are the most eligible to obtain funds for remediation from the UST Trust Fund.

II. STATEMENT OF FACTS

With the exception of the period from August 1983 to late 1986, when it sat idle, the Property has been operated as a service station from 1964 to the present. During that time, there have been three sets of USTs at the Property and three environmental investigations indicating possible discharges in the periods before August 1983 and between 1987 and 1994.

In 1969, Gulf Oil removed the First USTs and installed the Second USTs. The Calleris acquired the property in 1974. According to the Calleris, the Property was operated as a service station until August 1983, for the most part by the Calleris' lessees but also at times by the Calleris' themselves. *See* letter from Mary J. Swanson to Scott O. Seery, April 14, 1995, at 2; Calleris' Chronology, submitted to the Review Panel on March 30, 1995, at 2-3.

During the Calleris' ownership of the Property, Texaco sold the Calleris product on credit, secured by a deed of trust on the Property. In 1983, the Calleris defaulted on their obligations to Texaco, and Texaco bought the Property at a foreclosure sale in order to protect its security interest.

Texaco had no use for the Property as a service station. Accordingly, Texaco immediately took steps to sell it. *See* Exhibit A (Texaco 1983 surplus property report). Texaco was unable to sell the property until late 1986, however, when Kubo purchased it. From August 1983 until Kubo acquired the Property in 1986, the Property was not operated as a service station, and the Second USTs were not used. For this

reason, Texaco did not keep maintenance files or similar records, such as it would have done for an operating service station.[3]

The 1986 Environmental Report Indicates A Pre-August 1983 Isolated Discharge

In 1986, as part of the process of selling the Property, Texaco commissioned a hydrogeologic investigation of the Property by Groundwater Technology Inc. ("GTI"). GTI issued its report in October 1986 (the "GTI 1986 Report," submitted as Exhibit B). GTI found no detectable amounts of BTX or TPH in the composite soil samples. It found "minor amounts of hydrocarbon contamination" in groundwater from only two samples, SB-1 and MW-1, both of which were in the vicinity of the pump island, not of the tanks. GTI 1986 Report at 8.[4] Groundwater collected from the soil boring, SB-1, contained 0.22 ppm benzene, 0.39 ppm toluene, and 0.68 ppm xylene. GTI discounted this finding by noting that the "sample was drawn prior to developing a good hydraulic communication with the aquifer." GTI also reported "detectable amounts of xylene" at MW-1, but those levels were within the EPA standards for safe drinking water. GTI 1986 Report at 8-10.

What about UST removal records?

[3] Accordingly, the Calleris' attempt to manufacture some nefarious significance from the absence of records concerning Texaco's use of the Property is self-serving fantasy. Calleris' Memo. at 6. Texaco does not have records of its use of the Property because it never used the Property. Texaco has previously provided the Calleris' counsel with documentary evidence that it classed the Property as surplus and put it up for sale immediately on acquiring it. *See* Exhibit A. The Calleris' innuendo of "mysteriously misplaced" records is therefore empty lawerly abuse that should have no place in these proceedings.

[4] The GTI 1986 Report noted that the tanks remained in place at the time of the investigation but had been purged of product. GTI 1986 Report at 4. It is reasonable to conclude that the Second USTs were emptied of product prior to August 1983. No cash-strapped debtor, as the Calleris were in 1983, would abandon valuable product.

Accordingly, GTI gave the Property virtually a clean bill of health. GTI concluded:

> "The effects of any residual soil contamination on the groundwater was shown to be negligible in all but two of the borings (MW-1 and SB-1). These borings are located upgradient and to the north of the other monitoring wells in the vicinity of the pump island indicating the initial contamination originated near the pumps. Xylene concentrations were slightly higher than the more volatile benzene and toluene suggesting that the contamination is due to an older leak. While the BTX components reported in these water samples are slightly above EPA standards for safe drinking water, the lack of any detectable contamination in the downgradient wells suggests that a small localized loss likely occurred at the pump island.
>
> "The contamination present at the site appears to be an older leak of gasoline from around the pump island. Because the laboratory results detected negligible concentrations of petroleum hydrocarbons in the soil samples and minor to negligible concentrations of petroleum hydrocarbons in the groundwater samples it is Groundwater Technology's opinion that the investigation should be closed. This is based upon the fact that the contamination is localized and non-reoccurring, the groundwater in the vicinity does not presently meet EPA standards for drinking water (See Table 1), and the regional hydrogeology consists of small confined aquifers controlled by the intervening layers." (GTI 1986 Report at 10 (emphasis added).)

Texaco provided the GTI 1986 Report to Kubo prior to his purchase of the property.[5]

Texaco believes and circumstantial evidence indicates that the Second USTs, which had sat idle since 1983, were removed before the Property was transferred

[5] The Calleris argue that Texaco was obligated to turn this report over to regulators and to the Calleris' themselves in 1986. But the Calleris have never directed Texaco or the Review Panel to the legal basis for the obligation they now assert. Particularly in light of the negligible contamination noted and GTI's conclusions quoted above, it is hardly surprising that GTI 1986 Report was not circulated to state regulators at the time.

to Kubo in late 1986.[6] Kubo took possession of the Property, installed the Third USTs in 1987, and operated the site as a service station until 1990, when he sold the Property to Mohammadian.

The 1992 and 1994 Environmental Reports Indicate Discharges From the Third USTs Between 1987 and 1994

In 1992, Mohammadian's prospective lender commissioned a limited environmental investigation of the Property from GTI using the existing groundwater monitoring wells it had installed in 1986. GTI produced this report in December 1992 (the "GTI 1992 Report," submitted as Exhibit C). Consistent with the results of the GTI 1986 Report, the GTI 1992 Report found 3 ppb benzene, 0.5 ppb toluene, 1 ppb ethylbenzene, and 1 ppb xylene at MW-1. GTI 1992 Report at Table 2. Thus, where GTI had detected 220 ppb benzene, 390 ppb toluene, and 680 ppb xylene in 1986, by 1992 those levels had decreased drastically, as would be expected from the isolated discharge of volatile BTEX components originally deduced by GTI.

Where the GTI 1986 Report had detected no TPH as gasoline, however, the 1992 Report found between 720 and 69 ppb. This TPH as gasoline contamination did not exist in 1986 and could therefore only have resulted from the operations of Kubo and/or Mohammadian between 1987 and 1994, either from the Third USTs or from discharges in the vicinity of the pump island.

In 1994, Blaine Tech Services Inc. issued a third report on the Property ("BTS 1994 Report," submitted as Exhibit D). In that report, TPH as gasoline had spiked

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[6] Texaco submits that the uncertainty about exactly when the Second USTs were removed is a moot distraction for the present purpose of determining responsible parties. The Calleris are responsible parties because they owned the Second USTs immediately before their use was discontinued and during the time when there was an unauthorized discharge. Kubo and Mohammadian are responsible parties because they owned the Property after a discharge had occurred, and because they owned the Third USTs when those tanks appear to have made an unauthorized discharge. None of these designations as responsible parties depend on when the Second USTs were removed.

upward at MW-1 to 1,300 ppb, with benzene and ethylbenzene increasing to 110 and 19 ppb, respectively, at the same well. BTS 1994 Report at Table 2. Once again, this increased level of contamination could have only resulted from the operations of Kubo and/or Mohammadian between 1987 and 1994, again either from the Third USTs or from discharges near the pump island.

On March 21, 1995, the Alameda County Health Care Services Agency (ACHCSA) issued its first Notice of Violation to Mohammadian (Exhibit E) listing six pages of deficiencies and required corrective actions in his operation of the Third USTs. On May 15, 1995, ACHCSA issued its Second Notice of Violation to Mohammadian reiterating deficiencies in his operation of the Third USTs and required corrective actions (Exhibit F).

III. ARGUMENT

There is ample evidence to designate the Calleris, Kubo, and Mohammadian as responsible parties under Health and Safety Code section 25299.37 and 23 CCR section 2720. Texaco's limited connection with the Property and the hydrogeological evidence available to date dictates that Texaco not be named a responsible party or should be assigned secondary responsibility at most.

A. Retroactivity of the Corrective Action Provisions of the UST Trust Fund Cleanup Act

The Calleris contend that the Review Panel may not designate them as responsible parties because the corrective action provisions of the UST Trust Fund Cleanup Act (Chapter 6.75 of the Health and Safety Code, section 25299.37) were not enacted until 1989, after the Calleris had vacated the Property and the tanks had been removed, and the Act is not retroactive. Calleris' Memo. at 1-4. In response, Texaco notes that if the corrective action provisions of the Act do not apply to the Calleris, they do not apply to Texaco either. Texaco also vacated the property long before 1989.

In the interest of addressing the substantive issues before the Review Panel, however, Texaco also points out that the SWRCB has certainly acted as if it could regulate pre-1989 owners and operators of USTs under section 25299.37, even where the tanks at issue had been removed before 1989. In 1991, for example, in *Petition of Alvin Bacharach and Barbara Borsuk*, SWRCB Order No. WQ 91-07, 1991 Cal. ENV. LEXIS 17 (June 20, 1991), the Board determined that a former operator could be named as a responsible party under section 25299.37, even though it had ceased occupying the property in 1988 and had by that time replaced the tanks at issue. 1991 Cal. ENV. LEXIS 17, at *2-*3.

In any event, the Review Panel may also be able to rely on Water Code section 13304, which, in the limited context of underground petroleum storage tanks, is equivalent to the corrective action provisions of Health and Safety Code section 25299.37. *See Petition of Bacharach*, Cal. ENV. LEXIS 17, at *2-*3. Section 13304, of course, predates all the events relevant to this proceeding.

B. The Calleris Are Responsible Parties Under Section 2720 Because They Owned Or Operated The Second USTs Immediately Prior To The Discontinuation Of Their Use

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Section 2720 provides in part:

> "'Responsible party' means one or more of the following:
>
> ...
>
> (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."

The Calleris owned and sometimes operated the Second USTs from 1974 through August 1983. *See* Calleris' Chronology, at 2-3; April 14, 1995, Letter from Mary J. Swanson to Scott O. Seery, at 2. After the Calleris lost the Property in foreclosure in August 1983, no one else ever used the Second USTs. Under the plain

language of section 2720, the Calleris are responsible parties as the last owners or operators of the Second USTs before the discontinuation of their use.

The Calleris attempt to avoid the express terms of section 2720 by the remarkable argument that Texaco — which never operated a service station at the site — used the tanks from August 1983 through 1986. That is, according to the Calleris, while the Second USTs sat there from 1983 to 1986, idle and empty, they were in use.

The Calleris are mistaken. Both the case law and the SWRCB's own interpretation of section 2720 make clear that section 2720 means what it says: "use" means "use."

Thus, *G.J. Leasing Co., Inc. v. Union Electric Co.*, 825 F. Supp. 1363 (S.D. Ill. 1993), interprets 42 USC section 6991(3)(B), the provision on which section 2720 is based[7], to require active, conscious use. In *G.J. Leasing*, plaintiffs purchased an old power plant for salvage and renovation from defendant, which had operated the plant. The plant included USTs containing regulated substances. Just as in the present case, the tanks sat idle for a period of time awaiting salvage and renovation of the plant. Just as in the present case, defendant argued that the tanks were "in use" for the purposes of section 6991(3)(B) when they sat idle after purchase by plaintiffs. The court rejected this passive notion of "use," which is also urged by the Calleris. *Id.*, at 1383 ("The defendant wants this Court to interpret 'in use' passively to mean that a tank merely holding a regulated substance is 'in use'"). In the present case, the Second USTs were even more obviously not in use during Texaco's ownership because they had been purged of product. *G.J. Leasing* applies squarely to the facts in the case now before the Review Panel and

but there to appears have been "intent" that the USTs be put into use at a future date

[7] The SWRCB interprets definition 2 of section 2720 to include the RCRA provisions of 42 USC section 6991(3)(B) defining owners of tanks whose use was discontinued before November 8, 1984. *See* Letter from Mike McDonald to Local Oversight Program (LOP) Agencies, January 25, 1984, at 3.

demonstrates that the Second USTs were not in use after August 1983 for the purposes of section 2720.

To the same effect are two interpretative letters from the SWRCB. A 1993 letter to the Local Oversight Program Agencies reiterates the holding of *G.J. Leasing*, noting that "[t]he court specifically rejected assertions that 'in use' meant that a tank was in use merely because it held a regulated substance without conscious use being made of the tanks." Letter from Mike Harper to Local Oversight Program Agencies, October 5, 1993, at 1.

The Calleris mistakenly rely on a January 25, 1994 interpretative letter from the SWRCB to the Local Oversight Program Agencies (the "1994 McDonald Letter") to argue that the Second USTs were in use after August 1983, when Texaco acquired the Property. In fact, the 1994 McDonald Letter notes two factors indicating that tanks are no longer in use that apply directly to the present case: the owner abandoned the tank and no one else has used it; and the tank was sold to a person who had no use for the tank. 1994 McDonald Letter, at 3. It is beyond dispute that the Calleris lost the Property in foreclosure in August 1983, and no one used the Second USTs after that date. It is also beyond dispute that Texaco immediately declared the Property surplus and put it up for sale because it had no use for it. Both these factors from the 1994 McDonald Letter show that the Second USTs were not in use after August 1983, and that the Calleris were the last owners before the discontinuation of their use.

no use for the site, however, it appears site may have been marketed as a "turn-key" station, with intent to use USTs again

Finally, the Calleris attempt to avoid the plain language of section 2720 by arguing that they could not be the last owners or operators of the Second USTs before the discontinuance of their use because they did not intend to stop using the tanks in August 1983. Calleris' Memo. at 6. The argument is frivolous. Regardless of the Calleris' state of mind in 1983, we know that no one else ever used the tanks. Indeed, according to the Calleris' argument, they are still using the tanks to this day, because they never intended to stop.

The Calleris are therefore properly named as responsible parties under paragraph 2 of section 2720's definition. As the 1994 McDonald Letter makes clear, the Calleris are responsible parties under this definition regardless whether there is substantial evidence to show that a leak occurred before the discontinuation of use. The 1994 McDonald Letter states:

> "Under federal law [42 USC Section 6991(3)(B)], the person who owned a tank which was not used after November 8, 1984 immediately before the discontinuance of its use may be named a responsible party, even though substantial evidence does not exist to show that the leak occurred before discontinuance of use." 1994 McDonald Letter at 3 (emphasis added).

As set forth below, however, there is in fact ample evidence to show that the discharge noted in the original GTI report took place during the Calleris' ownership, providing an additional and independent basis for naming the Calleris as responsible parties.

C. There Is Sufficient Evidence To Show That The Discharges Reflected In The Environmental Reports Occurred During The Ownership Of The Calleris, Kubo, And Mohammadian, Not Of Texaco

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There is ample evidence to find that the minor contamination noted in the GTI 1986 Report occurred prior to August 1983. The Calleris are therefore responsible parties under paragraph 4 of section 2720's definition responsible parties.

Most obviously, the Second USTs were empty and idle after the Calleris vacated the Property in August 1983. The service station at the site was not operating. Common sense teaches that discharges typically result from operating USTs, not from inactive USTs.

In addition, the GTI 1986 Report provides several further facts showing that the discharge must have been before August 1983:

- Absence of any residual soil contamination
- Borings where any contamination was found in the groundwater were "located upgradient and to the north of the other monitoring wells in

the vicinity of the pump island indicating the initial contamination originated near the pumps"

- "Xylene concentrations were slightly higher than the more volatile benzene and toluene suggesting that the contamination is due to an older leak"
- The "lack of any detectable contamination in the downgradient wells suggests that a small localized loss likely occurred at the pump island"

(GTI 1986 Report at 10-11.) That the contamination originated near the pumps especially reinforces the conclusion that the contamination occurred while the pumps were in operation, as they were before August 1983 and not after. Further, the benzene noted in the GTI 1986 Report had almost disappeared in the GTI 1992 Report, confirming the GTI 1986 Report's conclusion that there had only been an old, isolated discharge, and not a continuing leak after 1983.

As noted, the GTI 1992 Report showed levels of TPH as gasoline that had not been present in late 1986, so that this contamination must have occurred after 1987, when Kubo and then Mohammadian owned and operated a service station on the Property. Similarly, the BTS 1994 Report showed much higher BTEX and TPH as gasoline levels even than had been present in 1992. Those findings again must have resulted from discharges after 1987. The two notices of violations, recounting numerous deficiencies in the operation and maintenance of the Third USTs, further support the conclusion that the present contamination of the Property has resulted from operation of the Third USTs after 1987.

The Review Panel therefore has sufficient evidence to find that the Calleris, Kubo, and Mohammadian are responsible parties on the ground that they owned or operated the USTs at the time of discharge.

D. The Calleris' 1984 Bankruptcy Does Not Shield Them From Responsible Party Status Now

The Calleris next argue that Mr. Calleri's bankruptcy filing in May 1984 protects them from responsible party status. The Calleris have misunderstood the law.

First, the pre- August 1983 contamination was not "fairly contemplated" as of the date the petition in bankruptcy was filed and therefore does not constitute a discharged debt in bankruptcy. *See California Department of Health Services v. Jensen,* 995 F. 2d 925, 930 (9th Cir. 1993); *In Re National Gypsum*, 139 B.R. 397 (N.D. Tex. 1992). Whether the release of contaminants and related costs were "fairly contemplated" is a factual question. The *National Gypsum* court identified four factors relevant to whether environmental response costs were "fairly contemplated" when the bankruptcy petition was filed:

- Knowledge by the parties that the site was contaminated
- Whether the site was listed on the National Priorities List
- Whether the debtor had been notified that it was a potentially responsible person
- Whether site investigation or cleanup had begun

Under none of these factors were the contamination and related costs "fairly contemplated" in 1984 when Mr. Calleri filed for bankruptcy.[8] There was no notice to anyone of a pre-August 1983 discharge until the GTI 1986 Report. In *Jensen*, by contrast, state regulators actually wrote to the debtor concerning environmental cleanup before the debtor filed for bankruptcy.

[8] It is not clear whether Mrs. Calleri was included in the 1984 bankruptcy petition. If she was not, then she of course is not protected by the bankruptcy discharge in any event.

Further, responsible party status resulting in a corrective action order requiring the Calleris to clean up presently existing contamination is not a pre-petition claim for money and therefore is not subject to discharge. *See e.g. Torwico Elecs., Inc. v. N.J. Dept. of Envt'l Protection & Energy*, 153 B.R. 24, 25-26 (D.N.J. 1992), *aff'd*, 8 F. 3d 146 (3rd Cir. 1993), *cert. denied* 114 S. Ct. 1576 (1994).

E. Texaco Should Be Excluded From The List Of Responsible Parties Or Should Be Assigned Secondary Responsibility

The Review Panel should follow the SWRCB's ruling in *Petition of Wenwest et al.*, SWRCB Order WQ 92-13, 1992 Cal. ENV. LEXIS 19 (October 22, 1992), and exclude Texaco from the list of responsible parties entirely or assign it at most secondary responsibility.

> In *Petition of Wenwest,* the Board stated:
>
> "No order issued by this Board has held responsible for a cleanup a former landowner who had no part in the activity which resulted in the discharge of the waste and whose period of ownership did not cover the time during which that activity was taking place." 1992 Cal. ENV. LEXIS 19, *6-*7.

The Board's appraisal of Wendy's circumstances fits Texaco's as well. The site was idle while Texaco owned it, and Texaco had nothing to do with the operation of the service station that discharged contaminants into the groundwater. The factors listed by the Board in favor of omitting Wendy's from its cleanup order dictate the same result for Texaco:

- Wendy's owned the site for a brief time. Relative to the many years the Property was operated as a service station, Texaco also owned the Property for a brief time. 3 years ?
- The franchisee who bought the property from Wendy's is named in the order. In the present case, Kubo and Mohammadian are also responsible parties.

- Wendy's had nothing to do with the activity that caused the leaks. So too, Texaco never operated a service station at the site.
- Wendy's never engaged in cleanup or other activity at the site that may have exacerbated the problem. So too, Texaco did nothing to exacerbate the level of contamination.
- While Wendy's had some knowledge of a pollution problem at the site, the focus at the time was on a single spill, not an on-going leak. Texaco only learned of any contamination just before it sold the Property to Kubo and was assured the contamination was minor and the result of an isolated spill. not by RWQCB, but GT!
- Wendy's purchased the site in 1984 at a time when USTs were just being recognized as a problem and before most UST legislation was passed. Texaco acquired the Property in 1983.
- There were several responsible parties properly named in the Wenwest order. The Calleris, Kubo, and Mohammadian are all proper responsible parties, and all potentially high priority claimants on the UST Trust Fund.
- The cleanup is proceeding. In the present case, cleanup has not begun, but environmental monitoring is in process. *Petition of Wenwest*, 1992 Cal. ENV. LEXIS 19, *7-*8.

Under the factors listed in *Petition of Wenwest*, Texaco should not be named as a responsible party.

In the alternative, the Board should assign Texaco only secondary responsibility because, while it owned the Property after a discharge appears to have taken place, Texaco in no way initiated or contributed to the actual discharge. *See Petition of Wenwest*, 1992 Cal. ENV. LEXIS 19, *8-*9 (current landowner assigned secondary responsibility where "she neither caused nor permitted the activity which led to

the discharge"); January 6, 1995 Letter from Mike Harper to Local Oversight Program Agencies Re: Primary/Secondary Responsibility for Tank Cleanups (Proposed language for the 1995-1997 contract: secondary responsibility is appropriate where primary responsible party is performing corrective action and it is clear that the party seeking secondary status did not in any way initiate or contribute to the actual discharge); September 22, 1994, Memorandum from Office of the Chief Counsel, SWRCB, at 2 ("Secondary responsibility is based on the combined notion of full legal responsibility through ownership or control together with complete lack of culpability"). Texaco never installed any tanks at the property, never used any tanks at the Property, and never operated on the Property in any way. At most it should be named as secondarily responsible. In that way, Texaco would only have to undertake cleanup if the Calleris, Kubo, and Mohammadian all failed to obtain funds for remediation from the UST Trust Fund or otherwise failed to clean up the Property.

IV. CONCLUSION

For the foregoing reasons, Texaco should not be named as a responsible party or should only be assigned secondary responsibility. The Calleris, Kubo, and Mohammadian should all be retained as responsible parties.

Dated: July 14, 1995

Respectfully submitted,

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ALAMEDA COUNTY HEALTH CARE SERVICES AGENCY
DEPARTMENT OF ENVIRONMENTAL HEALTH
ENVIRONMENTAL PROTECTION DIVISION

In Re The Properties Known As:	)
	)
Linda Shell	)
15595 Washington Avenue	)
San Lorenzo	)
	)

APPENDIX OF AUTHORITIES
SUBMITTED IN SUPPORT OF MEMORANDUM OF TEXACO INC.
RE RESPONSIBLE PARTIES

APPENDIX OF AUTHORITIES

Federal Cases

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

California Department of Health Services v. Jensen, 995 F. 2d 925 (9th Cir. 1993)

In Re National Gypsum, 139 B.R. 397 (N.D. Tex. 1992)

Torwico Elecs., Inc. v. N.J. Dept. of Envt'l Protection & Energy, 153 B.R. 24, (D.N.J. 1992), *aff'd*, 8 F. 3d 146 (3rd Cir. 1993), *cert. denied* 114 S. Ct. 1576 (1994)

California State Water Resource Control Board Orders

Petition of Exxon Company, SWRCB Order No. 85-7, 1985 Cal. ENV. LEXIS 10 (August 22, 1985)

Petition of Stinnes-Western Chemical Corporation, SWRCB Order No. WQ 86-16, 1986 Cal. ENV. LEXIS 18 (September 18, 1986)

Petition of Alvin Bacharach and Barbara Borsuk, SWRCB Order No. WQ 91-07, 1991 Cal. ENV. LEXIS 17 (June 20, 1991)

Petition of Wenwest et al., SWRCB Order No. WQ 92-13, 1992 Cal. ENV. LEXIS 19 (October 22, 1992)

California Regulations

23 CCR section 2720

Other Authorities

Letter from Mike Harper to Local Oversight Program Agencies, October 5, 1993

Letter from the SWRCB to the Local Oversight Program Agencies, January 25, 1994

Letter from Mike Harper to Local Oversight Program Agencies, January 6, 1995, with attachments, including September 22, 1994, Memorandum from Office of the Chief Counsel, SWRCB

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ALAMEDA COUNTY HEALTH CARE SERVICES AGENCY
DEPARTMENT OF ENVIRONMENTAL HEALTH
ENVIRONMENTAL PROTECTION DIVISION

In Re The Properties Known As: Linda Shell 15595 Washington Avenue San Lorenzo	MEMORANDUM OF TEXACO INC. RE DESIGNATION OF RESPONSIBLE PARTIES

1ST SECTION of Level 1 printed in FULL format.

THIS SECTION IS CURRENT THROUGH REGISTER 95, NO. 24, JUNE 16, 1995

TITLE 23. WATERS
DIVISION 3. STATE WATER RESOURCES CONTROL BOARD
CHAPTER 16. UNDERGROUND TANK REGULATIONS
ARTICLE 11. CORRECTIVE ACTION REQUIREMENTS

23 CCR 2720 (1995)

§ 2720. Additional Definitions

Unless the context clearly requires otherwise, the following definitions shall apply to terms used in this Article.

"Corrective action" means any activity necessary to investigate and analyze the effects of an unauthorized release; propose a cost-effective plan to adequately protect human health, safety, and the environment and to restore or protect current and potential beneficial uses of water; and implement and evaluate the effectiveness of the activity(ies). Corrective action does not include any of the following activities:

(1) Detection, confirmation, or reporting of the unauthorized release; or

(2) Repair, upgrade, replacement or removal of the underground storage tank.

"Cost-effective" means actions that achieve similar or greater water quality benefits at an equal or lesser cost than other corrective actions.

"Federal act" means Subchapter IX (commencing with Section 6991) of Chapter 82 of Title 42 of the United States Code, as added by the Hazardous and Solid Waste Amendments of 1984 (P.L. 98-616), or as it may subsequently be amended or supplemented, and the regulations adopted pursuant thereto.

"Regulatory agency" means the Board, regional board, or any local, state, or federal agency which has responsibility for regulating underground storage tanks or which has responsibility for overseeing cleanup of unauthorized releases from underground storage tanks.

"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.

AUTHORITY:

Note: Authority cited: Section 25299.77, Health and Safety Code. Reference: Section 25299.37, Health and Safety Code and 40 CFR Section 280.12.

HISTORY:

1. New section filed 12-2-91 as an emergency; operative 12-2-91. Text remains in effect uninterrupted pursuant to Health and Safety Code section 25299.77 (Register 92, No. 9).

2. Editorial correction of printing errors in History 1. (Register 92, No. 43).

LEVEL 1 - 4 OF 14 OPINIONS

In the Matter of the Petitions of WENWEST, INC., SUSAN ROSE, WENDY'S INTERNATIONAL, INC. AND PHILLIPS PETROLEUM COMPANY For Review of Cleanup and Abatement Order No. 92-041 by the California Regional Water Quality Control Board, San Francisco Bay Region. Our Files Nos. A-799, A-799(a), and A-799(b)

Order No. WQ 92-13

State of California
State Water Resources Control Board

1992 Cal. ENV LEXIS 19

October 22, 1992

BEFORE: [*1] W. Don Maughan, John Caffrey, Marc Del Piero, James M. Stubchaer

OPINIONBY: BY THE BOARD

OPINION:

On April 15, 1992, the California Regional Water Quality Control Board, San Francisco Bay Region (RWQCB), adopted Cleanup and Abatement Order No. 92-041 directing the cleanup of soil and ground water at a site in Concord. The contamination consists of gasoline and dissolved hydrocarbons at and near a former service station. The site is now occupied by a Wendy's hamburger restaurant. The RWQCB named five parties in its order: the former operators of the service station, the oil company whose predecessor owned the property, Wendy's International, Wenwest -- the franchise owner, and Susan Rose, a retired school teacher in Hawaii who has inherited the real property from her mother. All but the former operators have filed timely petitions with the State Water Resources Control Board (State Water Board). All argue that it is improper to name them in the order and, in the alternative, that the RWQCB abused its discretion when it refused to place them in a position of secondary responsibility.

I. BACKGROUND

There has been a service station on the site since near the end of World War II. From 1960 until [*2] 1980, the property was owned by a subsidiary of Aminoil USA, Inc. and leased to Redding Petroleum, Inc. (Redding). Aminoil USA, Inc. merged with Phillips Oil Company which became Phillips Petroleum Company in 1985. Redding operated a service station at this location from 1960 until 1984. Redding bought the property from Aminoil in 1980 and transferred title to Mr. and Mrs. Redding. They transferred it back to their corporation for sale to Wendy's International in 1984. Later that same year, after Wendy's found that Wenwest was qualified to build and run a restaurant, it sold the site to the franchisee. The following year, Wenwest sold the property to the mother of Susan Rose and immediately leased it back. Before escrow closed, the woman died leaving her daughter to take title. Ms. Rose still owns the property subject to a lease with Wenwest.

Contamination problems first came to light in the early 1980's. A neighbor began to detect floating gasoline in his well located some 150 feet downgradient of the service station. In 1983, responding to a complaint from that neighbor, Redding determined that an inventory loss of 600-800 gallons had taken place. Redding did some cleanup [*3] work with an extraction well and closed the underground tanks. When the property was sold in 1984, Redding claims it told Wendy's of the problem. Wendy's consultant noted in a report that "a gasoline layer was noticed floating on the groundwater in the borehole." However, no remediation was recommended or undertaken. In 1985, after Wenwest bought the property and built the restaurant, strong hydrocarbon odors were found in the women's restroom. An investigation by a different consultant was inconclusive and no action was taken. A subsequent and more extensive investigation by the second consultant began about three years later. By 1990 they had found strong evidence of gasoline contamination. Levels as high as 210,000 ppb total petroleum hydrocarbons were found in ground water. Those findings are the basis of the order RWQCB's order we now review.

II. CONTENTIONS AND FINDINGS

Contention: Each petitioner makes the same basic claim that the RWQCB should have left them off the order or that they should have been treated as secondarily responsible for the cleanup. n1

- Footnotes - - - - - - - - - - - - - - - - - -

n1 All contentions not discussed in this order are denied for failure to raise substantial issues appropriate for review. Title 23, California Code of Regulations, Section 2052(a)(1). People v. Barry (1987) 194 Cal.App.3d 158, 139 Cal.Rptr. 349.

- End Footnotes - - - - - - - - - - - - - - - - - -
[*4]

Findings: The RWQCB properly included Phillips Petroleum as a fully responsible party. Wendy's International should not have been included as a discharger in the cleanup and abatement order. Wenwest and Susan Rose are properly included in the order but should be treated as secondarily responsible for the tasks in the order. n2

- Footnotes - - - - - - - - - - - - - - - - - -

2n At the time the RWQCB issued its order, work was not progressing on the cleanup. This led the RWQCB to decide that the primary/secondary distinction was inapplicable. This was not an unreasonable conclusion for the RWQCB to reach. We now take notice that work is progressing satisfactorily and will address the case as it stands before us.

- End Footnotes - - - - - - - - - - - - - - - - - -

1. Phillips Petroleum

Although the Phillips name was not associated with the service station during its years of operation, the entity which owned the property from 1960 until 1980

was a subsidiary of what has since become Phillips Petroleum. The question before us is whether Phillips' predecessor acted in such a way as to obligate Phillips [*5] to participate in the cleanup. Under precedent established by this Board (see Petition of John Stuart, Order No. WQ 86-15), we apply a three-part test to former owners: (1) did they have a significant ownership interest in the property at the time of the discharge?; (2) did they have knowledge of the activities which resulted in the discharge?; and (3) did they have the legal ability to prevent the discharge? The answer to all three questions is affirmative as regards Phillips' predecessor.

While the only documented discharge of gasoline occurred in 1983, the record shows clearly that discharges took place much earlier. Phillips has offered no evidence to rebut the reports made by Wendy's and Wenwest's consultant that, considering the soil in the area and the distance the gasoline has travelled to reach the neighbor's well, discharges took place at least 12 years before it was detected by the neighbor. That places the time of discharge well within the ownership of the property by Phillips' predecessor. Phillips' argument that the 1983 leak somehow caused the pollution of the well that same year flies in the face of common sense and the laws of nature.

That Phillips' liability [*6] arises because of discharges which took place before 1980 is of no legal significance. The discharge of hydrocarbons into the State's ground water was a violation of the law long before 1980.

2. Wendy's International

We have issued many orders addressing the question of who is responsible for ground water cleanups. No order issued by this Board has held responsible for a cleanup a former landowner who had no part in the activity which resulted in the discharge of the waste and whose ownership interest did not cover the time during which that activity was taking place. Considering those facts and the existence of other fully responsible parties, we see no reason to establish that precedent in this case. We have applied to current landowners the obligation to prevent an ongoing discharge caused by the movement of the pollutants on their property, even if they had nothing whatever to do with putting it there. (See Petition of Spitzer, Order No. WQ 89-8; Petition of Logsdon, Order No. WQ 84-6; and others.) The same policy and legal arguments do not necessarily apply to former landowners.

In this case, the gasoline was already in the ground water and the tanks had been closed [*7] prior to the brief time Wendy's owned the site. They were told about the pollution problem by their consultant and perhaps by Redding. They took no steps to remedy the situation. On the other hand, they did nothing to make the situation any worse. Had a cleanup been ordered while Wendy's owned the site, it would have been proper to name them as a discharger. Under the facts as presented in this case, it is not.

In short, we conclude that it is inappropriate to include Wendy's as a discharger based on a number of considerations. Among the factors unique to this case are:

* Wendy's purchased the site specifically for the purpose of conveying it to a franchisee.

* Wendy's owned the site for a very brief time.

* The franchisee who bought the property from Wendy's is named in the order.

* Wendy's had nothing to do with the activity that caused the leaks. (In previous orders in which we have upheld naming prior owners, they have been involved in the activity which created the pollution problem. [See Logsdon Petition, op. cit., Petition of Stinnes-Western, Order No. WQ 86-16, and Petition of The BOC Group, Order No. WQ 89-13.])

* Wendy's never engaged in any cleanup or other [*8] activity on the site which may have exacerbated the problem.

* While Wendy's had some knowledge of a pollution problem at the site, the focus at the time was on a single spill, not an on-going leak.

* Wendy's purchased the site in 1984 at a time when leaking underground tanks were just being recognized as a general problem and before most of the underground tank legislation was enacted.

* There are several responsible parties who are properly named in the order.

* The cleanup is proceeding.

3. Susan Rose

As we indicated above, the current landowner, however blameless for the existence of the problem, should be included as a responsible party in a cleanup order. We have taken that position many times in the past and have never ruled to the contrary. Thus, we find that the RWQCB was correct in naming Susan Rose in its order.

The issue of secondary liability remains. This concept is one which we have discussed in a relative few of our orders. We first used it, without that label, in our order concerning the development of solar power plants in the Southern California desert. (See Petition of Southern California Edison, Order No. WQ 86-11.) Later we applied the principle [*9] to a mining operation on federal land. (See Petition of U.S. Department of Agriculture, Order No. WQ 87-5.) In both cases, the Regional Water Board had decided to place the petitioner in a position of secondary responsibility and we concurred.

We first applied this principle over the wishes of the Regional Water Board in another 1987 order. (See Petition of Prudential Insurance Company of America, Order No. WQ 87-6.) There we found that the unique facts of that case (a long-term lease with little actual access along with a cleanup that was well under way) justified putting the landowner in a position where it would have no obligations under the order unless and until the other parties defaulted on their's. In 1989, we again affirmed a Regional Water Board order which utilized the secondary liability approach. (See Petition of William R. Schmidl, Order No. WQ 89-1.) We have also required a Regional Water Board to include a previously unnamed party and to give that person secondary liability status in circumstances similar to the Prudential petition. (See Petition of Arthur Spitzer, Order No. WQ 89-8.)

Based on our earlier decisions and the information in the record, we find

[*10] it appropriate that Susan Rose be listed in the cleanup and abatement order as secondarily responsible party. While she is the current landowner, it is clear that she neither caused nor permitted the activity which led to the discharge. The order will be redrafted to reflect that change.

4. Wenwest, Inc.

The situation with regard to Wenwest is a little bit more complicated. Because Wenwest had nothing to do with the activity which caused the discharge and is, like Wendy's International, a former owner of the land, it could be argued that it does not belong in the order at all. However, we find that the controlling interest which Wenwest has in the property, springing as it does from a sale/lease back arrangement with an absentee landowner, places it in a position of some responsibility. Wenwest exercises all the normal attributes of day-to-day ownership of the property. We see no reason to treat Wenwest any differently from Susan Rose. Wenwest should be named as a secondarily responsible party.

III. CONCLUSION

The cleanup and abatement order issued by the RWQCB must be modified to remove one party and change the status of two others. The RWQCB properly included [*11] Phillips Petroleum whose predecessor owned the property and leased it to a service station operator during a time when leaks from the underground storage tanks were clearly taking place. Wendy's International has no present interest in the property and never owned it during the time the tanks were actually leaking. There is no basis to include Wendy's International in the order. Wenwest, the operator of the restaurant on the site, and Susan Rose, the owner of the property at present, both belong on the order as responsible parties. However, because they had nothing to do with the actual discharge and because the two primarily responsible parties are capable of and willing to undertake the cleanup, Wenwest and Ms. Rose should be required to perform the cleanup only in the event of default by Redding and Phillips.

IV. ORDER

It is hereby ordered that Cleanup and Abatement Order No. 92-041 be amended to remove Wendy's International, Inc. from the list of dischargers and to state that Wenwest, Inc. and Susan Rose are only to be held responsible for the performance of the listed tasks in the event that Redding and Phillips fail to fulfill their obligations.

LEVEL 1 - 7 OF 14 OPINIONS

In the Matter of the Petition of ALVIN BACHARACH AND BARBARA BORSUK For Review of Alameda County Cleanup Order Issued on January 14, 1991. Our File No. A-728

Order No. WQ 91-07

State of California
State Water Resources Control Board

1991 Cal. ENV LEXIS 17

June 20, 1991

BEFORE: [*1] W. Don Maughan, Eliseo M. Samaniego, John Caffrey

OPINIONBY: BY THE BOARD

OPINION:

The Alameda County Health Care Services Agency (County) has taken responsibility for supervising the cleanup of certain leaking underground tank sites within its jurisdiction. On July 31, 1990, the County issued a notice of violation to Alvin Bacharach and Barbara Borsuk (Petitioners) concerning a piece of property in Oakland which they have owned since about 1945. The site, located at 1432 Harrison Street, had served as a parking garage for several decades. It was leased to various operators over the years including Douglas Motor Services (Douglas) which occupied the site from 1972 through 1988. Petitioners asked the County to amend the notice of violation, as well as subsequent requirements for site assessment and cleanup, to include Douglas as a responsible party. On January 14, 1991, the County refused to do so. This petition followed on February 7, 1991.

I. STATE BOARD JURISDICTION

In 1989 the Legislature added several new sections to the underground tank law. Chapter 6.75 -- Petroleum Underground Storage Tank Cleanup -- was added to give local government more flexibility in ordering dischargers to clean [*2] up spilled gasoline and other petroleum products. Under earlier law, counties could only go to court for injunctions and penalties and had little more than the threat of doing so to compel cooperation. Chapter 6.75 placed local government on a part with a Regional Water Quality Control Board (Regional Board) in many ways. Among other things, local agencies "may issue an order to the owner, operator, or other responsible party requiring compliance" with the cleanup sections of the statute. (Health and Safety Code Section 25299.37(c).) The State Water Resources Control Board (State Board) is required to adopt regulations which implement Chapter 6.75. Those regulations may clarify the remedies available to local agencies. Until the State Board adopts those regulations, a local agency order must still be enforced using the normal judicial sanctions.

When a local agency issues an order under that section, the person to whom it is directed may petition the State Board in precisely the same manner as if it were a cleanup and abatement order issued by a Regional Board. (Health and

Safety Code Section 25299.37(d).) From the language as well as the context of that section, it seems [*3] clear the Legislature intended to give a local agency the power to issue what amounts to a cleanup and abatement order in this limited context. We will review the County's order as if it were a cleanup and abatement order issued by a Regional Board.

II. CONTENTION AND FINDING

1. Contention: Petitioner raises only one point in its brief to the State Board. Petitioner contends that the County erred in refusing to add the name of Douglas Motor Services to the order to investigate subsurface contamination of the parking garage. Petitioner has dropped the argument it made to the County that only Douglas should be named in the order.

Finding: Petitioner's claim that Douglas ought to be added to the order has merit. While a landowner generally should be named whenever he or she knew of and allowed the activity which caused the problem, it would be unfair to place all of the responsibility on the landowner. The Water Code provides for the issuance of cleanup and abatement orders to "dischargers." Orders issued pursuant to the Health and Safety Code section under which the County is proceeding are equivalent to cleanup and abatement orders under Section 13304 of the [*4] Water Code. Thus, equating "dischargers" with "operators" or "other responsible parties" in this order is proper. Lessees have often been named as responsible parties under Section 13304. (See e.g. Order No. WQ 89-8, Arthur Spitzer et al., Order No. WQ 85-15, Stuart Petroleum.)

Several factors support a conclusion that Douglas ought to be named in this order. Douglas operated a parking garage on the site for about 16 years. During that time, he pumped gas from two underground tanks. His business benefited from his ability to provide gasoline to his customers. Over time, he replaced both of those tanks largely at his own expense (though not without efforts to have Petitioners share in the cost.) The record contains some evidence that Douglas may have known in 1982 that the tanks were leaking. The extent of the migration of the gasoline, as mapped in the Subsurface Consultants report, is consistent with an assumption that leaks have existed for some time.

The record before the State Board is far from complete and, from it, we cannot be certain that leaks at the garage occurred during its operation by Douglas. However, if the County has substantial evidence which shows [*5] that Douglas was in control of the property and using the tanks while leaks were taking place, even if Douglas was not actually aware of the leaks, the County should consider Douglas a "responsible party" and, under these circumstances, name him in its order.

In many cases we have deemed it reasonable to place one party in a position of secondary responsibility. (See e.g. Order No. WQ 87-6, Prudential Insurance Company of America.) We find no basis for suggesting that the County do that in this case.

III. CONCLUSION

Petitioner's contention that Douglas ought to be added to the County's order appears to have merit. If the County has substantial evidence that the leaks from the underground tanks occurred during the time Douglas was operating them,

the County should add Douglas to its order.

IV. ORDER

IT IS HEREBY ORDERED that this matter is remanded to the County for action consistent with this order.

LEVEL 1 - 12 OF 14 OPINIONS

In the Matter of the Petition of STINNES-WESTERN CHEMICAL CORPORATION For review and petition for stay of Order No. 86-34, Waste Discharge Requirements of the California Regional Water Quality Control Board, San Francisco Bay Region Our File No. A-438

Order No. WQ 86-16

State of California
State Water Resources Control Board

1986 Cal. ENV LEXIS 18

September 18, 1986

BEFORE: [*1] W. Don Maughan, Chairman, Edwin H. Finster, Member, Eliseo M. Samaniego, Member, Danny Walsh, Member

OPINIONBY: BY THE BOARD

OPINION:

On May 21, 1986, the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Board) adopted waste discharge requirements (site cleanup requirements) Order No. 86-34, to address pollution problems at a chemical packaging and distribution facility. The order names Great Western Chemical Company, the current landowner, and Stinnes-Western Chemical Corporation, a successor in interest to a previous landowner, as responsible parties. On June 20, 1986, the State Board received a petition from Stinnes-Western (petitioner) requesting review and stay of the Regional Board Order. Since we will address the petition for review on its merits, we do not need to reach the issues of the stay request.

I. BACKGROUND

Great Western Chemical Company currently owns and operates a chemical packaging and distribution facility in the City of Milpitas in Santa Clara County. The previous landowner, Western Chemical and Manufacturing Company, bought the undeveloped land in 1969 and constructed a chemical packaging facility on the property. Western Chemical sold the [*2] facility in December 1978 to Great Western Chemical Company. Western Chemical Company was acquired by Stinnes-Western Chemical Corporation (petitioner) on February 5, 1980 pursuant to a stock purchase agreement. Large amounts of chemicals are currently handled and also were handled by petitioner's predecessor, Western Chemical, on the site. Eight 7,500 gallon underground tanks have been and are being used to store various alcohols and ketones such as acetone, butanone (also known as methyl ethyl ketone or MEK), butyl cellosolve, ethylene glycol, and isopropanol (and toluene for six months in 1982.)

Adjacent to the underground tanks were four above ground 6,000 gallon tanks. These tanks were removed by Great Western in 1984 and 1984. The above ground tanks were used to store chlorinated hydrocarbon solvents. The hydrocarbons included 1,1,1-trichloroethane (TCA), trichloroethene (TCE) and

tetrachloroethene (PCE). A continuous concrete slab was located beneath the aboveground tanks, and above the eight underground tanks.

A portion of the concrete slab has a small curb around it in the above ground tank area to drain stormwater runoff and spills into a concrete sump. This sump [*3] does not have double containment, and now has cracks in the concrete and possibly a separation of wall joints. The rest of the slab is sloped to drain rainfall runoff into the yard drain in the parking lot. Because of the elevations of the slab and the parking lot asphalt, runoff from the slab would have to drain into the yard drain along with runoff from the loading dock area. There is no indication in the record that any berms were placed around the overall raised concrete slab to prevent runoff of chemicals and rainfall.

In response to the Regional Board's May 1982 Underground Leak Detection Program Questionnaire, Great Western implemented an investigation in December 1982 to determine if solvent tanks or piping had leaked. Organic solvents were detected in the soil and groundwater on-site. High concentrations of chlorinated solvents and toluene are present in the soil and groundwater near the underground and above ground tanks. For example, soil core samples at the tank farm contained 11,000 parts per billion (ppb) TCE; 6,800 ppb TCA; 2,100 ppb PCE and other organic solvents.

Additional studies have shown that a solvent plume extends laterally from the tank area off site [*4] more than 2,250 feet to the northwest and vertically for a depth less than 60 feet from the ground surface. Significant groundwater pollution has occured. As shown in the following table, pollutant concentrations have exceeded Department of Health Services action levels by large margins throughout the plume. The maximum historical concentrations are listed in the table. The results from the date of February 20, 1985 are shown as a typical example:

TABLE 1
GROUNDWATER CONTAMINATION

COMPOUND	MAXIMUM CONCENTRATIONS (in ppb)		DEPT. OF HEALTH SERVICES ACTION LEVEL n1 (ppb)	RMCL (ppb)	MCL * (ppb)
	2/20/85	HISTORICAL			
1,1,1-trichloroethane (TCA)	240,000	530,000	200	200	200
trichloroethene (TCE)	140,000	670,000	5	0	5
tetrachloroethene (PCE)	45,000	250,000	4#H* 0	---	
dichloromethane (methylene chloride)	13,000		40	---	---
1,1-dichloroethene (DCE)	5,600		6	7	7
1,2-trans-dichloroethene	10,300		16	---	---
toluene	4,500		100	---	---
acetone	12,000		---	---	---
butanone	2,300		---	---	---

- Footnotes - - - - - - - - - - - - - - - - - -

* proposed [*5]

n1 California Department of Health Services "Action Levels" are health-based criteria which are not enforceable standards but are intended as guidelines. RMCLs or "recommended maximum contaminant levels" are established by EPA. RMCLs are strictly health-based and are set at a level at which no known or anticipated adverse human health effects will occur. MCLs or "maximum contaminant levels" are required to be set by EPA as close to RMCLs as feasible, after taking into account the technology treatment techniques and cost of achieving the standard for drinking water. Both RMCLs & MCLs are promulgated pursuant to the Safe Drinking Water Act (42 USC § 300f et seq.)

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With this background, we shall now turn to the contentions made by petitioner. We note that the adoption of the Order is not at issue here, but only whether Stinnes-Western was properly named as a discharge. While we will differentiate between the actions of Western Chemical and Stinnes-Western, we consider Stinnes-Western, as a successor in interest, to be ultimately responsible for any action of Western Chemical.

II CONTENTION AND [*6] FINDINGS

1. Contention: There is insufficient evidence in the record to establish that Western Chemical, (petitioner's predecessor in interest) discharged waste.

Finding: Our review of the Regional Board record shows a number of different factors which, taken as a whole, lead us to conclude that petitioner was properly named a responsible party.

At the outset, we note that all parties agree that Western Chemical and Great Western handled the same chemicals at the site. These are the same chemicals which have been found in soils and groundwater at the site.

Underground Tank Leakage

This groundwater and soil contamination may have occurred several different ways, or a combination of ways. One way is leakage of the underground tanks. Very high concentrations of chemicals are found in soils and groundwater immediately downgradient of the underground tank farm. Soil borings adjacent to the underground tanks show concentrations of both toluene and volatile organics. Similarly, our experience with underground tanks has shown that many of them leak. n1 While petitioners allege that the tanks were properly tested and built to Underwriters Laboratories standards at the time of installation, [*7] (approximately 1970-1971) there is no indication in the record showing that any subsequent testing of the tanks or the connecting pipes and hosing was ever done. Certainly, the tanks were not built to today's standards requiring double containment and leak detection systems. Of interest is the type of chemicals found in the soils adjacent to the underground tanks. The underground tanks were used primarily for alcohols and ketones, although declarations submitted by petitioner state for at least one period in 1971, a chlorinated solvent was stored in an underground tank. Both toluene and chlorinated organics are found in the soil by the underground tanks. There is a large quantity of acetone and butanone in the underlying groundwater.

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - -

n1 For example, a recent report by the Environmental Protection Agency (EPA) estimates 35% of underground motor fuel tank leak. While the underground tanks here are not motor fuel tanks, the leakage percentage is probably very similar. See "Underground Motor Fuel Storage Tanks: A National Survey." Volume 1, EPA 560/5-86-013, May 1986.

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[*8]

Above Ground Handling Practices

Another way contamination could have occurred is during above ground handling practices. Specific instances are discussed in three declarations. n2

- - - - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - - -

n2 Petitioner alleges that the Regional Board based its conclusion that Stinnes-Western had discharged waste entirely upon hearsay. We do not agree. Our regulations explicitly allow hearsay testimony to be admitted, although it is insufficient in and of itself to support a finding. As discussed infra, the Regional Board had numerous bases for its action. We note both petitioner and Great Western submitted sworn declarations, and Great Western had witnesses available at the Regional Board hearing not questioning. Petitioner could have questioned the witnesses, but chose not to do so. We believe the Regional Board properly looked at all declarations but did not base a finding solely on them.

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Petitioner submitted the sworn declaration of Gareld Johns, former president and owner of two-thirds of the outstanding common stock of Western [*9] Chemical, and the sworn declaration of Ted Cluff, former Secretary and owner of one-third of the outstanding common stock of Western Chemical. Great Western submitted the sworn declaration of Jack Hartsook, a former employee of Western Chemical.

Two declarations specifically mention a spill of PCE, estimated by Hartsook to have occurred in 1974, and to be from 500-600 gallons, and by Cluff to be from 300-400 gallons. Cluff indicates that the leakage was into a concrete containment area, and was then pumped back into drums. As noted earlier, the concrete above ground sump does not have double containment and now has cracks in the concrete and a possible separation in the wall joints.

As we will discuss further in regard to other discharges of chemicals onto the concrete slab, concrete is not impermeable. Spillage will inevitably result in some solvent reaching the ground through the concrete. The permeability of the concrete greatly increases when cracks are present. Cracks are certainly present now, and we note that at least small cracks are always present in concrete. n3 Thus, we find that the acknowledged spill of PCE inevitably resulted in some unquantified amount of material [*10] reaching the ground.

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n3 See, e.g. William B. Kayes, "Construction of Linings for Reservoirs, Tanks

and Pollution Control Facilities.", John Wiley and Sons, 1977 and "Petrology of Concrete Affected By Cement -- Aggregate Reaction", Duncan McConnell, et al., Geological Society of America, November 1950, p. 232, et seq.

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The Hartsook declaration also makes reference to several drumming practices of Western Chemical which would have resulted in the discharge of chemicals. Specifically, Hartsook declares that during the drumming process, wherein 54 gallon drums located on a flat concrete slab were filled with chemicals, some dripping or runoff from the hose would go into the concrete slab. Further, Hartsook declares that after the drumming process was completed, the wet hose was laid flat on the concrete slab to dry out or situated to drain by gravity. During the draining process, the chemical would drip from the hose onto the slab. A third item noted by Hartsook and confirmed by Cluff is that on occasion some of the [*11] 54 gallon drums used by Western Chemical would leak chemicals onto the concrete slab. As a result of these leaks, chemical products had to be repacked for proper storage. We note that the drums were manually filled, generating a significant danger of over topping.

While both Cluff and Johns declare that Western Chemical handled and stored chemicals in accord with safe handling practices of the chemical industry, the specific allegations above are not irrebutably refuted. For example, in regard to the drumming process, Cluff admits that a small amount of solvents were spilled, but specifically states ". . . the transfer of solvent chemicals does not occur in a totally closed system. Insignificant volumes of solvent may escape from the system. However, any small amount of such solvent quickly evaporates due to the volatile nature of the solvents involved and does not contaminate the surface, subsurface or groundwater." (Cluff declaration at paragraph 15.)

We are concerned what "insignificant" may mean, given the extremely low action levels for these chemicals. Additionally, we note that solvent does not necessarily quickly evaporate. Small quantities of solvent inevitably will [*12] seep through concrete, as discussed above.

The Cluff declaration also speaks to the procedure used by Western hemical when drums were found to be leaking or if a small amount of solvent were spilled, noting that spills either drained into the containments, or were absorbed by absorbent clay. "Any spill so small that it could not be absorbed would escape through evaporation" (Cluff at paragraph 16.)

In our view, what these declarations essentially say is that discharge of chemicals did occur, in numerous instances during the drumming process and due to leaking drums and because of the acknowledged PCE spill. We do not believe this material could have all "evaporated". Further, because of the nature of concrete and the "containment" system used by Western Chemical, some subsurface discharge would inevitably have occurred.

Additional Considerations

In our review of the record, we note several other factors supporting the naming of Stinnes-Western as a discharger. The Regional Board, in its response, has explicitly referred to chemical handling practices standard to the industry at the time Western Chemical owned the site. The Regional Board states that it

has found these past [*13] standard practices to be insufficient to protect the environment from chemical pollution. The Regional Board further notes that typically chemical handling practices in the past did unknowingly allow adverse environmental impacts to occur. n4

- Footnotes - - - - - - - - - - - - - - - - - -

n4 Indeed, the Regional Board cites the Cluff and Johns declarations, arguing that the envionmentally unsafe handling practices are still though to be appropriate by Cluff ("Insignificant volumes of solvent may escape from the system"). Further, the Regional Board notes the Johns declaration at paragraph 11, which does not deny the PCE spill, but alleges that no such spill "resulted in an adverse environmental impact". As we noted earlier, given the very low action levels for these chemicals, today we are concerned with any discharge.

- End Footnotes - - - - - - - - - - - - - - - - - -

We take administrative notice of the Regional Board's experience and expertise in this area. The Regional Board has regulated similar companies for many years. Currently, the Regional Board is engaged in overseeing numerous cleanup operations [*14] resulting from improper and inadequate handling of hazardous materials on sites.

Another factor discussed by the Regional Board is that of rainfall runoff resulting in a discharge. Based upon the site maps in the record, any spills or leaks of chemicals during a rainfall would be transported by rainfall runoff to the yard drain and from there to a storm drain leading to an unlined trench. Chemicals would percolate into the soil and groundwater from the trench.

Finally, we reviewed the characteristics of the solvent plume itself. The plume extends almost half a mile. We note that the gradient of the plume, at 0.007 (7 feet drop in groundwater elevation per 1000 feet distance) is not particularly steep. Use of the Darcy's Law standard equation for determining the movement of materials through soil and groundwater n5 shows that the time of travel of the chemicals was at least two years and up to 60 years.

- Footnotes - - - - - - - - - - - - - - - - - -

-Tn5 Darcy's Law, an established mathematical relationship in hydrogeology, allows one to determine groundwater velocity between various points, by use of the hydraulic conductivity, gradient and porosity.

- End Footnotes - - - - - - - - - - - - - - - - - -

[*15]

While no quantitative statement can be made regarding whether the plume began during Western Chemical's ownership, we note that the plume has travelled a long distance and it is reasonable to assume that it began prior to December 1978.

2. Contention: The Regional Board did not apply the proper standard of proof in determining that Stinnes-Western was properly named a responsible party.

Finding: Petitioner spends extensive time discussing the issue of which of two standards of review tests, the "substantial evidence test" or the

"preponderance of the evidence" test, the Regional Board should have applied. However, given our own review of the record and the facts in this case, and the conclusion we reached above, we believe the appropriate question is the standard of review we should apply when reviewing a Regional Board action.

As all parties acknowledge, we dealt with this very issue in previous Board Order No. WQ 85-7. In the Matter of the Petition of Exxon Company, USA (hereafter Exxon).

In Exxon we addressed the question of what standard of review we should apply when reviewing a Regional Board action. We discussed whether we should uphold a Regional Board action if there [*16] is any possible basis for the action or whether we should exercise our independent judgment as to whether the action was reasonable. We concluded that while we can independently review the Regional Board record, in order to uphold a Regional Board action, we must be able to find that the action was based on substantial evidence. In Exxon we determined that the mere disputed payment of taxes for possibly three years was not sufficient or substantial evidence upon which to base a finding of responsibility given Exxon's unrefuted explanation that the payments had been erroneously made.

Clearly, this is not the situation here. Our finding above that Stinnes-Western is properly named a responsible party is based on numerous facts and the record as a whole. As we did in Exxon, we reviewed the record and in this case, determined that there is substantial evidence to name petitioner.

This is consistent with the test we set forth in Exxon. We note further that Exxon also dealt with a groundwater pollution problem with disputed ownership and liability issues. In Exxon we stated at 11-12:

"Generally speaking it is appropriate and responsible for a Regional Board to name all parties [*17] for which there is reasonable evidence of responsibility, even in cases of disputed responsibility. However, there must be a reasonable basis on which to name each party. There must be substantial evidence to support a finding of responsibility for each party named. This means credible and reasonable evidence which indicates the named party has responsibility."

The standard that we set forth in Exxon, and have applied here is the same standard of review that would be utilized by a reviewing court. For example, the very recent case of United States v. State Water Resources Control Board (1986) 182 Cal.App.3d 82, 227 Cal.Rptr. 161 analyzes the Board's role in quasi-judicial matters. The court held that review for this type of adjudicatory action is governed by the standards of the Code of Civil Procedure Section 1094.5. In reviewing the Board's actions, the court looked for substantial evidence, requiring a search of the record for a "reasonable factual basis". The court quoted with approval an earlier case, Bank of America v. State Water Resources Control Board (1974) 42 Cal.App.3d 198 at 208, 116 Cal.Rptr. 770, which set forth a similar standard.

United States v. State Water [*18] Resources Control Board also explicitly recognizes the Board's expertise regarding water resources: "Nevertheless, deferential latitude should be accorded to the Board's judgment involving valuable water resources." (227 Cal.Rptr. at 176)

Similarly, we recognize the Regional Board's judgment in matters involving water resources and water quality. The Regional Board has had experience dealing with many similar groundwater contamination cases and has developed considerable expertise in evaluating causation and responsible parties.

Our review of the record, discussed above, and the Regional Board's judgment, has convinced us that there is a requisite reasonable factual basis for naming Stinnes-Western as a responsible party. In weighing the evidence, we particularly take notice that this case involves petitioner's predecessor in interest, who actively engaged in chemical packaging activities on the site. We believe there is credible and reasonable evidence that spills did occur while the prior landowner both owned and occupied the site.

Furthermore, we take notice of the public policy considerations in such a case. As we discussed in Exxon, fewer parties named in an order may well [*19] mean no one is able to clean up a demonstrated water quality problem. To the extent possible, we believe that multiple parties should properly be named in cases of disputed responsibility. This is consistent with the federal approach as articulated in the Comprehensive Environmental Response Compensation and Liability Act (CERCLA, 42 USC § 9601 et seq.). CERCLA provides that present owners and operators and owners and operators at the time of disposal of hazardous substances are responsible parties for purposes of allocating costs in a cleanup.

Our approach today, and historically, is also consistent with state policy. The Governor's Task Force on Toxics, Waste and Technology, May 1986, Final Report specifically recommends that the state explicitly define "responsible party" in the same way as CERCLA for the purpose of site cleanup. The Report notes, at p. 104 that this would help reduce the substantial uncertainty over who may be held responsible for cleanup costs.

3. Contention: The Regional Board improperly failed to allow petitioner the opportunity to inspect the site and review the proposed remedial plan.

Finding: We note at the outset that the Regional Board has no jurisdiction [*20] or authority to allow petitioner to inspect the site. Further the record shows that the Regional Board attempted to involve Stinnes-Western in this matter since January 1986. The Regional Board apparently was first informed by Great Western in December 1985 that Great Western believed Stinnes-Western to be responsible. The Regional Board generally will give approximately 60 days to companies responding to technical requests from the Regional Board staff. In this case, the Stinnes-Western consultants had at least 90 days to review the data. Stinnes-Western obtained copies of the Regional Board files on March 3, 1986.

We note that Great Western and Stinnes-Western are currently in litigation with each other. We do not want to delve into the myriad of assertions and counterassertions by each party as to whether Stinnes-Western had access to the site. In any event, Stinnes-Western now informs us that it has now been permitted on the site and should have a complete copy of the record. We would hope that the parties could continue to work out some access arrangement.

The Regional Board has been quite cooperative during our pending review of

this matter and has extended due dates [*21] for proposals required under the order until after we have ruled on the petition. The Regional Board has explicitly noted that the time extension may affect the petitioner's ability to comply with another due date, and stated that staff will take this delay into consideration. We believe this to be the proper approach. The Regional Board, which has been working with this case and with the parties for some time, should determine if any extensions of time are needed to allow the petitioner to comply with the order.

III. SUMMARY AND CONCLUSIONS

1. Significant groundwater contamination has occurred both on and off the site.

2. Looking at the Regional Board record as a whole, we conclude that petitioner was properly named a discharger. A number of factors support this conclusion, including:

a. Soil contamination of chemicals known to be stored in the underground tanks has been found adjacent to the tanks.

b. Chemical discharges occurred above ground. Spills happened during the drumming process and because of leaking drums. A large PCE spill occurred. Concrete would not have contained these spills.

c. Historical standard practices of the chemical industry as noted by [*22] the Regional Board have generally been insufficient to protect the environment from chemical pollution.

d. Any spills during rainfall would have led to discharges.

e. It is reasonable to assume that the large chemical plume began prior to December 1978.

3. Using the test we set forth in a previous Board order, we find that the Regional Board action was based on substantial evidence.

4. The Regional Board should make any changes it believes necessary in the time schedule due to the limited site access previously available to petitioner.

IV. ORDER

The Regional Board Order No. 86-34 is hereby affirmed.

LEVEL 1 - 14 OF 14 OPINIONS

In the Matter of the Petition of EXXON COMPANY, U.S.A., ET AL. of the Adoption of the Cleanup and Abatement Order No. 85-066 by the California Regional Water Quality Control Board, Central Valley Region. Our File No. A-387

Order No. WQ 85-7

State of California
State Water Resources Control Board

1985 Cal. ENV LEXIS 10

August 22, 1985

BEFORE: [*1] Raymond V. Stone, Darlene E. Ruiz, Edwin H. Finster, Eliseo M. Samaniego

OPINIONBY: BY THE BOARD

OPINION:

On March 22, 1985, the California Regional Water Quality Control Board, Central Valley Region, adopted Cleanup and Abatement Order No. 85-066 to address pollution problems caused by leaking underground gasoline storage tanks at gas station. The order names John W. and Mary L. Lynch, doing business as Village Market; Exxon Company, U.S.A. and C. P. Phelps. On April 19, 1985, Exxon Company appealed this order. On April 29, 1985, John and Mary Lynch filed an incomplete petition. John and Mary Lynch failed to amend their petition. Accordingly, we have treated them as an interested person to this matter. On April 30, 1985, C. P. Phelps filed a petition on this matter. While the Phelps petition was not timely, it involves the same issues raised by Exxon and we accordingly will consider it. The Regional Board subsequently, on April 18, 1985, issued another cleanup and abatement order naming Norman and Gail Houston previous landowners.

I. BACKGROUND

The Village Market is located in a rural subdivision approximately 6.5 miles west of the City of Tulare in Tulare County. The Village Market has [*2] been in existence since at least 1960 and consists of a two-tank gasoline station and a mini-mart. The facility is adjacent to a ground water recharge pond. Approximately 20 homes on individual water supply wells are in close proximity to the market.

A water contamination problem in the area first became apparent in June 1984, when the Tulare County Health Department received complaints from nearby residents of taste and odor problems. In August 1984, the Health Department notified two residents not to use their water for consumption. Two of three wells selected for analysis were found to contain benzene at concentrations of 16 and 18 parts per billion, well above the State Department of Health Services action levels for drinking water of 0.7 parts per billion. Benzene is water soluble and found in gasoline. Groundwater in this area is at approximately 40 feet and the soils are a fine sandy loam. The two private wells sampled appear

to be at 100 to 150 feet below the surface. The record discloses no possible sources of the pollution other than the gas station and none of the parties are contesting this issue.

The basic issue presented in these appeals is one of responsibility [*3] for the cleanup. Testimony before the Regional Board indicates that C. P. Phelps, a distributor of gasoline product, has been providing gasoline and service to the gasoline station since approximately 1960 when the facility was called Stewart's Market. At that time Phelps was a Norwalk distributor, a brand of Signal Oil and Gas Company. Exxon acquired the Signal properties in 1967. Phelps supplied Exxon product to the Village Market from 1968 to 1983.

The current landowners are John and Mary Lynch. They acquired the property in July 1981 from Norman Larry and Gail Eileen Houston, who had owned it since April 1979. Three weeks after John and Mary Lynch bought the property, they noticed that the top portion of the underground gasoline tanks were leaking. John Lynch testified that to deal with this problem, he did not keep the tanks full. In November 1983, John and Mary Lynch replaced the tanks. The new tanks have been tested and do not leak.

The Regional Board adopted a cleanup and abatement order on March 22, 1985, pursuant to Water Code Section 13304. The order names as dischargers John and Mary Lynch, Exxon Company U.S.A. and C. P. Phelps, Inc. The order requires the [*4] dischargers implement various remedial actions according to a time schedule. These actions include providing an alternate supply of drinking water to users of known polluted wells, assessment of the extent of the toxic contamination and a comprehensive cleanup program of contaminated soils, ground water and leaked fuel.

II. CONTENTIONS AND FINDINGS

The basic issue that Exxon and Phelps are contesting is responsibility and ownership of the old underground tanks which leaked. Both parties feel they should be removed from responsibility because they never owned the tanks.

The two underground tanks in question had been at the Village Market for an undetermined period of time. There is some evidence to suggest that these tanks had been in place since the 1940's. It is very unclear as to who owned these tanks. As discussed above, the gasoline supplier and distributor changed several times from 1960 to 1981. Additionally, a number of different parties owned the property from 1960 to 1981.

Copies of two Grant Deeds in the record from previous parties to the Houstons in 1979 and from the Houstons to John and Mary Lynch in 1981 convey generally the lot in question and are silent [*5] concerning anything else. There is no evidence in the record which conclusively shows who does own the tanks.

Order No. 85-066 contains a finding that "[t]here is evidence of ownership of the leaking fuel tanks by Exxon Company, USA and by C. P. Phelps, Inc., the distributor of the fuel." The Regional board relied on several different bases to conclude that the tanks were the personal property of Exxon and Phelps and to thereby name Exxon and Phelps in the order. These have all been challenged by petitioners. We will address each theory in turn.

1. Contention: Tulare County property tax records do not establish that

Exxon owned the tanks.

Finding: From 1968 to 1984 Exxon paid personal property taxes to Tulare County for certain property at the Village Market. The record contains copies of the personal property tax records from 1968 to 1984 as submitted by Exxon. Exxon explained its standard practice for payment of personal property taxes in Tulare County. Exxon submits to the County two copies of a form for service station business and property statements, one of which is returned to Exxon by the County with the assessed values. The first such statement in the record [*6] before us is from Humble Oil and Refining, Exxon's predecessor in interest, listing the following property at the site: two used pumps, one used air compressor, office furniture and equipment, a credit card imprinter and miscellaneous tools and equipment. Essentially the same listing was provided on the property statements for 1969, 1970, 1971, 1972, and 1973.

However, in 1974 the word "tanks" is 'listed as an improvement. Exxon argues that Exxon listed only property other than tanks and that the word "tanks" was included by the assessor on the copy returned to Exxon. In 1975 and 1976 the property statement reads merely "equipment only"; on the 1977 statement the words "pump, compressor, tanks and sign" appear. Exxon again argues this was because the tax assessor added this to the statement returned to Exxon. n1 This argument was not refuted or challenged.

- Footnotes - - - - - - - - - - - - - - - - - -

n1 Exxon argues they did not contest the two "erroneous" returns for cost-efficiency reasons. We note the total tax due from Exxon on this property in 1974 was $ 19.06, and in 1977, $ 22.62.

- End Footnotes - - - - - - - - - - - - - - - - - -
[*7]

Exxon does admit that it tendered a property statement in 1978 describing as its property pump, compressor, tanks and sign. Exxon alleges that this was an error, as its clerk had copied the "erroneous" tank listing that the County Assessor had added to the previous years' statement.

Since 1979 the only personal property Exxon has listed for this property is a sign and credit card imprinter. There is some discrepancy with the assessor's statement, which also lists pumps and a compressor. Exxon has further submitted an affidavit from its real estate and engineering manager stating that to the best of his knowledge Exxon has never had an ownership or leasehold interest in the tanks. A computer listing of the Village Market equipment from 1974 submitted to us by Exxon shows only a pole, pump, compressor and miscellaneous equipment being owned by Exxon. (It is not clear whether a tank could be considered miscellaneous equipment, but in any event, there is no support in the record for that proposition.)

The Regional Board also relied upon a letter from the California Service Station Association indicating it is general practice within the industry that when an oil company owns the [*8] pumps, signs and credit card imprinter, it also has ownership of the underground tanks. Exxon refuted this letter at the hearing, stating that it has never been Exxon's practice. n2

- Footnotes - - - - - - - - - - - - - - - - - -

n2 We note that a letter of this sort is clearly hearsay under our rules of procedure. While admissible, it is not sufficient in and of itself to support a finding.

- End Footnotes - - - - - - - - - - - - - - - - - -

The question thus becomes whether it is reasonable to base a finding of ownership of the tanks on the disputed tax records. As Exxon contends, payment of taxes itself does not establish ownership of property, citing Trabue Pittman Corp. v. County of Los Angeles, (1946) 29 Cal.2d 385, 175 P.2d 512. As we discuss infra, absent any additional information, we find that the Regional Board action is inappropriate.

2. Contention: Ownership interest in the tanks runs with the land.

Finding: Exxon argues that the tanks were fixtures, part of the realty, and therefore belonged to the successive owners of the Village Market. The Regional Board argues that the tanks [*9] were not "fixtures" and thus should not be considered real property. California Civil Code Section 660, in defining when a thing is deemed to be affixed to the land, uses such terms as "attached", "imbedded" and "permanently resting". Civil Code Section 1013 further provides:

"[W]hen a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as otherwise provided in this chapter, belongs to the owner of the land unless he chooses to require the former to remove it or the former elects to exercise the right of removal provided for in Section 1013.5 of this chapter."

Both of these statutes have been extensively interpreted by case law. According to Witkin, Summary of California Law, "Personal Property", p. 1663, under modern theories, the manner of the annexation is not the sole nor most important test. There are three main factors: (1) physical annexation; (2) adaptation to use with real property; and most significantly, (3) intention to annex to realty.

The Regional Board and Exxon both cite cases to support their respective interpretations. The cases provide various examples of what may or may not [*10] be considered fixtures. Barcroft and Sons v. Cullen (1933) 217 C. 708, 20 P.2d, cited by Exxon, holds that a steel service comfort station with combined plumbing and wiring is a fixture, but does not speak to tanks. Neither the holdings in People v. Church (1943) 57 Cal.App.2d, 136 P.2d 139 nor Standard Oil v. State Board of Equalization (1965) 232 Cal.App.2d. 91, 42 Cal.Rptr. 543, cited by the Regional Board, deal with gasoline tanks. Church indicates that certain types of equipment at a service station are personal property, noting that these items may be removed without destroying anything. Standard Oil also found that gasoline station equipment to be personal property for purposes of taxes.

We also note that Murr v. Cohn (1927) 87 Cal.App. 478, 262 P. 768 found a gasoline tank to be a trade fixture and removable by the tenant who installed it, as the removal would not hurt the property. An important aspect of all of these cases, however, is the intent of the parties to affix the item to realty.

The record before us provides little help in determining whether the tank in question should be regarded as personal or real property. The [*11] record does not indicate when or by whom the tank was installed, nor what the arrangement was between the parties, if any. Assuming arguendo that the tank was installed originally by the property owner, the tank would probably remain realty today. On the other hand, if the tank were installed by a tenant of the owner, or by a predecessor in interest to Exxon, the tank could be regarded as remained personal property, or it could have become affixed to the land. Exxon contends that there is no agreement in the record, pursuant to Civil Code Section 1013 which demonstrates that Exxon had the right to remove the tanks. n3 Exxon further argues that it did not have or exercise the right to possess and control the tanks before installation or during use. Exxon pertinently notes that John and Mary Lynch removed the tanks without notifying Exxon or obtaining consent or financial contribution from Exxon.

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n3 We do note that the record contains a letter from a party who owned the land in 1960 indicating her belief that she never owned the tank but that the gasoline company did. Once again, we note that this is hearsay and as such, does not provide a basis for a finding.

- - - - - - - - - - - - - - - - - - - End Footnotes - - - - - - - - - - - - - - - - - -
[*12]

There is insufficient evidence in the record to determine when, how, by whom and under what circumstances the tanks were installed. Accordingly, we can make no determination as to the personal or real property character of the tanks.

3. Contention: Both Phelps and Exxon disagree with the Regional Board's interpretation of Health and Safety Code § 25281(r) that under the law there is no distinction between the pumps and the tanks.

Finding: Chapter 6.7 of the Health and Safety Code, entitled "Underground Storage of Hazardous Substances" became effective January 1, 1984. This chapter requires registration and regulation of underground tanks. Section 25281(r) defines "underground storage tank" as meaning " . . . 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 . . . ."

The Regional Board argues that the law regulating discharges from underground tanks appears to consider pumps and tanks as one, noting that Section 25281(r) includes pipes. Since pumps contain pipes connected to the underground tanks, the Regional Board argues that [*13] under the law there is no distinction between the pumps and the tanks. Therefore, since Exxon has acknowledged ownership of the pumps, that it should also be considered owner of the tanks.

We disagree. We feel it is stretching the definition of "tanks" to include "pumps". We note that the Legislature could easily have explicitly included pumps within the definition of tanks, but chose not to do so. Elsewhere in the statute the term "pumps" is used (see, e.g. Section 25292(b)(4)(c)). Furthermore, Chapter 6.7 was adopted after the tank in question was removed.

Additionally, the statute does not purport to establish responsibility in cases such as that before us.

There is some material in the record indicating that both C. P. Phelps and Exxon may have had ownership and responsibility for the pumps at various times. However, there is no indication that it was the pumps which leaked and caused the harmful discharge. The record supports only the charge of faulty tanks. Absent any contention that the pumps leaked, we find there is no basis to name the owners of the pumps.

III. REVIEW AND CONCLUSIONS

In reviewing the contentions above, we believe that the record will support [*14] only that Exxon declared ownership and paid a small amount of property tax on the tanks in question for at least one year, and possibly two other years. These declarations and payments become the only basis upon which Exxon could properly be named. Exxon has raised a credible defense to these payments being indicative of ownership.

The question thus becomes what standard of review we should apply when reviewing a Regional Board action. Should we uphold a Regional Board action if there is any possible basis for the action, or should we exercise our independent judgment as to whether the action was reasonable? Generally speaking, the courts use one of two standards in reviewing an action of administrative agency: The substantial evidence test or the independent judgment rule. The former involves an examination of the record to establish the existence or nonexistence of substantial evidence to support the action taken. The latter permits the reviewing court to take a fresh look at the facts to see if the weight of the evidence supports the decision. Under the substantial evidence test, if a court disagrees with the conclusion but finds that there does exist a substantial body [*15] of evidence to support the decision, no reversal will take place. With the independent judgment rule, the court would not defer to the agency if the court disagreed with the conclusion.

The State Board is not subject to the exact standards which bind a court. Water Code Section 13320, which provides for State Board review of Regional Board action sets forth a standard of review which is different from ordinary judicial review in two important ways. First, under Section 13320(b) the State Board shall consider both the Regional Board record and "any other relevant evidence" which it wishes in reviewing the order. Second, if the State Board decides the Regional Board action is "inappropriate or improper", the State Board has several options, including remanding or reversing the Regional Board or taking the appropriate action itself. The scope of review thus appears to be closer to that of independent review.

However, any findings made by an administrative agency in support of an action must be based on substantial evidence in the record. (See, e.g. Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d. 506, 113 Cal.Rptr. 836.) Thus, while [*16] we can independently review the Regional Board record, in order to uphold a Regional Board action, we must be able to find that finding of ownership was founded upon substantial evidence.

In our review of the record in the case before us, we find it is not appropriate to name Exxon or Phelps without some additional factual basis. While

the disputed payment of taxes for three years provides some evidence of liability, we do not feel it to be sufficient or substantial given the lack of other information in the record and given Exxon's unrefuted explanation that the payments had been erroneously made. For example, the record is devoid of any information as to who paid taxes on the tanks for years other than 1974, 1977, and 1978. Further, there is no information concerning any contracts between any landowners and Exxon, or any predecessors in interest.

We recognize the difficult position in which this places the Regional Board. In this case the Regional Board was searching to find responsible parties who could effectuate the cleanup. Fewer parties named in the order may well mean no one is able to clean up a demonstrated water quality problem. We also recognize that the Regional [*17] Board does not have infinite resources available to it to extensively search through various county files in a quest for additional information. We note Exxon itself may have more dispositive information, which may be subpenaed by the Regional Board. However, in order to name parties such as Exxon and Phelps, we believe there should be more evidence than we have before us currently. Generally speaking it is appropriate and responsible for a Regional Board to name all parties for which there is reasonable evidence of responsibility, even in cases of disputed responsibility. However, there must be a reasonable basis on which to name each party. There must be substantial evidence to support a finding of responsibility for each party named. This means credible and reasonable evidence which indicates the named party has responsibility.

We note that in other cases we have not hesitated to uphold the Regional Board when it has named multiple parties responsible where there is substantial support in the record. (See, e.g. Board Order WQ 84-6, In the Matter of the Petition of Harold and Joyce Logsdon for a Stay and Review of Cleanup and Abatement Order of the California Regional [*18] Water Quality Control Board, Central Valley Region.) The record in this case simply does not contain the requisite evidence to support the naming of Exxon and Phelps in the cleanup order.

IV. SUMMARY

1. The Tulare County property tax records are not sufficient by themselves to support naming Exxon as the owner of the tanks.

2. There is insufficient information in the record to make any finding as to whether the tanks in question should be regarded as personal or real property and as to who the true owner is.

3. The Health and Safety Code definition of "underground storage tank" is inapplicable in this case and does not extend liability to the owners or maintainers of pumps.

4. While the State Board's scope of review of Regional Board action is similar to the independent review standard of a court, the findings made by the Regional Board must be supported by substantial evidence in the record.

5. There is not substantial evidence in the record upon which to base a finding that Exxon and Phelps should be named in Cleanup and Abatement Order No. 85-066.

V. ORDER

The Cleanup and Abatement Order No. 85-066 is hereby amended to delete Exxon Company, U.S.A. and C. [*19] P. Phelps, Inc.

ATE C CALIFORNIA - CALIFORNIA ENVIRONMEN PROTECTION AGENCY
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IVISION OF CLEAN WATER PROGRAMS
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PETE WILSON, *Governor*

93 OCT -7 AM 8:21

OCT 05 1993

TO: ALL LOCAL OVERSIGHT PROGRAM AGENCIES

RE: DEFINITION OF "DISCONTINUATION OF USE" AS IT APPLIES TO RCRA

We have been asked on several occasions to define the term "discontinuation of use" as it is used in 42 U.S.C. Section 6991(3) of the federal underground storage tank law to describe the owner of a tank no longer in use as of November 8, 1984.

Based in part on a recent U. S. District Court case, we interpret the term to mean the date when a tank was permanently taken out of use (i.e. when product is no longer put in or taken out of the tank and the circumstances are such that it is reasonable to conclude that use of the tank has permanently ceased).

In G.J. Leasing, et. al. v Union Electric, 825 F. Supp. 1363, the court discussed the federal definition of owner as it related to "use" of a tank which was taken out of service prior to November 8, 1984. That court said that:

> "...Indications that a tank is permanently taken out of use are: (a) if it is filled with inert solid or otherwise rendered unusable, or (b) if there is reason to believe that it will not be used in the future (e.g., the owner abandoned the tank, intakes and vents are paved over, access piping is disconnected or removed, or the tank was sold to a person who had no use for the tank such as a residential real estate developer)."

* The court specifically rejected assertions that "in use" meant that a tank was in use merely because it held a regulated substance without any conscious use being made of the tanks.

We hope that the above information is useful to you as you attempt to identify those parties who are responsible under federal law for remediation of leaks from pre-84 tanks.

As you all know by now, State law and regulations also identify additional parties who can be held responsible for remediation of leaks from underground storage tanks, whether or not use of those tanks ceased before or after November 8, 1984.

* There still seems to be some confusion about the following RP definition as contained in the corrective action regulations:

(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.

Remember that the RP definitions in the corrective action regulations apply only after an unauthorized release has occurred. The local agency must identify the date the unauthorized release occurred before attempting to name any RP. With the exception of the pre-84 owner where oversight is being funded from the Federal Petroleum Trust Fund, you cannot name as responsible any party who was involved with the tank prior to the unauthorized release.

If you have any questions concerning the above information, please telephone Lori Casias at (916) 227-4325.

Sincerely,

L Casias

for Mike Harper, Chief
Local Oversight Program

cc: Dorothy Jones
State Water Board Legal Counsel

revised interp
1/25/94

STATE OF CALIFORNIA - CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
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DIVISION OF CLEAN WATER PROGRAMS
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P.O. BOX 944212
SACRAMENTO, CA 94244-2120

PETE WILSON, Governor

(916) 227-4328
FAX: (916) 227-4349

JAN 25 1994

To: Local Oversight Program (LOP) Agencies

CLARIFICATION OF THE DEFINITION OF RESPONSIBLE PARTY UNDER THE CORRECTIVE ACTION REGULATIONS

This letter provides guidance to agencies acting under a Local Oversight Program (LOP) contract on the identification of responsible parties pursuant to the corrective action regulations (Article 11, Chapter 16, Title 23, California Code of Regulations).

The purpose of this letter is to clarify that persons whose ownership or control over the tank or tank site ceased before any unauthorized release occurred cannot be named as responsible parties, except for situations involving tanks where use was discontinued on or before November 8, 1984. Certain owners of tanks which were not used after November 8, 1984, may be named as responsible parties, even if their ownership ceased before the unauthorized release.

Section 2720 of the regulations define "corrective action" and "responsible party" as follows:

"Corrective action" means any activity necessary to investigate and analyze the effects of an unauthorized release; propose a cost-effective plan to adequately protect human health, safety, and the environment and to restore or protect current and potential beneficial uses of water; and implement and evaluate the effectiveness of the activity(ies). Corrective action does not include any of the following activities:

1. Detection, confirmation, or reporting of the unauthorized release; or

2. Repair, upgrade, replacement, or removal of the underground storage tank.

"Responsible party" means one or more of the following:

SURNAME				
DWR 540 REV. 1/86	L Casias 1-24-94	Schmeck 1-24-94	Brazell 1/24/94	1/25/94

BE 3910E

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 an underground storage tank at the time of or following an unauthorized release of a hazardous substance.

Reading these definitions together, it is clear that a prerequisite for naming a responsible party in a corrective action order is that there be a reasonable basis to conclude 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 reasonable basis includes 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 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.

The fourth definition of responsible party covers all persons who may be considered dischargers under Section 13304 of the Water Code. It is based on the word "control". State Water Board decisions have determined that necessary control exists where a person either: (1) had the legal ability to direct management of the tank or property on which the tank is or was located, (2) was in a legal position to prevent the release, or (3) assumed actual management duties.

Legal ability to direct management or to prevent the release may be set forth in documents such as leases, contracts, franchises, licenses, or monitoring programs. Actual management duties must be ascertained from the circumstances surrounding individual cases.

We recognize that many unauthorized releases are historical events that are discovered when tanks are pulled. This after-the-fact

discovery sometimes makes it difficult to figure out the exact date of the leak. However, it is critical for the regulatory agency to make a reasonable effort, based on the facts of the case, to establish the probable timing of the leak. Establishing a probable timing of the leak will avoid the extremes of: (1) only naming the current property owner and (2) naming anyone who ever owned, operated or controlled the tank or the property on which the tank is located at any time in the past without regard to whether that person's action contributed to the leak or whether that person had control over the property or tank at the time of or following the release.

One exception to the above discussion involves cases where discontinuance of use of the tank occurred before November 8, 1984. Discontinuance of use means 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. Circumstances which indicate no further intent to use the tank can include such factors as:

1. The tank is filled with an inert solid or otherwise rendered unusable;

2. The owner abandoned the tank and no one else has used it;

3. The intakes and vents are paved over;

4. Access piping is disconnected or removed; and

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

(See G. J. Leasing et al. v. Union Electric 825 F.Supp. 1363.)

Under federal law [42 USC Section 6991(3)(B)], the person who owned a tank which was not used after November 8, 1984 immediately before the discontinuance of its use may be named a responsible party, even though substantial evidence does not exist to show that the leak occurred before discontinuance of use. We interpret definition number 2 above to include the RCRA provisions defining owners of tanks whose use was discontinued before November 8, 1984.

Finally, it must be understood that the definition of responsible party in Article 11 of the regulations is necessarily broad in scope to cover a variety of situations. Local agencies operating under a LOP contract must name all persons who meet any of the four sets of circumstances listed in Section 2720.

If you have any questions about this letter, please contact Ms. Dorothy Jones at (916) 227-4421 or Ms. Lori Casias at (916) 227-4325.

Sincerely,

Mike McDonald, Manager
Underground Storage Tank Program

cc: Regional Water Quality Control Board
UST Program Managers

STATE OF CALIFORNIA - CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF CLEAN WATER PROGRAMS
2014 T STREET, SUITE 130
P.O. BOX 944212
SACRAMENTO, CA 94244-2120

(916) 227-4325
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JAN 0 6 1995

LOCAL OVERSIGHT PROGRAM AGENCIES

PRIMARY/SECONDARY RESPONSIBILITY FOR TANK CLEANUPS

We have received numerous inquiries and petitions concerning the designation of primary/secondary responsible parties. As you may or may not be aware, there have been a number of orders adopted by the State Board dealing with this issue. In order to be consistent with the decisions made in these orders, we are adding language to the 1995-97 contract dealing with primary/secondary responsible party identification. We have enclosed the draft language for your information and would like your comments/feedback. Please provide your comments to Lori Casias by January 31, 1995.

Also enclosed for your information is a memorandum from our Office of the Chief Counsel which discusses this issue.

If you have any questions, please call Lori at (916) 227-4325.

Sincerely,

Mike Harper, Chief
Local Oversight Program

Enclosures

ADDED LANGUAGE (**BOLD** PRINT) TO EXHIBIT B PAGE 6 OF 14

B. TASK 2: IDENTIFY AND NOTIFY OWNER

3. ...Each notice must be sent to the Responsible Party or Parties by way of certified mail return receipt requested. The Contractor shall notify each Responsible Party of the names and addresses of other Responsible Parties on those sites which have multiple Responsible Parties **and the criteria by which a determination of secondary Responsible Party may be made. If a Responsible Party requests that they be considered secondarily responsible, then the Contractor shall make a determination of secondary responsibility if:**

   a. The primary Responsible Party is performing corrective action and

   b. It is clear that the party seeking secondary status did not in any way initiate or contribute to the actual discharge.

   The notice to the Responsible Party shall indicate that, if the primary Responsible Party fails to perform corrective action, then the secondary Responsible Party will be considered a primary Responsible Party.

   Exhibit G shall be used at federally funded sites when the Contractor notifies a Responsible Party of its obligation to reimburse not more than 150 percent ...

State of California

Memorandum

To : James G. Giannopoulos
Supervising Engineer
Division of Clean Water Programs

Date: SEP 22 1994

Ted Cobb

Ted Cobb
Senior Staff Counsel

From : **OFFICE OF THE CHIEF COUNSEL**
STATE WATER RESOURCES CONTROL BOARD
901 P Street Sacramento, CA 95814
Mail Code G-8

Subject : PRIMARY/SECONDARY RESPONSIBILITY FOR TANK CLEANUPS

QUESTION

How should the Local Oversight Program address the primary versus secondary responsibility question when dealing with multiple parties in an underground tank cleanup case?

ANSWER

As in other cases reviewed by the State Water Resources Control Board (SWRCB), persons whose only involvement with a cleanup site is present ownership should generally be placed in a position of secondary responsibility so long as the primarily responsible parties are actively engaged in cleaning up the site.

DISCUSSION

In a series of orders issued by the SWRCB, the issue of primary and secondary responsibility for the cleanup of a contaminated site has been addressed several times. Before discussing when it is appropriate to bifurcate the cleanup responsibility, it is important to explain what it means to be named as "secondarily responsible" for a site.

In most cleanup orders, a list of tasks, together with benchmarks or completion dates, is set forth. Failure to meet any of those dates can lead to sanctions of various sorts. In many cases, several parties are held collectively responsible for meeting those deadlines, even though only one or two of them may be doing the actual work. Because the other parties may not be directly involved in either conducting or paying for the work, they

have no control over the timely completion of the tasks. The SWRCB has determined that, for those parties, it may be unreasonable to impose sanctions when a deadline is missed. Rather, they should be informed that the other parties have failed to comply and given an extension of time in which to complete the task themselves.

A typical example involves the primarily responsible party "A" and the secondarily responsible party "B". The order requires "A" to prepare a site characterization plan by July 1. The order goes on to say that, should "A" fail to prepare the plan by July 1, the Regional Water Quality Control Board (RWQCB) will notify "B" of that fact and "B" will be given 90 days from the date of the notice to prepare such a plan. Thus, if "A" does not comply, on July 2 the RWQCB has three alternatives. It can turn to "B" for compliance, pursue "A" for civil liability, or both. The only thing that the two-level liability structure would prevent at that juncture is pursuing "B" for civil liability.

In 1986, in its Vallco Park order (see below), the SWRCB established a three-part test under which a current landowner may be considered secondarily liable for a cleanup.

1. Is the primarily responsible party carrying out the cleanup?

2. Is it clear that the current landowner did not in any way initiate or contribute to the actual discharge of the waste?

3. Is the current landowner limited in its ability to conduct the cleanup because control of the property is in other hands?

Later orders have modified these criteria somewhat.

- The third part of the test, lack of control, has been largely abandoned.

- Current lessees/sublessors who meet the first two parts of the test are treated like current landowners, if they are to be held responsible at all.

- Governmental agencies are given special consideration for secondary status so long as they are actively working to get their lessees to pursue a cleanup and have the authority to require remediation.

It is vital to note that this principle **never** has been and **never** should be used to determine degrees of either culpability or responsibility among those who initiated, contributed to, or allowed a discharge of waste. (It is important that such issues be left to courts or arbitrators who have both expertise and experience in resolving such matters.) No one who is simply "less guilty" can lay claim to a position of secondary responsibility for a cleanup. Secondary liability is based on the combined notion of full

legal responsibility through ownership or control together with complete lack of culpability.

What follows is a short summary of each order issued by the SWRCB with regard to the secondary liability issue.

1. *SOUTHERN CALIFORNIA EDISON--WQ 86-11*

   Edison leased some property to another energy company. The RWQCB issued waste discharge requirements to the tenant and named Edison as a co-discharger. Day-to-day responsibility for compliance was placed on the tenant. Edison objected to being named at all. The SWRCB agreed with the RWQCB and affirmed the decision.

2. *VALLCO PARK, LTD.--WQ 86-18*

   Vallco leased the property for a long term but was named as a secondarily responsible party on a cleanup order issued to its tenant. Vallco objected but the SWRCB held that Vallco could not escape responsibility for its own property and that a secondary position was appropriate.

3. *U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE--WQ 87-5*

   The RWQCB issued waste discharge requirements to the tenant and named the Forest Service as a co-discharger. The Forest Service objected but the SWRCB affirmed. It held that the Forest Service could properly be named on the permit but that the RWQCB "should not seek enforcement of the waste discharge requirements against the Forest Service unless [the tenant] fails to comply."

4. *PRUDENTIAL INSURANCE COMPANY OF AMERICA--WQ 87-6*

   Prudential leased the property for a very long term but was named on a cleanup order issued to the tenants. Prudential did not object to being named but claimed that the RWQCB had abused its discretion by not placing Prudential in a position of secondary responsibility. The SWRCB agreed that it was unfair to hold Prudential directly and immediately responsible for the cleanup in view of its minimal control, lack of involvement in the actual discharge, and the progress made by the tenants in cleaning up the property.

5. *WILLIAM SCHMIDL--WQ 89-2*

   Mr. Schmidl was named as a secondarily responsible party to his tenant on a cleanup order. The SWRCB affirmed that decision.

6. *ARTHUR SPITZER, ET AL.--WQ 89-8*

   In a very complex case, the SWRCB held that a long-term lessee/sublessor should be treated as if it were a landowner for purposes of assessing secondary responsibility.

7. *SAN DIEGO UNIFIED PORT DISTRICT--WQ 89-12*

   The RWQCB named both the tenant and the Port District in a cleanup order. The Port wanted to be placed in a secondary position. The SWRCB rejected that request because the cleanup was not proceeding and the Port had exercised considerable control over the site during the time of the discharge.

8. *SAN DIEGO UNIFIED PORT DISTRICT--WQ 90-3*

   The RWQCB issued waste discharge requirements to the tenant and the Port District. The Port asked to be held secondarily responsible for compliance with the terms of the permit. The SWRCB found that such was the actual intent of the RWQCB and approved that assignment.

9. *WENWEST, ET AL--WQ 92-13*

   Wenwest is another factually complex case in which the SWRCB placed two parties, the current landowner and the current lessee, in a position of secondary responsibility. In the order, the State Board retraces some of the history of secondary responsibility.

The basic principles of secondary responsibility that can be seen through this line of case are as follows:

1. The current landowner can never be left out of the cleanup order. The landowner must stand in line ahead of the taxpayers when it comes to responsibility for dealing with the site.

2. Fairness dictates that current landowners who acquired the property after the activities that caused the pollution have ceased should not be treated the same as those that either carried out or allowed the activity.

3. If the primarily responsible parties are not carrying out the cleanup, the secondary responsibility issue is moot.

4. Parties holding leaseholds that have many of the attributes of ownership can be treated as if they are landowners for these and other purposes.

5. Secondary status is never available to anyone who either carried out or permitted the polluting activity.

JAMES WESLEY KINNEAR (CA Bar No. 124771)
COHEN, NELSON & MAKOFF
625 Market Street, Suite 1100
San Francisco, California 94105
(415) 495-6168

Attorneys for Texaco Inc.

ALAMEDA COUNTY HEALTH CARE SERVICES AGENCY
DEPARTMENT OF ENVIRONMENTAL HEALTH
ENVIRONMENTAL PROTECTION DIVISION

In Re The Properties Known As:	)
	)
Linda Shell	)
15595 Washington Avenue	)
San Lorenzo	)
	)

APPENDIX OF EXHIBITS
SUBMITTED IN SUPPORT OF MEMORANDUM OF TEXACO INC.
RE RESPONSIBLE PARTIES

APPENDIX OF EXHIBITS

Exhibit A: Texaco 1983 Surplus Property Report

Exhibit B: 1986 Groundwater Technology Report

Exhibit C: 1992 Groundwater Technology Report

Exhibit D: 1994 Blaine Tech Services Report

Exhibit E: March 21, 1995, Notice of Violation to Mehdi Mohammadian

Exhibit F: May 15, 1995, Second Notice of Violation to Mehdi Mohammadian

Texaco

FAX TRANSMITTAL COVER SHEET

95 FEB -2 PM 3:32

file 2506.7.452

DATE: February 2, 1995 NUMBER OF PAGES: C+ 1

MESSAGE TO: Ms. M. Swanson

TELEPHONE: 510/938-3800 FAX NO.: 510/938-3802

ORGANIZATION: Law Offices of M. Swanson

MESSAGE FROM: LISA KIM

TELEPHONE NO.: (818) 505-3030 FAX NO.: (818) 505-3059

ORGANIZATION: TEXACO INC., LEGAL DEPARTMENT

LOCATION: UNIVERSAL CITY, CALIFORNIA 91608 ROOM NO.: 1300

ADDITIONAL COMMENTS: Here is the information you requested concerning the broker:

Basil Christopoulous
Grubb & Ellis/Commercial Brokerage Co.
475 14th Street, Suite 1250
Oakland, California 94612

This is 1986 the address

Printed in U. S. A.

Form S-42 12-75

ORT OF STATION OPENED OR CL 'D

Region Western Station 62 488 329 (Code) San Lorenzo, Ca. (Name) Opened Closed 19

Street Address 15595 Washington Boulevard

Name of Superintendent, Agent, Consignee or Distributor Division No. 51

Method of Operation Surplus (Fee) property (Salary—Commission—Type of Sales Agreement)

Facilities owned by Texaco Inc. Site owned by Texaco Inc.

Site held under lease by Lease term (Co-owned Stations)

Plant located on rails of Railway.

Supply point effective

Facilities (size and kind of warehouse, capacity and number of storage tanks, and description of other facilities).

closed retail facility

Remarks: Escrow purchased subject property at public auction on June 21, 1983. The facility is not being utilized as a retail facility and the property was declared as Surplus (Fee) on October 14, 1983 and the location transferred to Corporate Real Estate.

Signed

Copies to: MN (2) - HHH - FILE

Dated October 14, 19 83

GROUNDWATER TECHNOLOGY, INC.
OIL RECOVERY SYSTEMS
4080 Pike Lane, Suite D, Concord, CA 94520-1227 (415) 671-238

REPORT
SUBSURFACE HYDROCARBON INVESTIGATION
TEXACO SERVICE STATION
15595 WASHINGTON STREET
SAN LORENZO, CALIFORNIA
October 17, 1986

Prepared for:

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Prepared by:

Groundwater Technology
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Concord, Ca. 94520

Joyce Miley
Project Geologist

Gary B. Taggart
District Manager
Certified Engineering
Geologist No. 1061

REPORT
SUBSURFACE INVESTIGATION AND ASSESSMENT
TEXACO SERVICE STATION
15595 WASHINGTON STREET
SAN LORENZO, CALIFORNIA
October 17, 1986

INTRODUCTION

This report presents the results of Groundwater Technology Inc.'s hydrogeologic investigation at the Texaco Service Station located at 15595 Washington Street, San Lorenzo, California (See Figure 1, Site Location Map). Groundwater Technology was retained by Mr. Patrick Donahue of Texaco U.S.A. to perform the investigation and provide an assessment of subsurface contamination by petroleum hydrocarbons. The investigation and assessment were conducted to comply with Texaco's Environmental Investigation Requirements prior to the site being placed for sale by the Marketing Division.

BACKGROUND

SITE SETTING

The Texaco site is located in the city of San Lorenzo and is situated approximately 1 1/2 miles northeast of the eastern shore of the San Francisco Bay. The general surface topography slopes gently to the west-southwest and the site is at an elevation of approximately 20 feet above sea level. The area within a quarter mile of the site consists of residential dwellings, small business and two schools. An apartment complex is located immediately behind the site and a vacant lot faces the property. Small businesses are located on both sides of the Texaco Station. San Leandro Creek passes less than one quarter mile

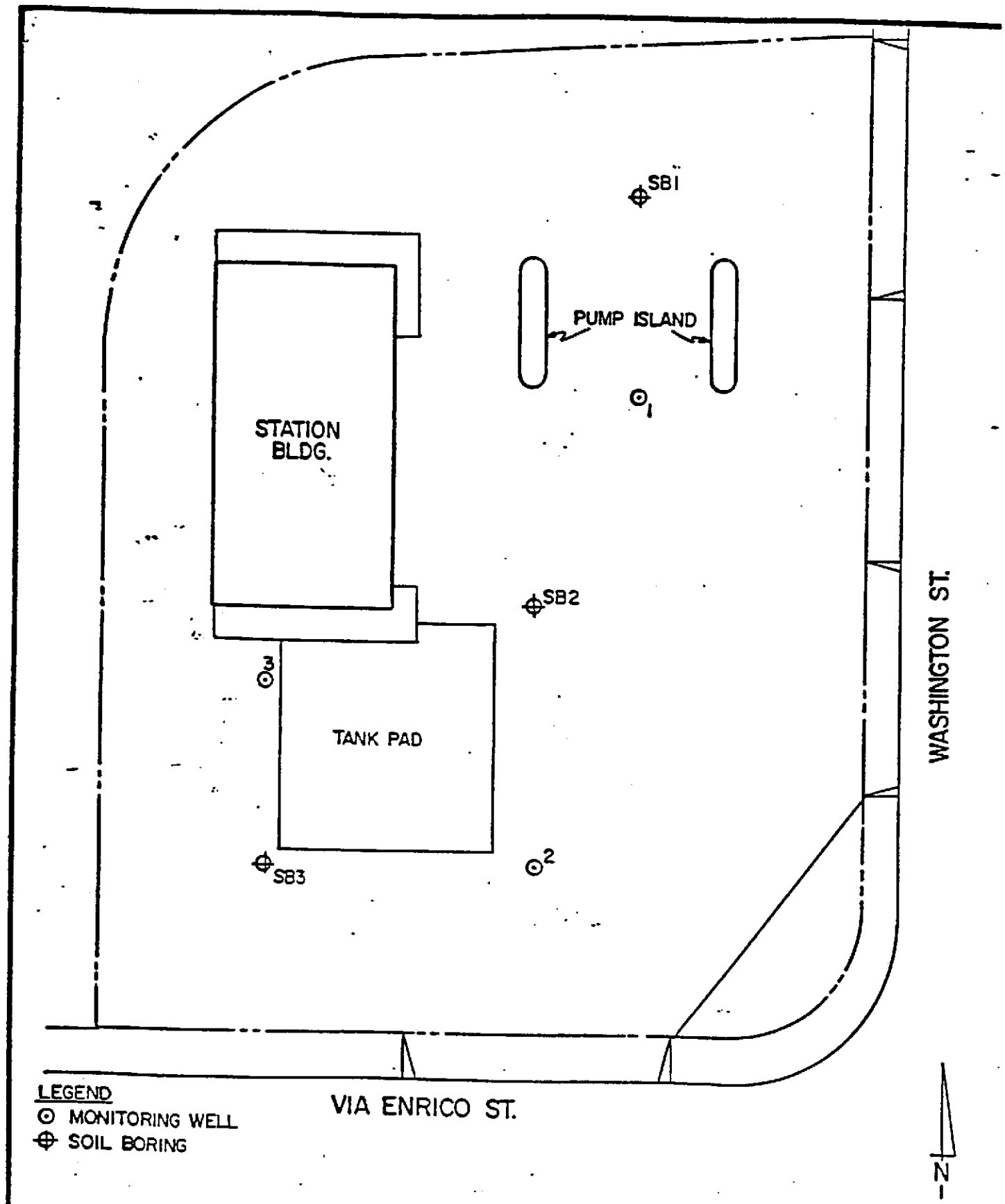

FIGURE 2
SITE PLAN

TEXACO USA
SAN LORENZO, CALIFORNIA

GROUNDWATER TECHNOLOGY

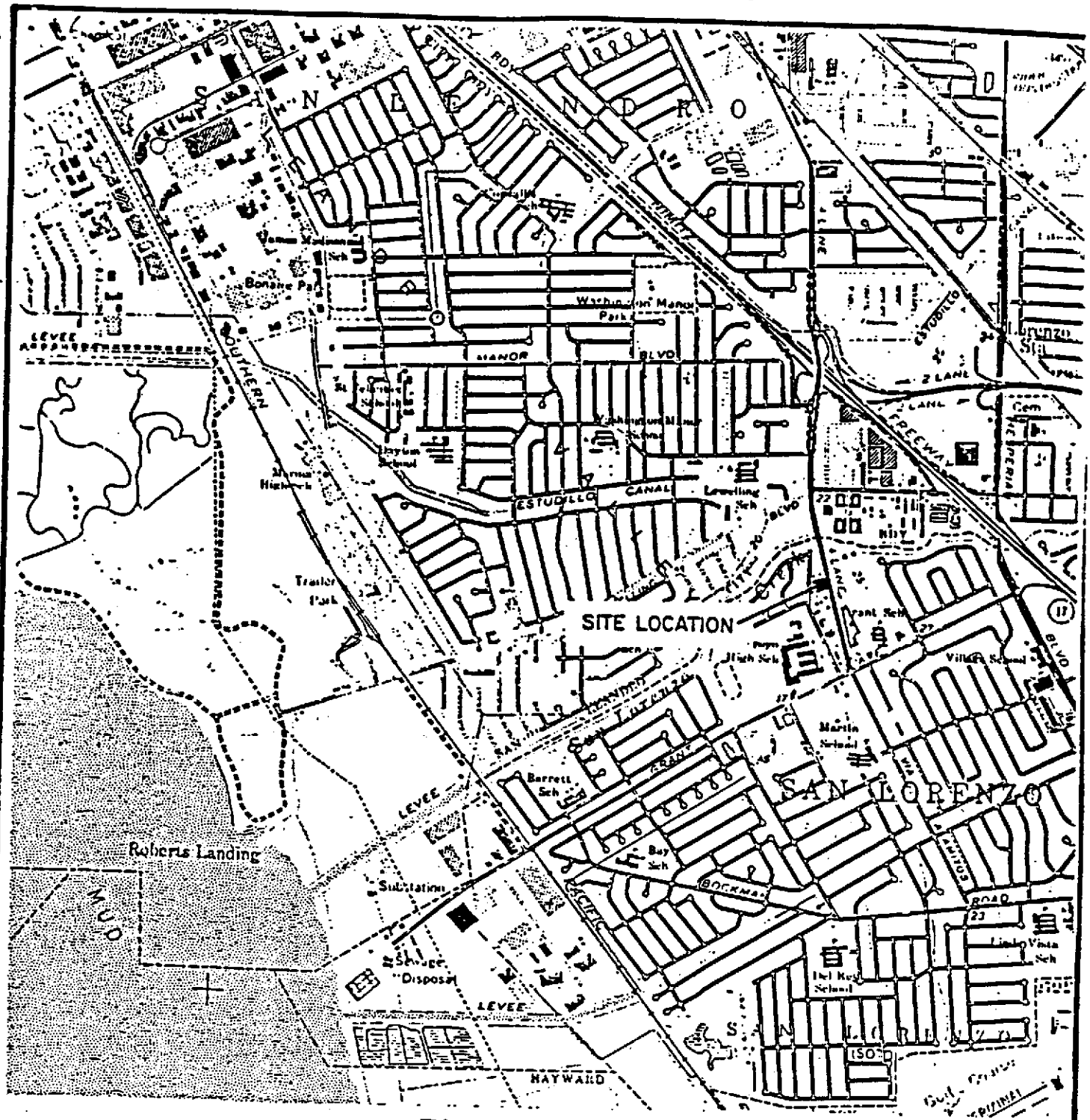

FIGURE 1
SITE LOCATION MAP

TEXACO USA/ WASHINGTON AVE.
SAN LORENZO, CALIFORNIA

GROUNDWATER TECHNOLOGY

north of the site flowing intermittently to the southwest toward the San Francisco Bay. The groundwater table in the vicinity of the site is reported to be shallow, with a regional groundwater gradient direction to the west.

SITE HISTORY

The site was operated as a Texaco Service Station until it was closed several years ago. The exact date of closure is not available to Groundwater Technology at this time. The underground storage tanks remain on-site but have been purged of all product.

SCOPE OF WORK

The Scope of Work performed by Groundwater Technology at the Washington Street site consisted of drilling six exploratory borings, the collection of soil and water samples for laboratory analysis, and an assessment of the site sensitivity to subsurface contamination with regards to local ground and surface waters. Because hydrocarbon odors were detected in the soil borings suggesting contamination, three selected soil borings were converted into monitoring wells. The details of the work steps implemented are presented in the following sections.

SOIL BORINGS

The purpose of the soil borings was to explore the site for the presence of subsurface hydrocarbon contamination, and to define the vertical and areal extent of the contamination should any be found. Texaco U.S.A. requested that a total of six borings be drilled at the site; five to a depth of 15 feet and one to a depth of 25 feet or groundwater, whichever was encountered first. Four borings were to be drilled at the corners of the underground tank pit area, and two in the area of the pump islands and product lines (See Figure 2, Site Plan).

All of the soil borings were drilled with a truck mounted drill rig using 7 1/2 inch O.D. (outside diameter) hollow stem augers. The drilling was performed under the direction of a geologist who also maintained a continuous log of the materials encountered (See Appendix I for Drilling Logs).

The soil borings not converted into monitoring wells were abandoned by backfilling with clean, native material and capped with 1.5 feet of cement. The contaminated soil was piled on the site for volatilization of hydrocarbons and disposal at a later date.

MONITORING WELL INSTALLATION/CONSTRUCTION

Three selected soil borings were converted to groundwater monitoring wells when strong petroleum odors were noticed in four borings (MW-1, MW-3, SB-1 & SB-2). The three monitoring wells were constructed of two inch diameter PVC pipe and well screen. The two inch diameter, 0.020 inch slotted, well screen was installed from the bottom of the boring to five feet below the ground surface. Blank casing was then installed to the surface. A well pack consisting of #2 Monterey sand was placed in the annulus (the space between the bore hole and well casing) from the bottom of the well borings to approximately 3 feet below ground surface. The wells were completed with a bentonite seal, cement and a traffic rated street box to provide access to the well. (See Appendix II for well construction details).

SOIL SAMPLING

Soil samples were obtained during drilling using a 2.5 inch O.D. split spoon sampler lined with three, 2" x 6" brass sample tubes and was driven eighteen inches at each sampling point. The samples were collected at 5 foot intervals from 5 feet below ground surface to the water table. The collected samples were

sealed, capped and packed on ice in an insulated cooler for subsequent delivery to the laboratory for analysis. Each sample was labeled with boring number, sample designation number, time of day and depth.

All samples remained in possession of the project geologist until delivery to the laboratory. A chain of custody manifest was included with the samples at all times. (See Appendix II - Standard Operating Procedures).

A composite soil sample for each boring was formed at the laboratory by combining one sample tube from each sampling interval and performing analysis for lead, benzene, toluene, xylene and total hydrocarbon concentrations. Analysis were performed by purge and trap gas chromatography, with flame ionization detection and photo-ionization detection as per EPA Methods 5030, 8015 and 8020.

GROUNDWATER SAMPLING

Groundwater was encountered in all of the soil borings at a depth of approximately 11 feet below grade. Groundwater samples were recovered from the borings that were not converted into monitoring wells immediately following drilling. The borings converted into monitoring wells were developed by hand bailing and sampled with an EPA approved teflon and glass sampler. The groundwater samples were collected, preserved and transported to the laboratory where they were then analyzed for benzene, toluene, and xylene under Chain of Custody as per guidelines outlined in Groundwater Technology's Standard Operating Procedures SOP 9, 10 and 11 (See Appendix II).

SITE CONDITIONS

GEOLOGY

The study area is located on the western margin of the San Lorenzo Alluvial Cone which formed at the base of Walpert Ridge in the Diablo Mountains. The San Lorenzo Cone is composed of sediments deposited by San Lorenzo Creek. The creek deposited sands and gravels in its braided channel and during times of flood flow, the overbank spread of water deposited finer grained silts and clays. These sediments were derived from erosion of the Franciscan formation of consolidated marine sediments, serpentine and igneous intrusions which make up the highlands. Marine inundations from San Francisco Bay have also deposited silts and clays over the alluvial deposits on the Bay margins.

Examination of the drill logs suggests the soils at the site can be divided into three general units, although correlation from well to well is not entirely consistent. The upper unit, extending to a depth of about 5 feet below surface grade, consists mainly of brown soft sandy clay. The middle unit of brown loose medium grained clayey sands, varies in thickness from about 2 feet (MW3, SB1, SB2 and SB3) to about 5 feet (MW2). The lower unit first occurs about 7 feet below surface grade and consists of a dark brown stiff clay of undetermined thickness.

HYDROGEOLOGY

The site is located on the San Lorenzo alluvial cone of the San Francisco Bay Plain depression. The cone is composed of interlayered deposits of relatively impervious clays and permeable alluvial sands and gravels which form a series of small confined aquifers. At the site, groundwater was encountered in the lower stiff clay unit in all borings at a depth of approximately 11 feet below grade.

Groundwater in this region has been increasingly degraded by the intrusion of sea water. Mr. John Monser from the Alameda County Flood Control District reports that one groundwater testing well was located within 1/2 mile of the site. However, this well was abandoned by the county in 1983 when analysis of a water sample drawn from 55-83 feet below ground surface reported total dissolved solids (TDS) higher than EPA drinking water standards. (See Table 1) Mr. Monser also indicated that some agricultural wells may exist within the project area. Exact locations for these agricultural wells are not known, but Mr. Monser believes they draw water from deeper aquifers. Research shows that no drinking water wells exist within 1/2 mile of the site.

SUBSURFACE CONTAMINATION

Analysis of the data collected during the hydrogeologic investigation at the Washington Street Station in San Lorenzo indicates that a minor amount of contamination is present in the site soils. The contamination, according to field data, appears as hydrocarbon odor in the lowest soil unit drilled between 7 and 12 feet below grade. Laboratory analysis of soil samples detected lead in each sample in concentrations of 12 to 20 parts per million (ppm). No detectable levels of BTX or total petroleum hydrocarbon were reported in the composite soil samples. The laboratory report presenting these test results is included in Appendix III.

Six groundwater samples were collected for laboratory analysis of petroleum hydrocarbons. Two samples, SB-1 and MW-1 which are located in the vicinity of the pump island, contained minor amounts of hydrocarbon contamination. The sample collected from the soil boring, SB-1 contained 0.22 ppm benzene, 0.39 ppm

TABLE 1

WATER QUALITY

Alameda County Flood Control and Water Conservation District

Element (ppm)	Maximum EPA levels in drinking water (ppm)*	Well 13B2 Testing Date September 1983 (ppm)
CA	*	84.0
MG	125.0	50.0
NA	No limit	159.0
K	*	0.9
CO_3	*	<1.0
HCO_3	*	497.0
SO_4	250.0	123.0
CI	250.0	92.0
NO_3	10.0	34.0
FL	1.8	<1.0
B	1.0	1.0
SIO_2	*	<1.0
TDS	500.0	854.0

* Maximum EPA levels allowed in drinking water has not been documented.

toluene and 0.68 ppm xylene, however, this sample was drawn prior to developing a good hydraulic communication with the aquifer. Although minor contamination does occur in this location, additional contamination could have been introduced during drilling. Detectable amounts of xylene were found in MW-1, but the level was within EPA standards for safe drinking water. The laboratory test results are presented in Appendix IV.

CONCLUSIONS AND RECOMMENDATIONS

The effects of any residual soil contamination on the groundwater was shown to be negligible in all but two of the soil borings (MW-1 and SB-1). These borings are located upgradient and to the north of the other monitoring wells in the vicinity of the pump island indicating the initial contamination originated near the pumps. Xylene concentrations were slightly higher than the more volatile benzene and toluene suggesting that the contamination is due to an older leak. While the BTX components reported in these water samples are slightly above EPA standards for safe drinking water, the lack of any detectable contamination in the downgradient wells suggests that a small localized loss likely occurred at the pump island.

The contamination present at the site appears to be an older leak of gasoline from around the pump island. Because the laboratory results detected negligible concentrations of petroleum hydrocarbons in the soil samples and minor to negligible concentrations of petroleum hydrocarbons in the groundwater samples it is Groundwater Technology's opinion that the investigation should be closed. This is based upon the fact that the contamination is localized and non-reoccurring, the groundwater in the vicinity does not presently meet EPA standards for drinking water (See Table 1), and the regional hydrogeology consists of small confined aquifers controlled by the intervening clay layers.

Any decision to abandon the 3 monitoring wells installed by Groundwater Technology should be based upon the intended use of the site by the new owners. If the site is to be an operating retail gasoline or automotive service station the monitoring wells could be maintained for possible use by the new owners. The monitoring wells should be abandoned following regional guidelines when the underground storage tanks are removed for site usage other than described above.

CLOSURE

Groundwater Technology would like to thank Texaco U.S.A for the opportunity to have been of service on this project. If you have any questions regarding this report, please feel free to contact our office at your earliest convenience.

GROUNDWATER TECHNOLOGY, INC.
OIL RECOVERY SYSTEMS
4080 Pike Lane, Suite D, Concord, CA 94520-1227 (415) 671-2

DISCLAIMER

The author of this report, GROUNDWATER TECHNOLOGY, INC., of Concord, County of Contra Costa, State of California, hereby gives notice that any statement of opinion contained in this report prepared by GROUNDWATER TECHNOLOGY, INC., shall not be construed to create any warranty or representation that the real property on which the investigation was conducted is free of pollution or complies with all applicable regulatory and statutory requirements; or that the property is fit for any particular purpose. Statements, descriptions or opinions are informational only and are not made or given as a warranty of the property in any way. Any purchaser of the property shall be solely responsible for determining the adequacy of the property for any and all uses for which the purchaser shall use the property. Any purchaser of the property which is subject of this report should enter into any purchase on sole reliance of his own judgement and upon his own personal investigation of the property he is to receive, and not in reliance upon any representation by GROUNDWATER TECHNOLOGY, INC., regarding such property, the character, quality or value thereof.

GROUNDWATER TECHNOLOGY
STANDARD OPERATING PROCEDURE
CONCERNING WATER SAMPLING METHODOLOGY
SOP 9

Prior to water sampling, each well shall be purged by pumping a minimum of four well volumes or until the discharge water indicates stabilization of temperature, conductivity,and pH. If the well is evacuated before four well volumes are removed or stabilization is achieved, the sample should be taken when the water level in the well recovers to 80% of its initial level.

Retrieval of the water sample, sample handling and sample preservation shall be conducted in accordance with Groundwater Technology Laboratory Standard Operating Procedure (GTL SOP 10) concerning Sampling For Volatiles in Water". The sampling equipment used shall consist of a teflon and/or stainless steel samplers, which meets EPA regulations. Glass vials with teflon lids should be used to store the collected samples.

To insure sample integrity, each vial shall be filled with the sampled water such that the water stands above the lip of the vial. The cap should then be quickly placed on the vial and tightened securely. The vial should then be checked to ensure that air bubbles are not present prior to labeling of the sample. Label information should include a sample identification number, job identification, date, time, type of analysis requested and the sampler's name. Chain-of-Custody forms shall be completed as per Groundwater Technology Laboratory Standard Operating Procedure (SOP 11) concerning Chain of Custody.

The vials should be immediately placed in high quality coolers for shipment to the laboratory. The coolers should be packed with sufficient ice or freezer packs to ensure that the samples are kept below 4C. Samples which are received at the Groundwater Technology Laboratory above 10 C. will be considered substandard. To minimize sample degradation the prescribed analysis shall take place within seven days of sample collection unless specially prepared acidified vials are used.

To minimize the potential for cross contamination between wells, all the well development and water sampling equipment which contacts the groundwater shall be cleaned between each well sampling. As a second precautionary measure, the wells shall be sampled in order of increasing contaminant concentrations as established by previous analysis.

GROUNDWATER TECENOLOGY LABORATORY (GTL)
STANDARD OPERATING PROCEDURE
CONCERNING SAMPLING FOR VOLATILES IN WATER (DISSOLVED GASOLINE, SOLVENTS, ETC.).
SOP 10

1. Use only vials properly washed and baked, available from GTL or Pierce Chemical.

2. Use clean sampling equipment. Scrub with Alconox or equivalent laboratory detergent and water followed by a thorough water rinse. Complete with a distilled water rinse.

   Sampling equipment which has come into contact with liquid hydrocarbons (free product) should be regarded with suspicion. Such equipment should have tubing and cables replaced and all resilient parts washed with laboratory detergent solution, as above. Visible deposits may have to be removed with hexane, breath methanol fumes. Solvent washing should be followed be detergent washing as above.

   This procedure is valid for volatile organics analysis only. For extractable organics (for example, pesticides, or base neutrals for EPA method 625) a final rinse with pesticide grade isopropyl alcohol, followed by overnight or oven drying, will be necessary.

3. Take duplicate samples for GTL. Mark on forms as a single sample with two containers to avoid duplication of analysis.

4. Take a site blank using distilled water or known uncontaminated source. This sample will be run at the discretion of the project manager.

5. Fill out labels and forms as much as possible ahead of time. Use an indelible laundry marker or a Space pen.

11. Unless the fabric type label is used, place scotch tape over the label to preserve its integrity.

12. For Chain of Custody reasons, sample vial should be wrapped end-for-end with scotch tape or evidence tape and signed with indelible ink where the end of the tape seals on itself. The septum needs to be covered.

13. Chill samples immediately. Samples to be stored should be kept at 4°C (39°F). Samples received at the laboratory above 10°C (as measured at glass surface by a thermocouple probe), after overnight shipping will be considered substandard, so use a high quality cooler with sufficient ice or freezer packs. (Coolers are available from GTL).

14. Fill out Chain of Custody and Analysis Request form. (See Chain of Custody Procedures SOP11).

GROUNDWATER TECHNOLOGY
STANDARD OPERATING PROCEDURE
CONCERNING MONITORING WELL INSTALLATION
SOP 13

The boreholes for the monitoring wells shall be drilled using a truck mounted hollow stem auger drill rig. The outside diameter (O.D.) of the auger should be a minimum of eight inches when installing 4-inch well screen. The hollow stem auger provides minimal interuption of drilling while permitting soil sampling at specific intervals. Soil samples can be taken at desired depths by hammering a conventional split barrel sampler containing precleaned 2 inch brass sample tubes.

The construction details of the monitoring wells to be drilled at the site are graphically depicted in the attached figure titled "Typical Detail of Monitoring Well Construction" (See Figure 1). The wells should be constructed of 4 inch PVC, .020 inch machine slotted screen and blank casing. The screened portion of the well will extend 5 feet above and 10 feet below the present water table. An appropriate sand pack as determined by grain size analysis shall be placed in the annular space between the casing and drilled hole to inhibit silt buildup around the well. An annular seal installed above the sand pack should consist of bentonite pellets overlain by neat cement or cement grout to the surface. The wellhead shall be protected below grade within a traffic rated street box. Each well shall have a permanently attached identification plate containing the following information (1) Well Number, (2) Wellhead Elevation, (3) Depth of Well, (4) Screened Interval.

Subsequent to installation the wells shall be developed to remove silts and improve well performance. The well development shall be conducted by air lifting the water within the well until groundwater pumped from the wells is silt free.

To assure that cross contamination does not occur between the drilling and development of successive wells all equipment contacting subsurface soils or ground water shall be steam cleaned. The steam cleaned equipment should include but not limited to the following (1) Drilling Augers, (2) Split Barrel Sampler, (3) Groundwater Monitoring and Sampling Equipment, (4) Well Development Piping and Sparging Equipment.

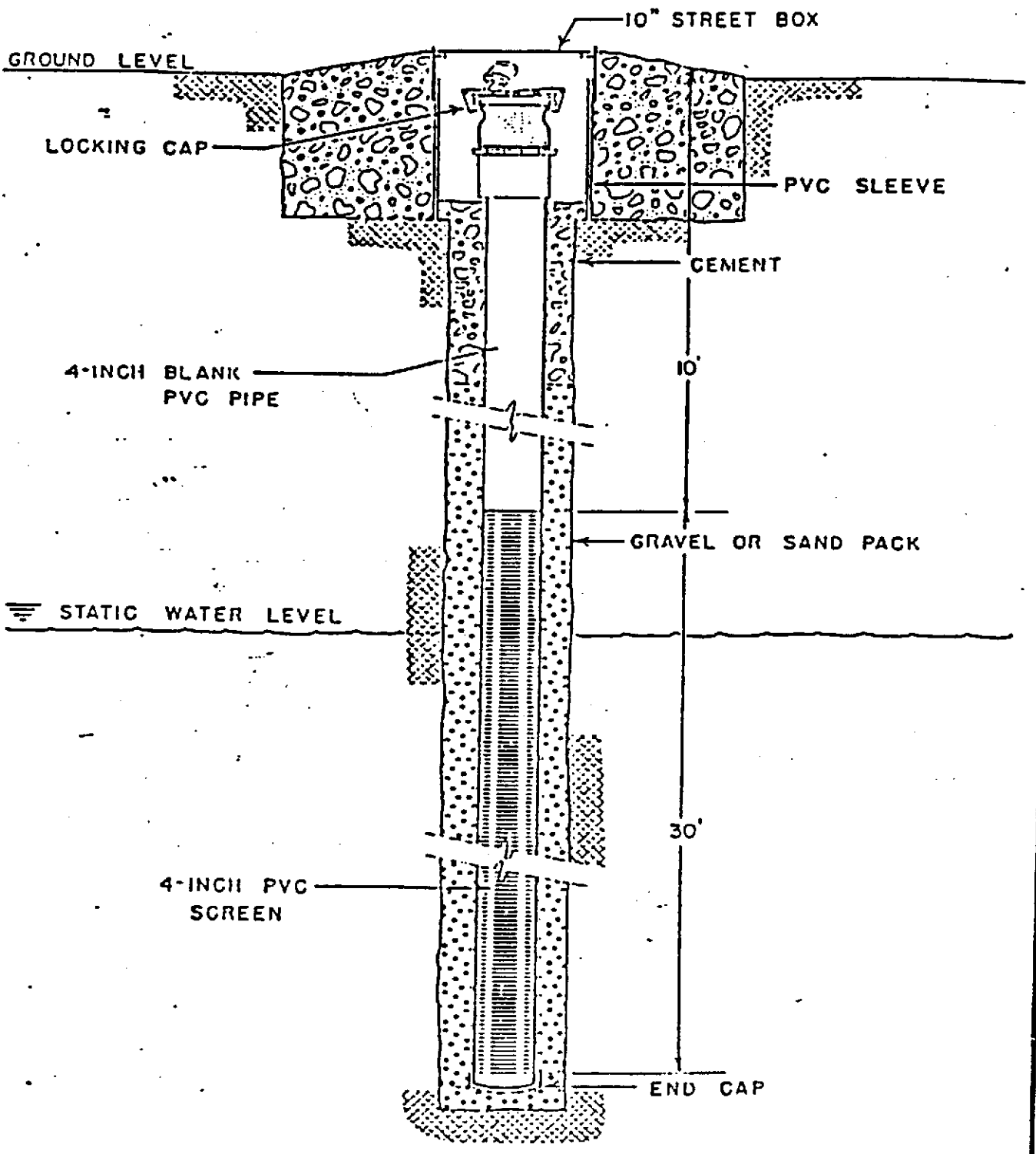

FIGURE 1

TYPICAL DETAIL

MONITORING WELL CONSTRUCTION

ARMOUR OIL - DAVIS, CALIF.

GROUNDWATER TECHNOLOGY
STANDARD OPERATING PROCEDURE
CONCERNING SOIL SAMPLING METHODOLOGY
SOP 14

Soil samples should be collected and preserved in accordance with Groundwater Technology Laboratory's Standard Operating Procedure (GTL SOP 15) concerning Soil Sample Collection and Handling when Sampling for Volatile Organics. A hollow stem soil auger should be used to drill to the desired sampling depth. A standard 2 inch diameter split spoon sampler 18 inches in length shall be used to collect the samples. The samples are contained in 2 inch diameter by 6 inch long thin walled brass tube liners fitted into the split spoon sampler (three per sampler).

The split spoon sampler should be driven the full depth of the spoon into the soil using a 140 pound hammer. The spoon shall then be extracted from the borehole and the brass tube liners containing the soil sample removed from the sampler. The ends of the liner tubes should be immediately covered with aluminum foil, sealed with a teflon or plastic cap, and then taped with duct tape. After being properly identified with sample data entered on a standard chain of custody form the samples shall be placed on dry ice (maintained below 4°C) and transported to the laboratory within 24 hours.

One of the three soil samples retreived at each sample depth shall be analyzed in the field using a photoionization detector and/or explosimeter. The purpose of the field analysis is to provide a means to choose samples to be laboratory analyzed for hydrocarbon concentrations and to enable comparisions between the field and laboratory analyses. The soil sample shall be sealed in a plastic bag and placed in the sun to accelerate the vaporization of volatile hydrocarbons from the soil. One of the two field vapor instruments shall be used to quantify the amount of hydrocarbon released to the air from the soils. The data shall be recorded on the drill logs at the depth corresponding to the sample point.

GROUNDWATER TECHNOLOGY
STANDARD OPERATING PROCEDURE
CONCERNING SOIL SAMPLE COLLECTION AND
HANDLING WHEN SAMPLING FOR VOLATILE ORGANICS
SOP 15

1. Use a sampling means which maintains the physical integrity of the samples. The project sampling protocol will designate a preferred sampling tool. A split spoon sampler with liners or similar tube sampler which can be sealed is best.

2. At the discretion of the project manager, the samples should be either.

   A. sealed in liner with teflon plugs (The "California Sampler") or

   B. field prepped for sample analysis.

   Projects using method (A) will incur a separate sample preparation charge of $ 10.00 per sample in the laboratory. For method (B), prepared and pre-weighed vials, and sample coring syringes must be ordered at least 2 weeks ahead of time from the laboratory before sampling. (Vials are free if samples will be sent to Groundwater Technology Laboratory).

3. For sending whole-core samples (2A above):

   A. Seal ends of liner with teflon plugs leaving no free air space inside.

   B. Tape with duct tape.

   C. Cover with a non-contaminating sealant (paraffin).

   D. Place in plastic bag labeled with indelible marker. Use Well #, depth, date, and job #.

   E. Place inside a second bag and place a labelling tag inside outer bag.

   F. Enclose samples in a cooler with sufficient ice or dry ice to maintain samples at 4 degrees during shipment.

   G. Seal cooler with a lock or tape with samplers signature so tampering can be detected.

H. Package cooler in a box with insulating material. Chain of custody forms can be placed in a plastic bag in this outer box.

I. If dry ice is used, a maximum of 5 pounds is allowed by Federal Express without special documents (documents are easy to obtain but just not necessary for under 5 pounds). Simply write "ORM-A dry ice, "_____ pounds, for research" on outside packaging and on regular airbill under classification. UPS does not accept dry ice.

J. Make yourself a supplies list necessary before going into the field.

K. Soil cores kept a 4 degrees C are only viable for up to 7 days when aromatic hydrocarbons are involved. The lab will prepare them in methanol as above once in the lab, but we will need a call ahead of time to schedule personnel.

4. For field-prepping (Step 2B above):

A. Obtain prepared sample containers from the laboratory. Order for # of samples intended and add 50%. This should be sufficient for QA requirements (below), breakage, and additional samples taken by discretion of sampler.

B. Organize containers consecutively - they are all numbered and pre-weighed. Make a necessary supplies list before going into the field.

C. For a 6" liner section retrieved from the spoon sampler, spread a 12" square piece of broiler (heavy) aluminum foil and slice it lengthwise with a clean stainless steel spatula.

D. Immediately sample with a coring syringe with plunger removed. Poke tube into mid-section of core (into undisturbed soil) to capture a 1/2 to 1 inch plug.

E. Immediately transfer to the sample vial with methanol by using plunger. Clean around lip of vial to remove soil with clean laboratory paper towelling

CAUTION: WORK ONLY IN WELL VENTILATED AREA. DO NOT BREATH METHANOL VAPOR. IT IS TOXIC. SEE MSDS ATTACHED.

and seal septum onto the vial with lid, teflon side (shiny) toward the sample. shake sample enough to break it up so that whole sample is immersed in methanol. The rapid progression of steps indicated here is necessary to prevent loss of volatiles from the soil. Do not leave vials unopened for any extended period - the methanol evaporates quickly. Grit left on threads of vial can cause vial to break.

F. * If required (see 5 below). Take a duplicate sample from the other half directly across from the first sample, or where ever undisturbed, yet representative soil occurs.

G. Label vial with legible information as follows:

1. Job name or number.

2. Date.

3. Time.

4. Depth and well number.

5. Samplers initials.

H. Tape vial across septum with scotch tape and around cap and sign on the tape with indelible ink to prevent tampering.

I. Wrap up a representative section of the core equivalent in volume to cube 3 cm on a side in the aluminum foil square, discarding the rest appropriately. Seal in saran wrap. This section is for dry weight determination. Close it in plastic bag with a tag or write on the bag with an indelible marker. These samples go into a separate cooler or box and not with the vials. The cooler for dry weight samples need not be iced, but overnight delivery is requested.

J. Discard plastic coring syringe, clean the spatula, and get clean equipment ready for next sample.

K. Ice the sample vials immediately and keep them iced through shipment.

L. Fill out chain of custody form. SOP 11 gives major details. Make sure sample requests is for proper analysis type.

M. Shipping of hazardous materials (methanol) requires special documents from Federal Express and UPS. Have this all arranged ahead of time (once set up with documents, the actual process will be little different than normal). Briefly you will need to add following to outside of package and on documents:

1. Flammable liquid label (some will come from lab with the vials).

2. "UN1230 methyl alcohol".

3. For UPS, a "Hazardous Material" label.

N. Ship overnight delivery to the lab. If dry ice is available, up to 5 pounds per package can be sent via Federal Express by simply writing "ORM-A dry ice", "_____ pounds, for research" on outside of package and on shipping document. UPS does not accept dry ice shipments.

5. Good sampling practice would include preparing 1 out of 5 samples to be prepared in duplicates for analysis. These 4 out of 20 samples will be for the following purposes.

A. One in every 20 samples should be analyzed as a field replicate to evaluate the precision of the sampling technique. A minimum of 1 sample per data set is suggested.

B. An additional 1 in 20 samples should be selected by sampler to be prepared in duplicate as alternative to Step (A). Choose a different soil type if available.

C. The lab does spiking with reference materials for internal QC so additionally a minimum of 2 in 20 samples need to be prepared in duplicate.

6. Other QC procedures can be specified at the project manager's discretion. See Table 3-2 (reference 2) attached.

7. Decontamination of equipment in the field requires a detergent wash, a water rinse, and spectrographic quality acetone rinse followed by distilled water.

REFERENCES

1. Soil Sampling Quality Assurance Users Guide, U.S. EPA Environmental Monitoring Systems Laboratory, Las Vegas, NV, EPA 600/4-84-043, May 1984.

2. Preparation of Soil Sampling Protocol. Techniques and Strategies, U.S. EPA, Environmental Monitoring Systems Laboratory, Las Vegas, NV, EPA 600/4-83-020, August 1983 (PB83-206979).

3. Test Methods for Evaluating Solid Waste, U.S. EPA, Office of Solid Waste and Emergency Response, Washington, D.C., SW 846, July 1982.

BROWN AND CALDWELL
ANALYTICAL LABORATORIES

RECEIVED
AUG 28 1986

LOG NO: E86-08-202

Received: 11 AUG 86
Reported: 28 AUG 86

Ms. Amy Sager
Groundwater Technology
4080 Pike Lane, Suite D
Concord, California 94520

Purchase Order: 464

REPORT OF ANALYTICAL RESULTS

LOG NO	SAMPLE DESCRIPTION , SOIL SAMPLES	DATE SAMPLED
08-202-1	MW-1 Composite	08 AUG 86
08-202-2	MW-2 Composite	08 AUG 86
08-202-3	MW-3 Composite	08 AUG 86
08-202-4	SB-1 Composite	08 AUG 86
08-202-5	SB-2 Composite	08 AUG 86

PARAMETER	08-202-1	08-202-2	08-202-3	08-202-4	08-202-5
Lead, mg/kg	12	12	18	14	20
Nitric Acid Digestion, Date	08.18.86	08.18.86	08.18.86	08.18.86	08.18.86
Benzene,Toluene,Xylene Isomers					
Benzene, mg/kg	<0.5	<0.5	<0.5	<0.5	<0.5
Toluene, mg/kg	<0.5	<0.5	<0.5	<0.5	<0.5
Total Xylene Isomers, mg/kg	<1.0	<1.0	<1.0	<1.0	<1.0
Total Fuel Hydrocarbons, mg/kg	<10	<10	<10	<10	<10

BROWN AND CALDWELL
ANALYTICAL LABORATORIES

LOG NO: E86-08-202

Received: 11 AUG 86
Reported: 28 AUG 86

Ms. Amy Sager
Groundwater Technology
4080 Pike Lane, Suite D
Concord, California 94520

Purchase Order: 464

REPORT OF ANALYTICAL RESULTS

LOG NO	SAMPLE DESCRIPTION , SOIL SAMPLES	DATE SAMPLED
08-202-6	SB-3 Composite	08 AUG 86

PARAMETER	08-202-6
Lead, mg/kg	12
Nitric Acid Digestion, Date	08.18.86
Benzene,Toluene,Xylene Isomers	
Benzene, mg/kg	<0.5
Toluene, mg/kg	<0.5
Total Xylene Isomers, mg/kg	<1.0
Total Fuel Hydrocarbons, mg/kg	<10

BROWN AND CALDWELL
ANALYTICAL LABORATORIES

LOG NO: E86-08-202

Received: 11 AUG 86
Reported: 28 AUG 86

Revised 09/17/86

Ms. Amy Sager
Groundwater Technology
4080 Pike Lane, Suite D
Concord, California 94520

Purchase Order: Texaco/San Lorenzo

REPORT OF ANALYTICAL RESULTS

LOG NO	SAMPLE DESCRIPTION , SOIL SAMPLES	DATE SAMPLED
08-202-1	MW-1 Composite	08 AUG 86
08-202-2	MW-2 Composite	08 AUG 86
08-202-3	MW-3 Composite	08 AUG 86
08-202-4	SB-1 Composite	08 AUG 86
08-202-5	SB-2 Composite	08 AUG 86

PARAMETER	08-202-1	08-202-2	08-202-3	08-202-4	08-202-5
Lead, mg/kg	12	12	18	14	20
Nitric Acid Digestion, Date	08.18.86	08.18.86	08.18.86	08.18.86	08.18.86
Benzene,Toluene,Xylene Isomers					
Benzene, mg/kg	<0.5	<0.5	<0.5	<0.5	<0.5
Toluene, mg/kg	<0.5	<0.5	<0.5	<0.5	<0.5
Total Xylene Isomers, mg/kg	<1.0	<1.0	<1.0	<1.0	<1.0
Total Fuel Hydrocarbons, mg/kg	<10	<10	<10	<10	<10

BROWN AND CALDWELL

ANALYTICAL LABORATORIES

LOG NO: E86-08-202

Received: 11 AUG 86
Reported: 28 AUG 86

Ms. Amy Sager
Groundwater Technology
4080 Pike Lane, Suite D
Concord, California 94520

Purchase Order: Texaco/San Lorenzo

REPORT OF ANALYTICAL RESULTS

LOG NO	SAMPLE DESCRIPTION , SOIL SAMPLES	DATE SAMPLED
08-202-6	SB-3 Composite	08 AUG 86

PARAMETER	08-202-6
Lead, mg/kg	12
Nitric Acid Digestion, Date	08.18.86
Benzene,Toluene,Xylene Isomers	
Benzene, mg/kg	<0.5
Toluene, mg/kg	<0.5
Total Xylene Isomers, mg/kg	<1.0
Total Fuel Hydrocarbons, mg/kg	<10

BROWN AND CALDWELL BC
ANALYTICAL LABORATORIES

LOG NO: E86-08-202

Received: 11 AUG 86
Reported: 28 AUG 86

Ms. Amy Sager
Groundwater Technology
4080 Pike Lane, Suite D
Concord, California 94520

Purchase Order: Texaco/San Lorenzo

REPORT OF ANALYTICAL RESULTS

LOG NO	SAMPLE DESCRIPTION , GROUND WATER SAMPLES	DATE SAMPLED
08-202-7	MW-1	08 AUG 86
08-202-8	MW-2	08 AUG 86
08-202-9	MW-3	08 AUG 86
08-202-10	SB-1	08 AUG 86
08-202-11	SB-2	08 AUG 86

PARAMETER	08-202-7	08-202-8	08-202-9	08-202-10	08-202-11
Benzene,Toluene,Xylene Isomers					
Benzene, mg/L	<0.05	<0.05	<0.05	0.22	<0.05
Toluene, mg/L	<0.05	<0.05	<0.05	0.39	<0.05
Total Xylene Isomers, mg/L	0.082	<0.05	<0.05	0.68	<0.05

BROWN AND CALDWELL

ANALYTICAL LABORATORIES

LOG NO: E86-08-202

Received: 11 AUG 86
Reported: 28 AUG 86

Ms. Amy Sager
Groundwater Technology
4080 Pike Lane, Suite D
Concord, California 94520

Purchase Order: Texaco/San Lorenzo

REPORT OF ANALYTICAL RESULTS

LOG NO	SAMPLE DESCRIPTION , GROUND WATER SAMPLES	DATE SAMPLED
08-202-12	SB-3	08 AUG 86

PARAMETER	08-202-12
Benzene,Toluene,Xylene Isomers	
Benzene, mg/L	<0.05
Toluene, mg/L	<0.05
Total Xylene Isomers, mg/L	<0.05

Robert P. Pinzo for
D. A. McLean, Laboratory Director

BROWN AND CALDWELL BC
ANALYTICAL LABORATORIES

LOG NO: E86-08-202

Received: 11 AUG 86
Reported: 28 AUG 86

Ms. Amy Sager
Groundwater Technology
4080 Pike Lane, Suite D
Concord, California 94520

Purchase Order: 464

REPORT OF ANALYTICAL RESULTS

LOG NO	SAMPLE DESCRIPTION , GROUND WATER SAMPLES	DATE SAMPLED
08-202-7	MW-1	08 AUG 86
08-202-8	MW-2	08 AUG 86
08-202-9	MW-3	08 AUG 86
08-202-10	SB-1	08 AUG 86
08-202-11	SB-2	08 AUG 86

PARAMETER	08-202-7	08-202-8	08-202-9	08-202-10	08-202-11
Benzene,Toluene,Xylene Isomers					
Benzene, mg/L	<0.05	<0.05	<0.05	0.22	<0.05
Toluene, mg/L	<0.05	<0.05	<0.05	0.39	<0.05
Total Xylene Isomers, mg/L	0.082	<0.05	<0.05	0.68	<0.05

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BROWN AND CALDWELL BC
ANALYTICAL LABORATORIES

LOG NO: E86-08-202

Received: 11 AUG 86
Reported: 28 AUG 86

Ms. Amy Sager
Groundwater Technology
4080 Pike Lane, Suite D
Concord, California 94520

Purchase Order: 464

REPORT OF ANALYTICAL RESULTS

LOG NO	SAMPLE DESCRIPTION , GROUND WATER SAMPLES	DATE SAMPLED
08-202-12	SB-3	08 AUG 86

PARAMETER	08-202-12
Benzene,Toluene,Xylene Isomers	
Benzene, mg/L	<0.05
Toluene, mg/L	<0.05
Total Xylene Isomers, mg/L	<0.05

Linda Grack FOR
D. A. McLean, Laboratory Director

dup

GROUNDWATER TECHNOLOGY, INC.

4057 Port Chicago Highway, Concord, CA 94520 (415) 671-2387
FAX (415) 685-9148

December 4, 1992

Project No. 020203324

Ms. Nhi To
Tracy Federal Bank
1655 Willow Pass Road
Concord, California 94520

SUBJECT: Report of Sampling Activities
15595 Washington Street
San Lorenzo, California

Dear Ms. Nhi To:

Groundwater Technology was contacted by Tracy Federal Bank to conduct a limited investigation of the above-referenced site (Attachment 1, Figures 1 and 2). Tracy Federal Bank is processing a commercial loan for the property, and the investigation is part of the agreement for the loan. The purpose of this investigation was to provide Tracy Federal Bank with a report of the petroleum hydrocarbon concentrations in groundwater by using existing groundwater monitoring wells, which were installed by Groundwater Technology on August 8, 1986. The site is currently operated as a Shell Service Station.

MONITORING AND SAMPLING ACTIVITIES

On November 12, 1992, Groundwater Technology, monitored the depth to water (DTW) in three groundwater monitoring wells, purged the monitoring wells by hand bailing, and collected water samples from the monitoring wells. Water samples were analyzed for concentrations of benzene, toluene, ethylbenzene, and xylenes (BTEX) and total petroleum hydrocarbons-as-gasoline (TPH-G) by Environmental Protection Agency (EPA) Methods 8015/8020. The work at the site was performed according to Groundwater Technology Inc. Standard Operating Procedures (SOPs) 8 through 11 (Attachment 2). A Site Safety Plan was also prepared for the site and was reviewed and signed by the Groundwater Technology field technician before beginning site activities.

On November 12, 1992, the protective road box lids and caps to the monitoring wells were removed and the groundwater level in the monitoring wells was allowed to stabilize. The monitoring wells were then gauged to determine depth to separate-phase hydrocarbons (if present), DTW, and total well depth (TWD). Separate-phase hydrocarbons were not detected in the monitoring wells. The TWDs were measured at approximately 15 feet below the top of the casings. The DTW was

measured at 11.37 feet in MW-1, at 10.55 feet in MW-2, and 11.32 feet in MW-3. Wellhead elevation data was not available to calculate the groundwater surface elevation in each well. The groundwater monitoring data is summarized in Table 1 (Attachment 3).

Three gallons of water were purged from each of two monitoring wells (MW-1 and MW-2) and two gallons of water were purged from monitoring well MW-3. Purging groundwater from the monitoring wells before sampling allows formation water to enter the well from which representative samples characteristic of the groundwater are collected. After purging, groundwater samples were collected with a clean Teflon® sampler. Groundwater samples were placed in sterile 40-milliliter glass containers and fitted with plastic caps lined with a Teflon® septum. The samples were sealed so that no air remained inside, labeled, and placed in an insulated cooler for transportation to a California-certified laboratory for analyses. A chain-of-custody record was completed and accompanied the water samples at all times. The water generated during the purging and sampling activities was stored on site in a labeled 55-gallon drum.

LABORATORY ANALYTICAL RESULTS

Analytical results of groundwater samples collected on November 12, 1992, reported TPH-G concentrations ranging from 720 parts per billion (ppb) to below the method detection limit (MDL) of 10 ppb in monitoring wells MW-1, MW-2, and MW-3. Concentrations of BTEX were reported at 6 ppb for the samples collected from monitoring well MW-1 and below MDL for the samples from monitoring wells MW-2 and MW-3. The analytical results are summarized in Table 2 (Attachment 3). Laboratory reports and the chain-of-custody record are included in Attachment 4.

CONCLUSIONS

Analytical results of the groundwater sample from monitoring well MW-1 reported a benzene concentration above the allowable limit established for drinking water. The maximum allowable limit of benzene for drinking water is 1 ppb. Laboratory results reported other tested constituents below established California State action levels. Groundwater flow direction and gradient could not be calculated because the top of the monitoring well casing elevations is unknown.

RECOMMENDATIONS

Groundwater Technology recommends performing quarterly groundwater monitoring and sampling for one year to evaluate the groundwater gradient and flow direction and to monitor the hydrocarbon concentrations during seasonal groundwater fluctuations. To evaluate the groundwater gradient and

flow direction, the wellhead elevations should be professionally surveyed to an established benchmark (relative to mean sea level). The purge water generated during this sampling event should be properly disposed of at a licensed disposal facility.

Groundwater Technology does not know if Alameda County Health Care Services (ACHCS) has been notified of groundwater conditions at this site. Because benzene concentrations in the shallow groundwater exceed established drinking water levels, Groundwater Technology recommends that ACHCS be notified of the results of this investigation.

This concludes Groundwater Technology's letter report of sampling activities at 15595 Washington Avenue in San Lorenzo, California on November 12, 1992.

Groundwater Technology appreciates this opportunity to be of service to Tracy Federal Bank. If you have any questions regarding this letter report please contact us at (510) 671-2387.

Sincerely,

Groundwater Technology, Inc.
Written/Submitted by

Tim Watchers
Project Geologist

Groundwater Technology, Inc.
Reviewed/Approved by

David R. Kleesattel, R.G.
District Hydrogeologist

Sandra L. Lindsey
Project Manager

Attachment 1 Figures
Attachment 2 Standard Operating Procedures
Attachment 3 Tables
Attachment 4 Laboratory Report

cc: Mr. Bert Kebo, 5772 Sellers Avenue, Oakley, CA 94561
Mr. Mehdi Mohammedian, 15595 Washington Street, San Lorenzo, CA 94580

LR3324A1.TW

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ATTACHMENT 1

FIGURES

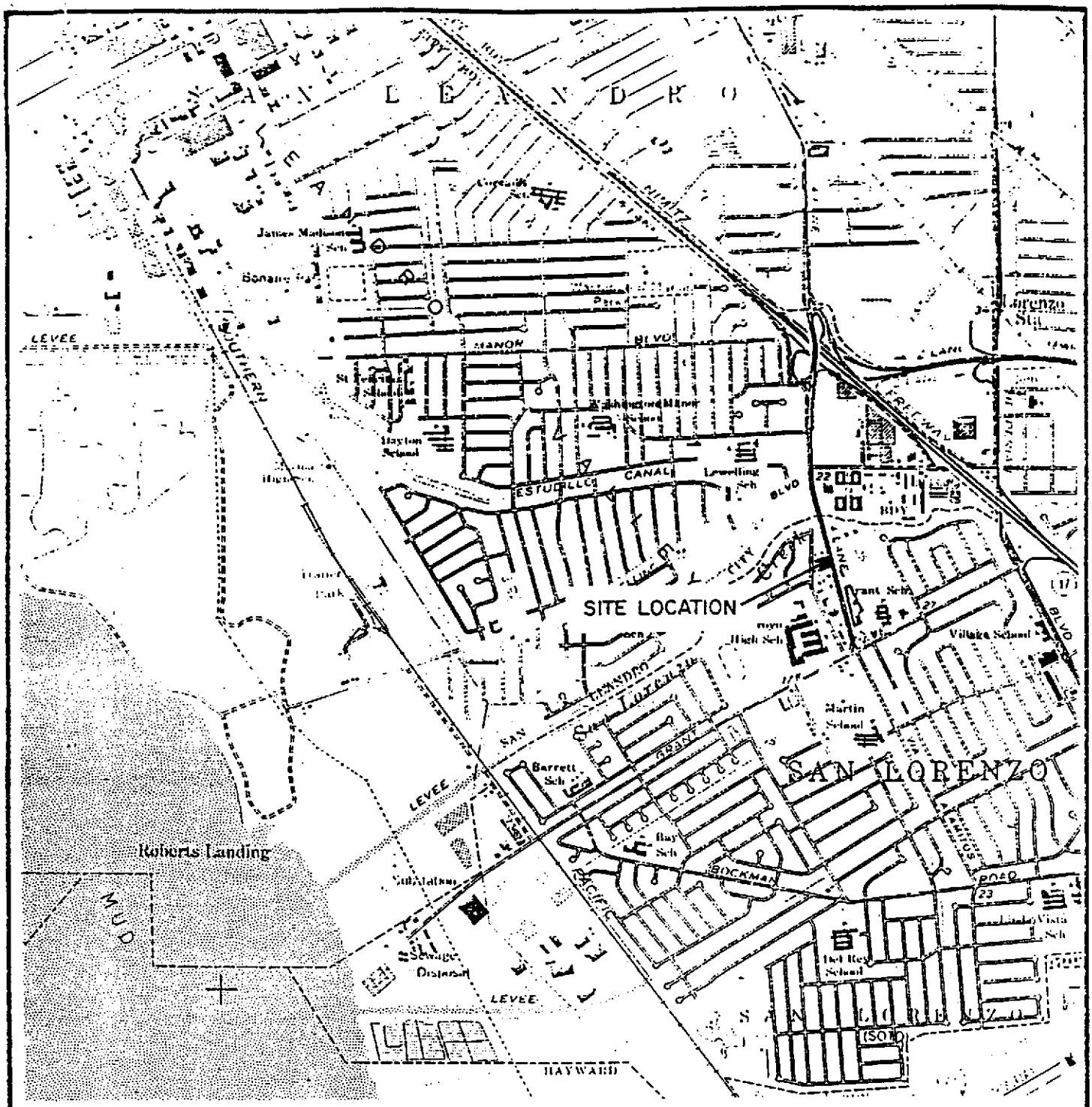


FIGURE 1
SITE LOCATION MAP

15595 WASHINGTON AVENUE
SAN LORENZO, CALIFORNIA

GROUNDWATER TECHNOLOGY

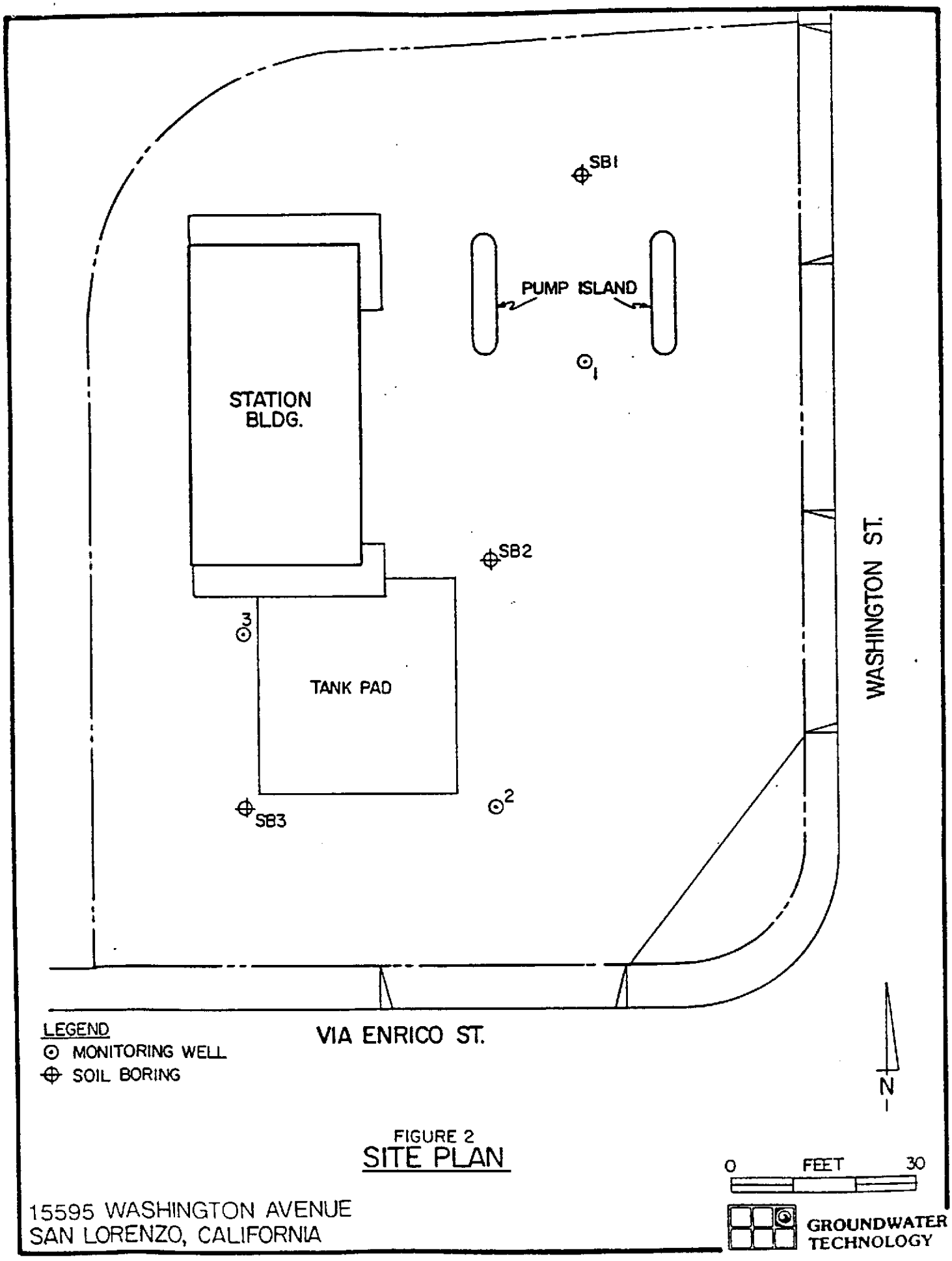


FIGURE 2
SITE PLAN

15595 WASHINGTON AVENUE
SAN LORENZO, CALIFORNIA

10. Label vial, using indelible ink, as follows:

    A. Sample I.D. No.
    B. Job I.D. No.
    C. Date and Time
    D. Type of analysis required
    E. Your name

11. Unless the fabric-type label is used, place Scotch™ tape over the label to preserve its integrity.

12. For chain-of-custody reasons, sample vial should be wrapped end-for-end with Scotch™ tape or evidence tape and signed with indelible ink where the end of the tape seals on itself. The septum needs to be covered.

13. Chill samples immediately. Samples to be stored should be kept at 4° Celsius (C) (30° Fahrenheit [F]). Samples received at the laboratory above 10°C (as measured at glass surface by a thermocouple probe), after overnight shipping, will be considered substandard, so use a high quality cooler with sufficient ice or freezer packs.

14. Fill out Chain-of-Custody Manifest and Analysis Request Form (see Chain of Custody Procedures, SOP 11).

ATTACHMENT 2

GROUNDWATER TECHNOLOGY, INC.
STANDARD OPERATING PROCEDURES

GROUNDWATER TECHNOLOGY, INC.

GROUNDWATER TECHNOLOGY, INC.
STANDARD OPERATING PROCEDURE
CONCERNING GROUNDWATER MONITORING
SOP 8

Groundwater monitoring of wells at the site shall be conducted using an ORS Environmental Equipment (ORS) INTERFACE PROBE ™ and SURFACE SAMPLER™. The INTERFACE PROBE ™ is a hand-held, battery-operated device for measuring depth to petroleum product and depth to water as measured from an established datum (*i.e.*, top of the well casing which has ben surveyed). Separate-phase hydrocarbon (product) thickness is then calculated by subtracting the depth to product from the depth to water. In addition, water elevations are adjusted for the presence of fuel with the following calculation:

(Product Thickness) (0.8) + (Water Elevation) = Corrected Water Elevation

Note: The factor of 0.8 accounts for the density difference between water and petroleum hydrocarbons.

The INTERFACE PROBE ™ consists of a dual-sensing probe which utilizes an optical liquid sensor and electrical conductivity to distinguish between water and petroleum products. A coated steel measuring tape transmits the sensor's signals to the reel assembly where an audible alarm sounds a continuous tone when the sensor is immersed in petroleum product and an oscillating tone when immersed in water. The INTERFACE PROBE ™ is accurate to 1/16th inch.

A SURFACE SAMPLER™ shall be used for visual inspection of the groundwater to note sheens (difficult to detect with the INTERFACE PROBE ™), odors, microbial action, etc.

The SURFACE SAMPLER™ used consists of a 12-inch-long case acrylic tube with a Delrin ball which closes onto a conical surface creating a seal as the sampler is pulled up. The sampler is calibrated in inches and centimeters for visual inspection of product thickness.

To reduce the potential for cross contamination between wells, the monitorings shall take place in order from the least to the most contaminated wells. Wells containing separate-phase hydrocarbons (free product) should be monitored last. Between each monitoring the equipment shall be washed with laboratory-grade detergent and double rinsed with distilled water.

GROUNDWATER TECHNOLOGY, INC.
STANDARD OPERATING PROCEDURE
CONCERNING WATER SAMPLING METHODOLOGY
SOP 9

Before water sampling, each well shall be purged by pumping a minimum of four well volumes or until the discharge water indicates stabilization of temperature conductivity and pH. If the well is evacuated before four well volumes are removed or stabilization is achieved, the sample should be taken when the water level in the well recovers to 80 percent of its initial level.

Retrieval of the water sample, sample handling and sample preservation shall be conducted according to Standard Operating Procedure 10 concerning "Sampling for Volatiles in Water." The sampling equipment used shall consist of a Teflon® and/or stainless steel samplers which meet U.S. Environmental Protection Agency (EPA) regulations. Glass vials with Teflon® lids should be used to store the collected samples.

To ensure sample integrity, each vial shall be filled with the sampled water in such a way that the water stands above the lip of the vial. The cap should then be quickly placed on the vial and tightened securely. The vial should then be checked to ensure that air bubbles are not present prior to labeling of the sample. Label information should include a sample identification number, job identification, date, time, type of analysis requested, and sampler's name. Chain-of-custody records shall be completed according to Standard Operating Procedure (SOP) 11 concerning chain of custody.

The vials should be immediately placed in high quality coolers for shipment to the laboratory. The coolers should be packed with sufficient ice or freezer packs to ensure that the samples are kept below 4° Celsius (C). To minimize sample degradation the prescribed analysis shall take place within seven days of sample collection unless specially prepared acidified vials are used.

To minimize the potential for cross contamination between wells, all the well development and water sampling equipment which contacts the groundwater shall be cleaned between each sampling. As a second precautionary measure, the wells shall be sampled in order of increasing contaminant concentrations (the least contaminated well first, the most contaminated well last) as established by previous analysis.

STANDARD OPERATING PROCEDURE 10
CONCERNING SAMPLING FOR VOLATILES IN WATER
(DISSOLVED GASOLINE, SOLVENTS, ETC.)
SOP 10

1. Use only vials properly washed and baked.

2. Use clean sampling equipment. Scrub with Alconox or equivalent laboratory detergent and water followed by a thorough water rinse. Complete with a distilled water rinse.

   Sampling equipment which has come into contact with liquid hydrocarbons (free product) should be regarded with suspicion. Such equipment should have tubing and cables replaced and all resilient parts washed with laboratory detergent solution as indicated above. Visible deposits may have to be removed with hexane. Solvent washing should be followed by detergent washing, as indicated above.

   This procedure is valid for volatile organic analysis only. For extractable organics (for example, pesticides, or base neutrals for U.S. Environmental Protection Agency [EPA] Method 625 a final rinse with pesticide-grade isopropyl alcohol), followed by overnight or oven drying will be necessary.

3. Take duplicate samples. Mark on forms as a single sample with two containers to avoid duplication of analyses.

4. Take a site blank using distilled water or known uncontaminated source. This sample will be run at the discretion of the project manager.

5. Fill out labels and forms as much as possible ahead of time. Use an indelible marker.

6. Preservatives are required for some types of samples. Use specially prepared vials marked as indicated below, or use the appropriate field procedure (SOP 12 for acidification). Make note on forms that samples were preserved. Always have extra vials in case of problems. Samples for volatile analyses should be acidified below pH 2 upright. Eye protection, foot protection, and disposable vinyl gloves are required for handling. Samples designated for expedited service and analyzed within seven (7) days of sampling will be acceptable without preservation. Acid-causing burns. Glasses or goggles (not contact lenses) are necessary for protection of the eyes. Flush eyes with water for 15 minutes if contact occurs and seek medical attention. Rinse off hands frequently with water during handling.

   For sampling chlorinated drinking water supplies for chlorinated volatiles, samples shall be preserved with sodium thiosulfate. Use vials labeled "CONTAINS THIOSULFATE." No particular cautions are necessary.

7. Fill vial to overflowing with water, avoiding turbulence and bubbling as much as possible. Water should stand above lip of vial.

8. Carefully, but quickly, slip cap onto vial. Avoid dropping the Teflon® septum from cap by not inverting cap until it is in contact with the vial. Disc should have Teflon® face toward the water. Also avoid touching white Teflon® face with dirty fingers.

9. Tighten cap securely, invert vial, and tap against hand to see there are not bubbles inside.

GROUNDWATER TECHNOLOGY, INC.
STANDARD OPERATING PROCEDURE
CONCERNING CHAIN OF CUSTODY
SOP 11

1. Samples must be maintained under custody until shipped or delivered to the laboratory. The laboratory will then maintain custody. A sample is under custody if:

    a) It is in your possession
    b) It is in your view after being in your possession
    c) You locked it up after it was in your possession
    d) It is in a designated secure area

2. Custody of samples may be transferred from one person to another. Each transferer and recipient must date, sign and note the time on the chain-of-custody form.

3. In shipping, the container must be sealed with tape, and bear the sender's signature across the area of bonding at the ends of the tape to prevent undetected tampering. Each sampling jar should be taped and signed as well. Scotch tape works well.

4. Write "sealed by" and sign in the "Remarks" box at the bottom of the form before sealing the box. Place form in a plastic bag and seal it inside the box.

5. The "REMARKS" section of the form is for documenting details such as:

    a) Correlation of sample numbers if samples are split between labs.
    b) QC numbers when lab is logging in the samples.
    c) Sample temperature and condition when received by lab.
    d) Preservation notation.
    e) pH of samples when opened for analysis (if acidified).
    f) Sampling observation or sampling problem.

6. The chain-of-custody form should be included inside the shipping container. A copy should be sent to the project manager.

7. When the samples are received by the lab, the chain-of-custody form will be dated, signed, and the time noted by a laboratory representative. The form will be retained in the laboratory files along with shipping bills and receipts .

8. At the time of receipt of samples by the laboratory, the shipping container will be inspected and the sealing signature will be checked. The samples will be inspected for condition and bubbles, and the temperature of a representative sample container will be measured externally by a thermocouple probe (held tightly between two samples) and recorded. The laboratory QC numbers will be placed on the labels, in the accession log, and on the chain-of-custody form. If samples are acidified, their pH will be measured by narrow range pH paper at the time of opening for analysis. All comments concerning procedures requiring handling of the samples will be dated and initialed on the form by the laboratory person performing the procedure. A copy of the completed chain-of-custody form with the comments on sample integrity will be returned to the sampler.

ATTACHMENT 3

TABLES

TABLE 1
SUMMARY OF GROUNDWATER MONITORING DATA
NOVEMBER 12, 1992

WELL ID	DTW ((ft)	DTP (ft)	TWD (ft)
MW-1	11.37	ND	15
MW-2	10.55	ND	15
MW-3	11.32	ND	15

DTW = Depth to water
DTP = Depth to product (separate-phase hydrocarbons)
TWD = Total well depth
Measurements in feet from the top of the casing.
Wellhead elevation data was not available.

TABLE 2
SUMMARY OF ANALYTICAL RESULTS

WELL ID	TPH-AS-GASOLINE	BENZENE	TOLUENE	ETHYLBENZENE	XYLENES
MW-1	720	3	0.5	1	1
MW-2	<10	<0.3	<0.3	<0.3	<0.5
MW-3	69	<0.3	<0.3	<0.3	<0.5

Concentrations in parts per billion

ATTACHMENT 4

LABORATORY REPORTS
CHAIN-OF-CUSTODY RECORD

GTEL
ENVIRONMENTAL
LABORATORIES, INC.

Northwest Region
4080-C Pike Lane
Concord, CA 94520
(510) 685-7852
(800) 544-3422 *from inside California*
(800) 423-7143 *from outside California*
(510) 825-0720 (FAX)

Client Number: 020203324
Project ID: San Lorenzo
Work Order Number: C2-11-292

November 30, 1992

Tim Watchers
Groundwater Technology, Inc.
4057 Port Chicago Hwy.
Concord, CA 94520

Enclosed please find the analytical results for samples received by GTEL Environmental Laboratories, Inc. on 11/12/92, under chain of custody record 19924.

A formal Quality Assurance/Quality Control (QA/QC) program is maintained by GTEL, which is designed to meet or exceed the EPA requirements. Analytical work for this project met QA/QC criteria, unless otherwise stated in the footnotes.

GTEL is certified by the California State Department of Health Services to perform analyses for drinking water, wastewater, and hazardous waste materials according to EPA protocols.

If you have any questions concerning this analysis or if we can be of further assistance, please call our Customer Service Representative.

Sincerely,
GTEL Environmental Laboratories, Inc.

Eileen F. Bullen/R.M.

Eileen F. Bullen
Laboratory Director

Client Number: 020203324
Project ID: San Lorenzo
Work Order Number: C2-11-292

Table 1

ANALYTICAL RESULTS

Aromatic Volatile Organics and Total Petroleum Hydrocarbons as Gasoline in Water

EPA Methods 5030, 8020, and Modified 8015[a]

GTEL Sample Number		01	02	03	04
Client Identification		RBMW3	MW3	MW2	MW1
Date Sampled		11/12/92	11/12/92	11/12/92	11/12/92
Date Analyzed		11/18/92	11/18/92	11/18/92	11/18/92
Analyte	Detection Limit, ug/L	Concentration, ug/L			
Benzene	0.3	<0.3	<0.3	<0.3	3
Toluene	0.3	0.4	<0.3	<0.3	0.5
Ethylbenzene	0.3	<0.3	<0.3	<0.3	1
Xylene, total	0.5	<0.5	<0.5	<0.5	1
BTEX, total	–	0.4	–	–	6
Gasoline	10	<10	69	<10	720
Detection Limit Multiplier		1	1	1	1

a. Test Methods for Evaluating Solid Waste, SW-846, Third Edition, Revision 0, US EPA November 1986. Modification for TPH as gasoline as per California State Water Resources Control Board LUFT Manual protocols, May 1988 revision.

CHAIN-OF-CUSTODY RECORD AND ANALYSIS REQUEST

GTEL ENVIRONMENTAL LABORATORIES, INC.
880 PIKE LANE
CONCORD, CA 94520
(415) 685-7852
(800) 423-7143 (OUTSIDE CA) (800) 544-3422 (INSIDE CA)

Company Name: GTI
Phone #:
FAX #:
Company Address: CONCORD
Site location: San LORENZO
Project Manager: SANDRA LINDSEY
Client Project ID: (#) 020203324
(NAME) Tracy Federal Bank
I attest that the proper field sampling procedures were used during the collection of these samples.
Sampler Name (Print): HECTOR MORENO

Field Sample ID	GTEL Lab # (Lab use only)	# Containers	Matrix: WATER	SOIL	AIR	SLUDGE	PRODUCT	OTHER	Method Preserved: HCl	HNO_3	H_2SO_4	ICE	UNPRESERVED	OTHER (SPECIFY)	Sampling: DATE	TIME
TB Bank		1	X						X						11/	
MW3 01		1													12/	
MW3 02		3														
MW2		1														
MW2 03		3														
MW1		1														
MW1 04		3	V						V			V			92	

Field Sample ID	BTEX/602 ☐ 8020 ☐ with MTBE ☐	BTEX/Gas Hydrocarbons PID/FID ☐ with MTBE ☐	Hydrocarbons GC/FID Gas ☐ Diesel ☐ Screen ☐	Hydrocarbon Profile (SIMDIS) ☐	Oil and Grease 413.1 ☐ 413.2 ☐ SM 503 ☐	TPH/IR 418.1 ☐ SM 503 ☐	EDB by 504 ☐ DBCP by 504 ☐	EPA 502.2 ☐	EPA 601 ☐ EPA 8010 ☐	EPA 602 ☐ EPA 8020 ☐	EPA 608 ☐ 8080 ☐ PCB only ☐	EPA 624/GC/MS ☐ 8240/TAL ☐ NBS (+15) ☐	EPA 625/GC/MS ☐ 8270/TAL ☐ NBS (+25) ☐	EPA 610 ☐ 8310 ☐	EP TOX Metals ☐ Pesticides ☐ Herbicides ☐	TCLP Metals ☐ VOA ☐ Semi-VOA ☐ Pest ☐ Herb ☐	EPA Metals - Priority Pollutant ☐ TAL ☐ RCRA ☐	CAM Metals TTLC ☐ STLC ☐	Lead 239.2 ☐ 200.7 ☐ 7420 ☐ 7421 ☐ 6010 ☐	Organic Lead ☐	Corrosivity ☐ Flash Point ☐ Reactivity ☐
TB Bank		X																			
MW3 01		X																			X
MW3 02		X																			
MW2		X																			X
MW2 03		X																			
MW1		X																			
MW1 04		X																			

TAT
Priority (24 hr) ☐
Expedited (48 hr) ☐
7 Business Days ☐
Other ____
Business Days ☐

Special Handling
GTEL Contact ____
Quote/Contract # ____
Confirmation # ____
PO # ____

SPECIAL DETECTION LIMITS

SPECIAL REPORTING REQUIREMENTS
FAX ☐

REMARKS BTEX TPHGAS

Lab Use Only Lot # ____ Storage Location: ____
Work Order # ____

BLUE ☐ CLP ☐
QA / QC LEVEL
OTHER ____

	Date	Time
Relinquished by Sampler:	11/12/92	
Received by:		
Relinquished by:		
Received by:		
Relinquished by:		
Received by Laboratory:		

CUSTODY RECORD

Texaco Refining
and Marketing Inc

[illegible] Cutting Blvd
Richmond CA [illegible]

May 3, 1994

file 2506.7-152

ENV - STUDIES, SURVEYS, & REPORTS
15595 Washington Avenue
San Lorenzo, California

Ms. Juliet Shin
Alameda County Environmental
Health Department
80 Swan Way, Room 200
Oakland, CA 94621

Dear Ms. Shin:

This letter presents the results of groundwater monitoring and sampling conducted by Blaine Tech Services, Inc. on March 24, 1994, at the site referenced above (see Plate 1, Site Vicinity Map). Based on groundwater level measurements, the areal hydraulic gradient was estimated to be west (see Plate 2, Groundwater Gradient Map). The gradient map has been reviewed by a registered professional. TPHg and benzene concentrations are shown on Plate 3. Tables 1 and 2 list historical groundwater monitoring data and analytical results, respectively.

The certified analytical report, chain-of-custody, field data sheets, and bill of lading are in the Appendix along with Blaine Tech Services' Field Procedures and Protocols Summary.

If you have any questions or comments regarding this site, please call the Texaco Environmental Services' site Project Coordinator, Mr. Marvin Katz at (818) 505-2734.

Best Regards,

Rebecca B. Digerness
Groundwater Monitoring Coordinator

Karen E. Petryna
Engineer
Texaco Environmental Services

RBD:hs

A:\1Q94QMR.let

Enclosures

Groundwater Monitoring and Sampling
First Quarter, 1994
at
Former Texaco Station
15595 Washington Avenue
San Lorenzo, CA

SOURCE:
1993 THE THOMAS GUIDE
ALAMEDA COUNTY, PAGE 27 (D6)

N

0 1/4 1/2 3/4 1
MILE

1"=2000'

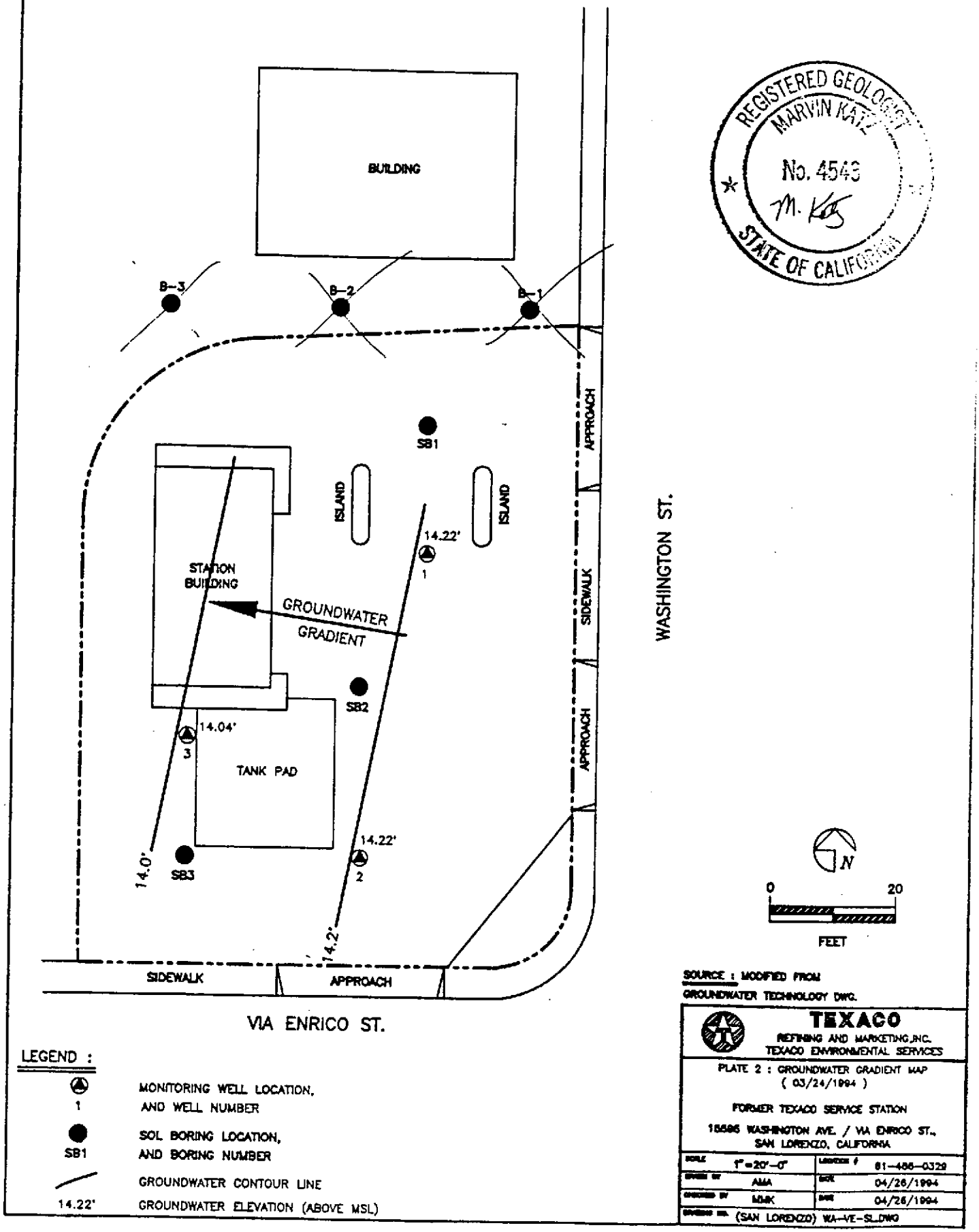
TEXACO
REFINING AND MARKETING INC.
TEXACO ENVIRONMENTAL SERVICES

PLATE 1

SITE VICINITY MAP

FORMER TEXACO SERVICE STATION

15595 WASHINGTON AVE. / VIA ENRICO ST.,
SAN LORENZO, CALIFORNIA



REGISTERED GEOLOGIST
MARVIN KATZ
No. 4543
M. Katz
STATE OF CALIFORNIA

SOURCE : MODIFIED FROM GROUNDWATER TECHNOLOGY DWG.

LEGEND :

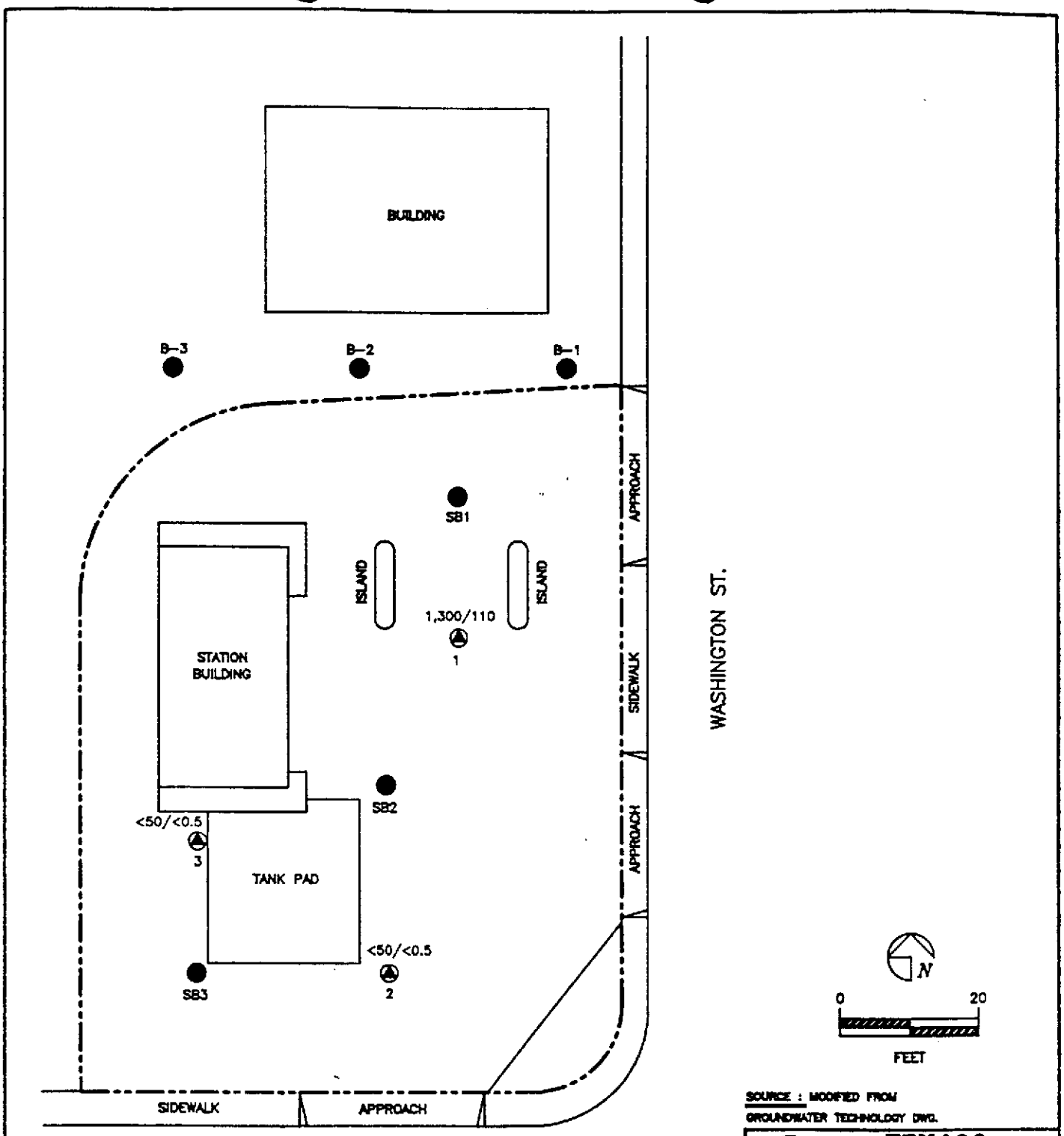
- 1 — MONITORING WELL LOCATION, AND WELL NUMBER
- SB1 — SOIL BORING LOCATION, AND BORING NUMBER
- GROUNDWATER CONTOUR LINE
- 14.22' — GROUNDWATER ELEVATION (ABOVE MSL)

TEXACO
REFINING AND MARKETING,INC.
TEXACO ENVIRONMENTAL SERVICES

PLATE 2 : GROUNDWATER GRADIENT MAP
(03/24/1994)

FORMER TEXACO SERVICE STATION
15585 WASHINGTON AVE. / VIA ENRICO ST.,
SAN LORENZO, CALIFORNIA

SCALE	1"=20'-0"	LOCATION #	81-486-0329
DRAWN BY	AMA	DATE	04/26/1994
CHECKED BY	MJK	DATE	04/26/1994
DRAWING NO.	(SAN LORENZO) WA-VE-SL.DWG		



SOURCE : MODIFIED FROM GROUNDWATER TECHNOLOGY DWG.

LEGEND :

1	MONITORING WELL LOCATION, AND WELL NUMBER
SB1	SOIL BORING LOCATION, AND BORING NUMBER
1,300/110	TPHg/BENZENE CONCENTRATION IN GROUNDWATER (ppb)

TEXACO
REFINING AND MARKETING,INC.
TEXACO ENVIRONMENTAL SERVICES

PLATE 3 : TPHg/BENZENE CONCENTRATION IN GROUNDWATER (03/24/1994)

FORMER TEXACO SERVICE STATION
15565 WASHINGTON AVE. / VIA ENRICO ST.,
SAN LORENZO, CALIFORNIA

SCALE	1"=20'-0"	LOCATION #	61-486-0329
DRAWN BY	AMA	DATE	04/28/1994
CHECKED BY	MMK	DATE	04/28/1994
DRAWING NO.	(SAN LORENZO) WA-VE-SL.DWG		

Table 1
Groundwater Elevation Data
15595 Washington Avenue, San Lorenzo, CA

Well	Date	Well Elevation (feet, MSL)	Depth to Water (feet, TOC)	Groundwater Elevation (feet, MSL)
MW - 1	3/24/94	22.93	8.71	14.22
MW - 2	3/24/94	22.09	7.87	14.22
MW - 3	3/24/94	22.73	8.69	14.04
MSL = Mean Sea Level				
TOC = Top of Casing				

Table 2
Groundwater Analytical Data
15595 Washington Avenue, San Lorenzo, CA

Well	Date	TPHg	Benzene	Toluene	Ethyl-benzene	Xylenes
MW - 1	3/24/94	1,300	110	<0.5	19	<0.5
MW - 2		<50	<0.5	<0.5	<0.5	<0.5
MW - 3		<50	<0.5	<0.5	<0.5	<0.5
Results in parts per billion (ppb).						
< = Less than the detection limit for the specified method of analysis.						

MOBILE CHEM LABS INC.

5011 Blum Road, Suite 1 • Martinez, CA 94553
Phone (510) 372-3700 • Fax (510) 372-6955

624880329\1428\013405

Texaco Environmental Services
108 Cutting Blvd.
Richmond, CA 94804
Attn: Rebecca Digerness
Environmental Technician

Date Sampled: 03-24-94
Date Received: 03-25-94
Date Analyzed: 03-31-94

Sample Number	Sample Description
034373	Texaco - San Lorenzo 15595 Washington MW-1 WATER

ANALYSIS

	Detection Limit	Sample Results
	ppb	ppb
Total Petroleum Hydrocarbons as Gasoline	50	1,300
Benzene	0.5	110
Toluene	0.5	<0.5
Xylenes	0.5	<0.5
Ethylbenzene	0.5	19

QA/QC: Duplicate Deviation is 9.2%

Note: Analysis was performed using EPA methods 5030 and TPH LUFT with method 602 used for BTX distinction.
(ppb) = (µg/L)

MOBILE CHEM LABS

Ronald G. Evans
Lab Director

MOBILE CHEM LABS INC.

5011 Blum Road, Suite 1 • Martinez, CA 94553
Phone (510) 372-3700 • Fax (510) 372-6955

624880329\1428\013405

Texaco Environmental Services
108 Cutting Blvd.
Richmond, CA 94804
Attn: Rebecca Digerness
Environmental Technician

Date Sampled: 03-24-94
Date Received: 03-25-94
Date Analyzed: 03-31-94

Sample Number	Sample Description
034374	Texaco - San Lorenzo 15595 Washington MW-2 WATER

ANALYSIS

	Detection Limit	Sample Results
	ppb	ppb
Total Petroleum Hydrocarbons as Gasoline	50	<50
Benzene	0.5	<0.5
Toluene	0.5	<0.5
Xylenes	0.5	<0.5
Ethylbenzene	0.5	<0.5

QA?QC: Spike Recovery is 78%

Note: Analysis was performed using EPA methods 5030 and TPH LUFT with method 602 used for BTX distinction.
(ppb) = (µg/L)

MOBILE CHEM LABS

Ronald G. Evans
Lab Director

MOBILE CHEM LABS INC.

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Phone (510) 372-3700 • Fax (510) 372-6955

624880329\1428\013405

Texaco Environmental Services
108 Cutting Blvd.
Richmond, CA 94804
Attn: Rebecca Digerness
Environmental Technician

Date Sampled: 03-24-94
Date Received: 03-25-94
Date Analyzed: 03-31-94

Sample Number	Sample Description
034375	Texaco - San Lorenzo 15595 Washington MW-3 WATER

ANALYSIS

	Detection Limit	Sample Results
	ppb	ppb
Total Petroleum Hydrocarbons as Gasoline	50	<50
Benzene	0.5	<0.5
Toluene	0.5	<0.5
Xylenes	0.5	<0.5
Ethylbenzene	0.5	<0.5

Note: Analysis was performed using EPA methods 5030 and TPH LUFT with method 602 used for BTX distinction.
(ppb) = (µg/L)

MOBILE CHEM LABS

Ronald G. Evans
Lab Director

MOBILE CHEM LABS INC.

5011 Blum Road, Suite 1 • Martinez, CA 94553
Phone (510) 372-3700 • Fax (510) 372-6955

624880329\1428\013405

Texaco Environmental Services
108 Cutting Blvd.
Richmond, CA 94804
Attn: Rebecca Digerness
Environmental Technician

Date Sampled: 03-24-94
Date Received: 03-25-94
Date Analyzed: 03-31-94

Sample Number	Sample Description
034376	Texaco - San Lorenzo 15595 Washington EB WATER

ANALYSIS

	Detection Limit	Sample Results
	ppb	ppb
Total Petroleum Hydrocarbons as Gasoline	50	<50
Benzene	0.5	<0.5
Toluene	0.5	<0.5
Xylenes	0.5	<0.5
Ethylbenzene	0.5	<0.5

Note: Analysis was performed using EPA methods 5030 and TPH LUFT with method 602 used for BTX distinction.
(ppb) = (µg/L)

MOBILE CHEM LABS

Ronald G. Evans
Lab Director

MOBILE CHEM LABS INC.

5011 Blum Road, Suite 1 • Martinez, CA 94553
Phone (510) 372-3700 • Fax (510) 372-6955

624880329\1428\013405

Texaco Environmental Services
108 Cutting Blvd.
Richmond, CA 94804
Attn: Rebecca Digerness
Environmental Technician

Date Sampled: 03-24-94
Date Received: 03-25-94
Date Analyzed: 03-31-94

Sample Number	Sample Description
034377	Texaco - San Lorenzo 15595 Washington TB WATER

ANALYSIS

	Detection Limit	Sample Results
	ppb	ppb
Total Petroleum Hydrocarbons as Gasoline	50	<50
Benzene	0.5	<0.5
Toluene	0.5	<0.5
Xylenes	0.5	<0.5
Ethylbenzene	0.5	<0.5

Note: Analysis was performed using EPA methods 5030 and TPH LUFT with method 602 used for BTX distinction.
(ppb) = (µg/L)

MOBILE CHEM LABS

Ronald G. Evans
Lab Director

BLAINE TECH SERVICES INC.

985 TIMOTHY DRIVE
SAN JOSE, CA 95133
(408) 995-5535
FAX (408) 293-8773

CHAIN OF CUSTODY 940324 F1

CLIENT: Texaco Environmental Services

SITE: Location # 6249803279

15595 Washington

San Lorenzo Ca.

C = COMPOSITE ALL CONTAINERS

CONDUCT ANALYSIS TO DETECT: TPH G - BTEX

LAB: Mobile Chem Laboratory DHS #

ALL ANALYSES MUST MEET SPECIFICATIONS AND DETECTION LIMITS SET BY CALIFORNIA DHS AND

☐ EPA ☐ RWQCB REGION ____

☐ LIA

☐ OTHER

SPECIAL INSTRUCTIONS

Report & Invoice to:
Texaco Environmental Service
108 Cutting Blvd.
Richmond, CA 94804
Attn: Rebecca Digerness
(510) 236-3541

SAMPLE I.D.			MATRIX S = SOIL W = H2O	CONTAINERS TOTAL	CONTAINERS 40 ml VOA HCl	ADD'L INFORMATION	STATUS	CONDITION	LAB SAMPLE #
MW-1	3/24/94	1010	W	3					
MW-2		925		3					
MW-3		9:50		3					
EB-		9:30		3					
TB		LAB		2					

SAMPLING COMPLETED	DATE	TIME	SAMPLING PERFORMED BY	RESULTS NEEDED NO LATER THAN
	3/24/94	1010	Tom Flory	

RELEASED BY	DATE	TIME	RECEIVED BY	DATE	TIME
	3/25/94	1345	DALE HEWING	32594	1:45
RELEASED BY	DATE	TIME	RECEIVED BY	DATE	TIME
RELEASED BY	DATE	TIME	RECEIVED BY	DATE	TIME

SHIPPED VIA	DATE SENT	TIME SENT	COOLER #	
				ON ICE NO head space

WELL GAUGING DATA

624580329

Project # 940324-F1 Date 3-24-94 Client Texaco

Site 15595 Washington San Lorenzo Ca.

Well I.D.	Well Size (in.)	Sheen/ Odor	Depth to Immiscible Liquid (feet)	Thickness of Immiscible Liquid (ft.)	Volume of Immiscibles Removed (ml)	Depth to Water (feet)	Depth to Well Bottom (feet)	Survey Point: TOB or TOC
MW-1	2"	ODOR				8.71	14.78	TOC
MW-2	2"					7.87	14.64	↓
MW-3	2"					8.69	14.82	↓

TEXACO WELL MONITORING DATA SHEET

Project #: 940324F1	Facility # 624886329
Sampler: Tom	Date Sampled: 3-24-94
Well I.D.: MW-1	Well Diameter: (circle one) (2) 3 4 6 ___
Total Well Depth: Before 14.78 After	Depth to Water: Before 8.71 After
Depth to Free Product:	Thickness of Free Product (inches):
Measurements referenced to: ~~PVC~~	Grade Other --

1.0	x	3	=	3.0
1 Case Volume		Specified Volumes		gallons

Purging: Bailer ✓
Middleburg
Electric Submersible
Suction Pump
Type of Installed Pump _____

Sampling: Bailer ✓
Middleburg
Electric Submersible
Suction Pump
Installed Pump

TIME	TEMP. (F)	pH	COND.	TURBIDITY:	VOLUME REMOVED:	OBSERVATIONS:
10:02	59.6	7.1	1300	>200	1.0	ODOR
10:04	62.7	7.1	1400	>200	2.0	↓
10:07	62.9	7.2	1400	>200	3.0	↓

Did Well Dewater? no If yes, gals. Gallons Actually Evacuated: 3.0

Sampling Time: 10:10

Sample I.D.: MW-1 Laboratory: m Chem

Analyzed for: TPH6-BTEX

Duplicate I.D.: Cleaning Blank I.D.:

Analyzed for:

Wellhead Condition: SECURE? Yes (No) If No explain: need new lock

Wellhead Maintenance Performed: new lock

TEXACO WELL MONITORING DATA SHEET

Project #: ~~940324F1~~ 940324F1	Facility # 6248803 29
Sampler: Tom	Date Sampled: 3-24-94
Well I.D.: MW-2	Well Diameter: (circle one) (2) 3 4 6 ___
Total Well Depth: Before 14.64 After	Depth to Water: Before 7.87 After
Depth to Free Product:	Thickness of Free Product (inches):
Measurements referenced to: (PVC) Grade Other --	

1.0	x	3	=	3.0
1 Case Volume		Specified Volumes		gallons

Purging: Bailer ✓
Middleburg
Electric Submersible
Suction Pump
Type of Installed Pump _____

Sampling: Bailer ✓
Middleburg
Electric Submersible
Suction Pump
Installed Pump

TIME	TEMP. (F)	pH	COND.	TURBIDITY:	VOLUME REMOVED:	OBSERVATIONS:
9:17	62.7	6.8	1300	>200	1.0	
9:19	67.2	6.9		>200	2.0	
9:22	64.4	7.0	1300	>200	3.0	✓

Did Well Dewater? no If yes, gals. Gallons Actually Evacuated: 3.0

Sampling Time: 925

Sample I.D.: MW-2 Laboratory: McKm

Analyzed for: TPHG-BTEX

Duplicate I.D.: Cleaning Blank I.D.:

Analyzed for:

Wellhead Condition: SECURE? Yes (No) If No explain: need new Lock

Wellhead Maintenance Performed: new Lock

TEXACO WELL MONITORING DATA SHEET

Project #: 940324F1	Facility # 624880329
Sampler: Tom	Date Sampled: 3-24-94
Well I.D.: MW-3	Well Diameter: (circle one) (2) 3 4 6 ___
Total Well Depth: Before 14.82 After	Depth to Water: Before 8.69 After
Depth to Free Product:	Thickness of Free Product (inches):
Measurements referenced to: (PVC) Grade Other --	

1.0	x	3	3.0
1 Case Volume		Specified Volumes	= gallons

Purging: Bailer ✓
Middleburg
Electric Submersible
Suction Pump
Type of Installed Pump ____

Sampling: Bailer ✓
Middleburg
Electric Submersible
Suction Pump
Installed Pump

TIME	TEMP. (F)	pH	COND.	TURBIDITY:	VOLUME REMOVED:	OBSERVATIONS:
9:40	61.5	7.3	1100	>200	1.0	
9:43	62.4	7.2	1200	>200	2.0	
9:47	62.9	7.1	1300	>200	3.0	

Did Well Dewater? no If yes, gals. Gallons Actually Evacuated: 3.0

Sampling Time: 9:50

Sample I.D.: MW-3 Laboratory: M. Chem

Analyzed for: TPHG-BTEX

Duplicate I.D.: Cleaning Blank I.D.: EB Time = 9:30

Analyzed for:

Wellhead Condition: SECURE? Yes (No) If No explain: need new Lock

Wellhead Maintenance Performed: new Lock

TEXACO TYPE **A** BILL OF LADING

SOURCE RECORD **BILL OF LADING**

FOR NON-HAZARDOUS PURGEWATER RECOVERED FROM GROUNDWATER WELLS AT TEXACO FACILITIES IN THE STATE OF CALIFORNIA. THE NON-HAZARDOUS PURGE-WATER WHICH HAS BEEN RECOVERED FROM GROUND-WATER WELLS IS COLLECTED BY THE CONTRACTOR, MADE UP INTO LOADS OF APPROPRIATE SIZE AND HAULED TO THE DESTINATION DESIGNATED BY TEXACO ENVIRONMENTAL SERVICES (TES).

The contractor performing this work is BLAINE TECH SERVICES, INC., 985 Timothy Drive, San Jose, CA 95133 (phone [408] 995-5535). Blaine Tech Services, Inc. is authorized by TEXACO ENVIRONMENTAL SERVICES to recover, collect, apportion into loads, and haul the Non-Hazardous Well Purgewater that is drawn from wells at the TEXACO facility indicated below and to deliver that purgewater to an appropriate destination designated by TEXACO ENVIRONMENTAL SERVICES in either Redwood City, California or in Richmond, California. Transport routing of the Non-Hazardous Well Purgewater may be direct from one Texaco facility to the designated destination point; from one Texaco facility to the designated destination point via another Texaco facility; from a Texaco facility to the designated destination point via the contractor's facility, or any combination thereof. The Non-Hazardous Well Purgewater is and remains the property of Texaco Environmental Services (TES).

This Source Record **BILL OF LADING** was initiated to cover the recovery of Non-Hazardous Well Purgewater from wells at the Texaco facility described below:

62488 0005

TEXACO #: "0227
" "0329

street number	street name	city	state
2411	OAKGROVE	WALNUT CREEK	CA.
5399	CLAYTON RD	CONCORD	CA.
15595	WASHINGTON ST.	SAN LORENZO	CA.

WELL I.D.	GALS.	WELL I.D.	GALS.
940323 F2	88.0		
940324 F1	9.0		
940323F3	74.0		
	171		

added equip. rinse water 25

any other adjustments 0

TOTAL GALS. RECOVERED 196.0

loaded onto BTS vehicle # 11

BTS event # 940323 F2 & F3 ~~940324 F1~~ time 1300 date 3/24/94

signature

****

REC'D AT BTS time 15:00 date 3/24/94

unloaded by signature

BLAINE TECH SERVICES, INC.
A SUMMARY OF
FIELD PROCEDURES AND PROTOCOLS

WELL GAUGING (MONITORING)

All field notations are made on preprinted field data collection forms which are supplied to our personnel in a field notebook specific to each assignment at each site. All notations are contemporaneous and completed field notebooks (which we call Sampling Event Folders) are turned in daily and reviewed by our office personnel.

Water-level information is obtained from groundwater monitoring wells either as a preliminary step before evacuation or as a separate activity which is performed on wells that will not be sampled. In cases where none of the wells at the site are scheduled to be evacuated and sampled, the gauging of the wells for the purpose of collecting water-level information is conducted during a designated gauging event.

Wells should be gauged in Clean-to-Dirty Order.
Well gauging instruments and devices are cleaned after each use and before use in the next well.
Well gauging is performed prior to well evacuation and sampling.
Well gauging is to be completed in as short a time period as possible.

Normal gauging activities include the following Wellhead Maintenance checks:

1. Is there a lid on the grade level utility box that encloses the wellhead? Yes/No
2. Is the lid whole or damaged? Okay/Cracked/Chipped/Broken
3. Is the lid secured in the intended manner? Yes/No/Loose/Missing bolts
4. Is the lid equipped with a seal? Yes/No/Damaged
5. Is there water standing in the utility box? Yes/No
6. Water stood in what relationship to the top of the well? Above/Below/Even with the top
7. Is there a cap or plug in the well, itself? Yes/No (Cap/Plug)
8. Is there a lock to secure the cap or plug? Yes/No
9. Is the lock closed so as to secure the well? Yes/No
10. Is the lock functional? Yes/No
11. Is the cap or lid on the wellhead capable of sealing out water? Yes/No seal is possible
12. Is the cap or plug sealing tightly? Yes/No/Can be pulled loose

The foregoing 12 checks are drawn from our more extensive Wellhead Survey Forms. They will be included in the next revision of the Sampling Event Field Folder forms.

Well gauging includes the following measurements:

1. Depth to Water (DTW)
2. Total Depth (TD)
3. Odor and Sheen (O&S),
4. Separate Phase Hydrocarbon (SPH) thickness (to the nearest 0.01').

Depth to Water measurements are referenced to the surveyed elevation of the wellhead to calculate the elevation of the groundwater in each well (for groundwater gradient mapping). Depth to Water and Total Depth measurements are used in calculating the volume of the water column standing in the wellcase (for evacuation calculation). Odor, sheen and Separate Phase Hydrocarbon thickness are used in evaluating whether or not the well meets standards set by the client that determine when a well should be evacuated and sampled and when that well should not be evacuated and sampled.

EVACUATING GROUNDWATER WELLS

Wells are selected for evacuation and sampling in Clean-to-Dirty order.

Blaine Tech Services, Inc. field personnel select well **evacuation devices** based on efficiency. They can select from the following:

1. **Bailers**. Teflon and stainless steel are the only materials used in Blaine Tech Services bailers. Our shop fabricates stainless steel bailers in any size we need. Typical bailers are hand operated, but we have hydraulic booms and high speed winches to handle the larger versions.
2. **Pneumatic purge pumps**. These evolved from the USGS/Middleburg bladder type sampling pumps which we began using in 1982. We retain the Teflon air pressure and water discharge hoses, but have modified the pump to increase efficiency and allow more certain cleaning than was possible with the original design. These pumps are ideal for certain types of wells and turbidity control situations.
3. **Variable speed electric** submersible pump. This 2" Grundfos pump has become an accepted tool of the environmental industry in recent years. Despite claims to the contrary, we do not see it as a suitable sampling pump (except in dedicated applications) and use it only as a well evacuation device.
4. **Fixed speed electric** submersible pumps. These 3" and 4" pumps (made by Grundfos and others) are also useful evacuation tools where the well depth or volume of water needing to be removed warrants their use.
5. **Suction pumps**. Grade level pneumatic diaphragm pumps (and similar devices) can be used to evacuate shallow wells when the proper type of hose and footvalves are assembled.

Normal field instrument readings are taken during the evacuation process. These include pH, temperature and electrical conductivity (EC) readings taken within each case volume of groundwater removed and at least one final set of readings taken just prior to sampling. The volume of water evacuated from the well is typically three case volumes and whatever additional volume is needed to achieve stable parameters.

We routinely remove four case volumes of water in those jurisdictions where the regulatory agency requests this level of purging. Our personnel are also equipped to take turbidity readings

and adjust our evacuation protocol to conform to regulatory standards for achieving specific NTU levels prior to collecting samples.

Wells that dewater are handled according to the protocol specified by each client. In most cases this is based on 80% recovery of the original water column or an evaluation of the volume of water that recharges into the well within a period not greater than 24 hours. In view of the volatile constituents being sought, most clients and their consultants are willing to have samples collected from whatever volume of water has recharged into a dewatered well by the end of the day or the end of the work being performed by our personnel at that particular site.

Instruments are calibrated daily and calibration logs are maintained at our office. In addition, each vehicle has calibration fluids on board so that pH and EC meters can be recalibrated in the field. Parameter readings are recorded (along with case volume calculations and other important information) on the preprinted Well Data sheet. Effluent water from the evacuation process is contained and transported in tanks on the sampling vehicle or in tanks on one of our water hauling trailers.

SAMPLE COLLECTION

Blaine Tech Services, Inc. several years ago standardized its sample collection procedures. With few exceptions, all groundwater samples are taken with a **bailer**. We have a large number of stainless steel and/or Teflon bailers. Specialized bailers are used to perform field filtration of water that will receive metals analyses and other bailers can be rigged as flow-through devices which are attached to the evacuation pump so that the entire volume of evacuated water moves through the bailer which then collects the final volume when the evacuation pump is turned off. Normal sampling is simple and straightforward. It involves removing the evacuation device from the well and promptly collecting water in a stainless steel sampling bailer which is lowered into the well and retracted with a disposable cotton line.

Typically, sample bottles appropriate to the intended analyses are supplied by the laboratory along with prepared trip blanks and a volume of organic free water sufficient to take any equipment rinsate blanks and/or field blanks that have been requested. These sample bottles are filled in accordance with EPA requirements as specified in the SW-846 and the T.E.G.D. Our personnel verify the correct composition of the sample set by referring to the Scope of Work statement provided by our office, and authorized by the client or client's consultant. In addition to notations required by the client, our personnel complete the preprinted Well Data Sheet, the multi-part Chain of Custody form and the blank portions of our computer generated sample bottle labels (time, date and sampler's initials). The samples are placed in an ice chest for storage and transport to the laboratory. We comply with regulatory agency specifications for both temperature and the material by which temperature is achieved and maintained. (e.g. Southern Alameda County Water District requires the use of ice rather than frozen blocks of ice substitutes such as Blue Ice and Super Ice.) Strict adherence to Chain of Custody requirements is maintained.

DECONTAMINATION

Blaine Tech Services, Inc. field personnel are trained and equipped to decontaminate all the devices which have been used to inspect, measure, evacuate and sample each well before moving on to the next well. All apparatus is brought to the site in clean and serviceable condition. It is then thoroughly cleaned after each every use.

Our QA program includes spot audits of our field personnel while they are working at a client's site and the collection of various blanks which are in-addition-to and outside of the normal project QA measures and therefore analyzed at our expense.

All vehicles used for petroleum sites are equipped with steam cleaners which we have had the supplier detune to function as **hot pressure washers**. After modification these units produce a high pressure jet of very hot water which retains its heat better than jets of steam which start off hotter but cool very quickly. (Steam cools so rapidly that it falls to the same temperature as hot water only 8" out from the nozzel and is far cooler than hot water thereafter.) These hot pressure washer units are supplied with deionized water from an onboard tank. (Deionized water is very hard on the steel components of our steam cleaners, but using it increases our cleaning efficiency.) Hot deionized water from the steam cleaner is supplemented with scrub brushes, soak tanks, and the application of aqueous cleaners which we test and evaluate. We do not use solvents or petroleum products as cleaning agents.

All effluent liquids are captured and retained. The effluent from all on site decontamination procedures is classified the same as the evacuated water from the well in which that equipment was used.

In most cases this means that the effluent from the cleaning of pumps and bailers will be classified as a non-hazardous effluent material which we will be able to transport away from the site as a non-hazardous material. (See Water Hauling below.) In those few cases where the concentration of fuel hydrocarbons in the groundwater causes the well's effluent water to be classified as a hazardous material, we will treat the effluent from our on site cleaning the same way and contain that effluent material along with the well effluent for proper on site storage, transport and disposal. (See Free Product Bailing & Transportation below).

NON-HAZARDOUS PURGEWATER HAULING

Blaine Tech Services, Inc. has evolved a paperwork tracking system for hauling non-hazardous purge water that uses two Bill of Ladings.

The effluent from wells which can be classified as non-hazardous is collected in onboard storage tanks and recorded on a **Source Record Bill of Lading** by our personnel as they collect effluent in the course of doing their work in the field. The small additional volume of water that is used to clean the evacuation and sampling equipment is added to the onboard non-hazardous effluent tank and recorded on the Source Record Bill of Lading. Each vehicle creates a Source Record Bill of Lading to cover all the non-hazardous purgewater hauled away from any Texaco site. If three

vehicles work on the same site each will have a Source Record Bill of Lading to cover the water being hauled away from that site by that vehicle. If a vehicle collects water from more than one Texaco site, it will have a Source Record Bill of Lading to cover the water obtained at each Texaco site. The Source Record Bill of Ladings covers the legal transport of non-hazardous purgewater and related effluent from one Texaco site to the Blaine Tech Services, Inc. facility in San Jose, California. There the water is offloaded from the individual sampling vehicles into a storage tank dedicated exclusively to non-hazardous purgewater from Texaco sites.

When a sufficient volume of Texaco purgewater has been collected in the Texaco storage tank to make up an efficient load to the destination designated by Texaco Environmental Services, we will create such a load. Purgewater is pumped out of the Texaco storage tank into an appropriate water hauling vehicle (we have both truck mounted tanks and trailers). The person loading the vehicle makes up a **Bulk Load Disposition Bill of Lading.** This documentation covers the load of purgewater during its movement from our facility to the destination designated by Texaco Environmental Services (whether to the Gibson Pilot facility in Redwood City or to the TES offloading point in Richmond).

We maintain a file for both Source Record Bill of Ladings and for Bulk Load Disposition Bill of Ladings. Periodic audits can be easily performed by reviewing this file.

FREE PRODUCT BAILING AND TRANSPORT

Blaine Tech Services, Inc. is not in the hazardous waste hauling business. The insurance overhead is so great that it is not economical to haul hazardous waste on an occasional or casual basis. Since we are in the sampling and objective data collection business, it makes sense to leave hazardous waste hauling to firms that are in the hazardous waste hauling business.

There is a fair amount of attention being put on clarifying EPA regulations which may offer exemptions to hazardous waste classification rules that apply to fuel facility waste material and debris that is being moved from a retail fuel dispensing facility to a refinery. It is thought that this or some similar loophole will be found that will eliminate some or all of the restrictions which are now being applied to fuel facility materials. As these openings develop, we will perform all the actions which are appropriate for us to perform. However, we are cautious because we certainly do not want to bring discredit to ourselves or to our client by presuming too much, too quickly.

Pending the clarification of exemptions that might allow us to transport such materials, we continue to remove place all the highly contaminated effluent materials we pump or bail from wells in properly labeled drums which remain on the site. Drums or the waste materials in the drums is removed and transported off the site by a properly licensed hazardous waste hauler.

There are several different arrangements that can be made, but most involve some liaison between ourselves and the licensed hazardous waste hauler who will need to offhaul any hazardous materials we place in the barrels within 90 days. Our personnel are involved in tracking the actual performance of the hazardous waste hauler by noting when new barrels are delivered to the

site and when resident barrels are emptied and labeled as empty. Our personnel fill out labels when adding material to a barrel and are careful to follow all the barrel preparation and closure protocols specified by our client and the hazardous waste hauler. The management of barrels and hauling requires tracking systems we have already developed for other clients

ABILITY TO PERFORM

In the first quarter of 1993 one of our clients awarded us an additional territory and new sites that added more than 600 new gas station wells to our workload. These were not the only increases we took on and completed at the start of 1993, but they illustrate the fact that we can flex our organization to handle sudden increases.

Blaine Tech Services, Inc. performed all its 1993 commitments with never more than 10 field technicians working out of four (4) General Purpose Sampling Vehicles and six (6) Big Rigs. We managed all our commitments without relying on our #11 truck which was out of service during 1993, receiving a new body and serving as the test bed for the development of the new electric pump hose handling and cleaning package which you saw a week or so before it was completed. That #11 truck is now back in service and we are preparing to add field personnel.

We have also placed in service a new water hauling vehicle (#18) and have taken delivery of another new Ford Super Duty (#19) which is now in the shop to receive the same equipment package that was prototyped on #11. We hope to have #19 out of the shop by the time #20 arrives later in the first quarter of 1994. These added vehicles represent our commitment to a reasonable rate of growth which we achieve by backing up our field personnel with efficient equipment.

However, we do not require *any* additional vehicles to handle Texaco work in the amounts you are likely to limit us to. **The #11 truck which is now in service can handle all the wells in any two Texaco territories with a 30% safety margin.** That translates into a little more than one (1) site per day or one territory per month with the third month of each quarter free to pursue other work. The safety margin is actually even wider because our field personnel work only four days a week. If we found ourselves running behind we could add either more personnel or require overtime.

In practice we always assign **several trucks** to perform work of this type so that we can quickly build a broad base of experienced personnel. However, the single truck yardstick is useful for calculating the overall level of stress which a new assignment adds to the organization.

We have every reason to believe that we can handle whatever work you would like to award us. If we are fortunate enough to be successful in our bidding, we will commence work at Texaco sites during the first week of 1994.

Richard Blaine
President

ALAMEDA COUNTY
HEALTH CARE SERVICES
AGENCY
DAVID J. KEARS, Agency Director

RAFAT A. SHAHID, Assistant Agency Director

RAFAT A. SHAHID, Director
Department of Environmental Health
1131 Harbor Bay Parkway, Room 250
Alameda, CA 94502-6577
(510) 567-6700

STID 1360

March 21, 1995

Mehdi Mohammadian, Owner
Linda Shell
15595 Washington Avenue
San Lorenzo, CA 94580

Certified Letter: Z 196 176 837

Dan Kirk
Shell Oil
P.O.Box 4023
Concord, CA 94524

Certified Letter: Z 196 176 838

NOTICE OF VIOLATION

Subject: Compliance with requirements of the Five Year permit for the operation of the four (4) underground storage tanks at 15595 Washington Avenue, San Lorenzo, CA, 94580.

Dear Mr. Mohammadian:

On March 20, 1995, Rob Weston and I made an inspection of your facility to determine if you are operating your underground storage tanks (UST) in compliance with the requirements of your five year permit. We observed a number of deficiencies which must be corrected within the 30 day limit specified on your copy of the inspection report. A more complete description of the problems and the required corrections follows:

When we arrived at your station at 1:00 pm you showed us the Pollulert panel in your office. The Pollulert panel controls the electronic monitoring system and displays its status. The control panel does not indicate which of the four tanks has set off the alarm. All of the lights on the panel were activated including the light which indicates the presence of water on one of the four probes. When Mr. Weston examined the panel he found that the audible alarm had been bypassed using the deactivation button on the front of the panel. You stated that whenever it rains the water light flashes and that the flashing stops once the rains stop. When questioned, you stated that you only had some oral instruction from the previous owner (Mr. Kubo) that the alarm would be loud and very noisy if there was a problem. You informed us that you were not aware of any service to the alarm system since your purchase of the station from Mr. Kubo. We then went outside to inspect the four UST systems (tanks and piping) at this site.

Linda Shell
15595 Washington, San Lorenzo 94580

March 22, 1995
STID 1360

During our survey of the three UST systems containing motor vehicle fuel we saw at each tank:

- A large, square plate which is above the submersible pump.
    - We opened one of the plates nearest the office (mid-grade fuel) and saw what appeared to be the top of a Red Jacket pump and leak detector system for the piping. You stated that the leak detector has not been serviced since you purchased the station.
    - The visible piping was steel and had no visible double containment.
    - There is no containment sump around the pump nor any leak detector in the sump.
    - Beside the Red Jacket pump was another device which we were not familiar with and could find no explanation for. This device is connected to what appears to be product conveyance or vapor return piping. **Please explain what this 12" diameter device is.**
    - There is a plywood structure which keeps some of the pea gravel from filling in around the Red Jacket pump. The pea gravel was all the way up to the bottom of the piping, and we could not see to the surface of the tank.
- A round metal plate near the fill tube cover. This plate covers the Phase II vapor recovery connection to the tank.

Observations of structures common to all four USTs

- A colored, round metal plate which covers the fill tube for the tank. Under the plate is a fill tube with a spill bucket around it. There is what appears to be a release button which (when pushed) would allow any fluid to flow back into the tank. (Note: the waste oil tank did not have this release button).
    - Two of the three spill containers (for the fuel tanks) had standing water and the third appeared to be dry. The blue colored plate (for the mid grade fuel tank) was broken and had allowed the container below to partially fill with rain water. **The broken blue cover needs to be replaced.** When questioned, you stated that the water was bailed out of the spill containers and allowed to flow to the storm drain. **PLACE ANY WATER FROM THE SPILL CONTAINER IN A STORAGE CONTAINER AND DISPOSE OF**

IT PROPERLY. The spill container around the waste oil fill tube was partially filled with waste oil. You stated that this would be dipped out of the container and poured into the waste oil tank. **Empty this container before any waste oil is poured into the tank because you need the full capacity of the spill container to contain any spillage.**

- We looked down the fill tubes into the tanks and could see no evidence of any mechanical overfill prevention system.

- A round metal plate near the southern end of each tank. This plate covers the pipe containing the Pollulert probe. According to our files each of the four tanks has a Pollulert probe in the annular space between the inner and the outer walls of the reported fiberglass tanks. The top of the tube leading to the tank is covered with a testing cap. There is a button to push and three lights. When the button is pushed one of the lights should come on to indicate the status of the probe in that specific tank. One light is for water, one for hydrocarbon and one for "dry". Without the operating manual for the Pollulert it is unclear if the probe tester above each tank would allow the station operator to identify which tank is at fault when the Pollulert panel is in alarm status. When we pushed the test button on each of the four probes, only one of the units functioned (it lit up the "dry" light). The other three probe testers did not activate any of the lights. We do not know if the system has ever been serviced or checked since it was installed in early 1987 so it is reasonable to conclude that the system is probably not functioning properly.

We then examined the dispensers at the four pump islands. Some of the dispensers were not functioning (broken nozzles, missing vapor boot, broken or leaking hose). We had you remove the side panel for three of the four dispenser islands so we could look at the piping. Several of the delivery lines to the bottom of the dispensers were discolored and/or damp as though the joints above the shear valves were leaking. **All leaking delivery lines must be serviced and repaired.** Since there are no spill pans below the dispensers any leakage from the dispenser piping (or leakage from maintenance of the filters) will spill directly into the pea gravel below the dispenser.

Based on our observations the underground storage tanks at 15595 Washington Avenue, San Lorenzo are not being operated under the conditions of the five year permit and are in violation of Title 23 of the California Code of Regulations, among other laws and regulations, as follows.

- sec. 2630(d) The monitoring of the tanks and piping must be done according to the law. The monitoring system must be maintained and serviced by

a certified technician on an annual basis. Written records must be kept as specified in sec. 2712.

- sec. 2632(c)(2)(A and B) Continuous monitoring of the interstitial space of the tank is required, and the monitoring system must be connected to an audible and visual alarm.

- sec. 2632(d) A written monitoring plan and a written spill response plan is required and must be accepted by this office.

- sec. 2636(c) The secondary containment for the piping must be sloped so all releases flow to a containment sump.

- sec. 2636(f)(1) The secondary containment system for the piping must be continuously monitored.

- sec. 2636(f)(4) The piping must be pressure tested annually.

You have until April 21, 1995 to bring the facility into compliance by completing the following items. {sec. 2712(f)}

You must do the following to meet the conditions of the permit: (sec. 2711, 2712, and 2630)

1 Form A- fill out and return an ammended copy. {sec. 2711(b)}

2 Form B- fill out and return an ammended copy for each of the four tanks and return. {sec. 2711(b)}

3 Provide us with "as built" engineering drawings for the station. (The drawings that were given to us on behalf of Mr. Kubo do not correspond with photos of the construction site nor with our field observations. Thus the drawings are inaccurate and inadequate.) {sec. 2711 (a)(8)}

4 Consolidated Tank Management Plan- fill out and return a copy of the plan. Keep a copy on site. {sec. 2711(a)(9), and sec. 2712}

5 Financial responsibility- Complete and return a copy of this information (at the end of the consolidated tank management plan). {sec. 2711(a)(11)}

6 Service and repair the Pollulert leak detection system for the tanks. **Send a copy of the servicing report to this office.** (This must be serviced annually or in accordance with the manufacturer's instructions.) {sec. 2630(d), and sec. 2632(d)(1)(F)}

7 Obtain a written operating manual for the Pollulert system (include training requirements for the leak detection systems in #4 above). {sec. 2632(d)(1)(F), and sec. 2630(d)}

8 Service and repair the Red Jacket leak detection systems for the product delivery lines. **Send a copy of the servicing report to this office.** (These must be serviced annually.) {sec. 2636(f)(2), sec. 2643(c)(1 and 3), and sec. 2630(d)}

9 Pressure test the product delivery lines and **send a copy of the test results to this office.** This must be done annually. {sec. 2636(f)(4)}

10 Repair the apparently leaking delivery lines below each of the dispensers. {sec. 2712(j)}

11 Replace the cast iron cover for the (blue) mid-grade fuel delivery tube.

12 Provide proof that there are striker plates below the fill tube of each of the tanks. {sec. 2631(c)}

13 Install an overfill prevention system on the three fuel tanks which can not be manually overridden. {sec. 2635(b)(2)}

14 Install a continuous monitoring system on the piping's secondary containment system. {sec. 2636(f)(1)}

Please note that any structural modifications to the tanks or the piping must be approved by this office in advance of the work. Please call me at 510-567-6734 if you have questions or need assistance.

Sincerely,

Don Atkinson-Adams
Sr. Registered Environmental
Health Specialist #5485

Enclosure

cc: -Gil Jensen, Alameda County District Attorney,
Environmental and Consumer Affairs

-Scott Seery, Local Oversight Program

-Robert Weston, Environmental Protection

-Bill Raynolds, Area Manager, East Team

-Gordon Coleman, Chief, Environmental Protection

-Lisa Kim
Texaco, Inc.
10 Universal City Plaza, 13th floor
Universal City, CA 91608-1006

-Bertram Kubo
5772 Sellars Avenue
Oakley, CA 94561

-Jessen and Agnes Calleri
1901 Cliffland Avenue
Oakland, CA 94605

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ALAMEDA COUNTY
HEALTH CARE SERVICES
AGENCY
DAVID J. KEARS, Agency Director

RAFAT A. SHAHID, Director

DEPARTMENT OF ENVIRONMENTAL HEALTH
Environmental Protection Division
1131 Harbor Bay Parkway, #250
Alameda, CA 94502-6577
(510) 567-6700

May 15, 1995

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RECEIVED
MAY 18 1995
LEGAL DEPARTMENT
WESTERN DIV.

Mehdi Mohammadian, Owner
Linda Shell
15595 Washington Avenue
San Lorenzo, CA 94580

Certified Letter: Z 773 036 455

Dan Kirk
Shell Oil
P.O.Box 4023
Concord, CA 94524

Certified Letter: Z 773 036 454

SECOND NOTICE OF VIOLATION

Subject: Compliance with requirements of the Five Year permit for the operation of the four (4) underground storage tanks at 15595 Washington Avenue, San Lorenzo, CA, 94580.

Dear Mr. Mohammadian:

On March 21, 1995, a **Notice of Violation** letter was sent to you which specified fourteen (14) items for you to complete before April 21, 1995. We only have evidence of the completion of item 3. (We have accepted the new drawings submitted to us by Mr. Kubo.) You must submit documentation to this office to prove compliance with the other items in the **Notice of Violation**. The phone calls from you and your lawyer are not sufficient evidence of correction of the problem.

By our observations the underground storage tanks at 15595 Washington Avenue, San Lorenzo are not being operated under the conditions of the five year permit. You have 30 days from May 11, 1995 to either bring the facility into compliance or to close and remove the four tanks.

You must do the following to meet the conditions of the permit:

1 Form A- fill out and return an amended copy.

2 Form B- fill out and return an amended copy for each of the four tanks.

~~3 Provide us with as built drawings for the station (the drawings that we have do not show adequate detail on the location of the piping.)~~ **completed.**

4 - Complete and return a copy of the Consolidated Tank Management Plan. Keep a copy on site.

5 - Complete and return a Certificate of Financial Responsibility.

6 Repair the Pollulert leak detection system for the tanks. **Send a copy of the servicing report to this office to confirm operation.**

7 Obtain an operating manual for the Pollulert system (include training requirements for the leak detection systems in #4 above).

8 Service and repair the Red Jacket leak detection systems for the product delivery lines. **Send a copy of the servicing report to this office.**

9 Perform integrity tests on the product delivery lines and **send a copy of the test results to this office.**

10 Repair the (apparently) leaking delivery lines below each of the dispensers. (Provide a signed statement from the repairman.)

11 Replace the cast iron cover for the (blue) mid-grade fuel delivery tube.

12 Provide proof that there are striker plates below the fill tube of each of the tanks.

Please note that requirements #13 and #14 have been removed because the 1985 version of Title 23 did not specifically require them. (The removal of these requirements was covered in separate letters.)

A new requirement has been added:

15 One additional requirement is made on the piping. There is a short section of steel piping between the top of the pump and the double wall fiberglass pipe. <u>All of this steel piping must be corrosion protected.</u> **(This requirement was in effect at the time of the installation of the piping, see section 2635 (b)(4) from the August 13, 1985 version of Title 23 of the California Code of Regulations.)** copy enclosed

Any structural modifications to the tanks or piping must be approved by this office in advance of the work, and the work must be inspected by us. Please call me at 510-567-6734 if you have any questions or need assistance.

Be advised that upon conviction violations of section 25299 of the Health and Safety Code carry possible criminal and civil sanctions and up to $5000 per day per violation per underground storage tank.

Sincerely,

Don Atkinson-Adams
Senior Registered Environmental
Health Specialist #5485

Enclosure

cc: Gil Jensen, Alameda County District Attorney, Environmental and Consumer Affairs

Scott Seery, Local Oversight Program

Robert Weston, Environmental Protection

Bill Raynolds, Acting Chief, Environmental Protection

Lisa Kim
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